SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003990-22

N.A.R., INC., ASSIGNEE OF
FIRST WESTERN CREDIT,

Plaintiff,

—against—

EASTERN OUTDOOR FURNISHINGS
A.K.A. JC PARTNERS LLC,

Defendant/Third-Party Plaintiff-Appellant,

—against—

AMD DIRECT, INC., D/B/A SUMMERSET
PROFESSIONAL GRILLS,

Third-Party Defendant-Respondent.

CIVIL ACTION

ON APPEAL FROM THE ORDERS ENTERED MARCH 27, 2023 AND JULY 17, 2023, SUPERIOR COURT OF NEW JERSEY LAW DIVISION, PASSAIC COUNTY
DOCKET NO. PAS-L-003511-20

SAT BELOW:
HON. THOMAS F. BROGAN
J.S.C.

BRIEF FOR DEFENDANT/ THIRD-PARTY PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS I

TABLE OF JUDGMENTS, ORDERS AND RULINGS IV

TABLE OF AUTHORITIES IV

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 4

STATEMENT OF MATERIAL FACTS 7

A. THE BIRTH OF EASTERN OUTDOOR AND THE SUMMERSET BRAND. 7

B. DOCUMENTARY EVIDENCE ESTABLISHES THAT EASTERN OUTDOOR WAS DIRECTLY AND INTEGRALLY INVOLVED WITH THE DEVELOPMENT OF THE SUMMERSET BRAND, WHICH INCLUDED SEVERAL "SUMMERSET' SUB-BRANDS. 9

C. JEFFREY STRAUBEL CONFIRMS, IN WRITING, THAT AN ARRANGEMENT EXISTS BETWEEN SUMMERSET AND EASTERN OUTDOOR SUCH THAT EASTERN OUTDOOR IS SUMMERSET'S "TRUSTED PARTNER" IN DEVELOPING THE SUMMERSET BRAND. 13

D. AMD EXPRESSLY, IN WRITING, GRANTS EASTERN OUTDOOR PERMISSION TO USE AMD'S INTELLECTUAL PROPERTY TO SELL SUMMERSET PRODUCT. 14

E. SEVERAL SUMMERSET-BRANDED ENTITIES – ALL OWNED BY JEFFREY STRAUBEL – SUPPLY SUMMERSET PRODUCTS TO EASTERN OUTDOOR

UNDER THE "SUMMERSET" LABEL AND PUBLICLY CONFIRM THAT AN ARRANGEMENT EXISTS BETWEEN SUMMERSET AND EASTERN OUTDOOR. 15

F. INITIALLY, EASTERN OUTDOOR REVOLVES ITS ENTIRE BUSINESS AND MARKETING EFFORTS ON THE DEVELOPMENT OF THE SUMMERSET BRAND, WHICH HAD ZERO MARKET SHARE PRIOR TO EASTERN OUTDOOR'S INVOLVEMENT. 17

G. OVER THE DECADE LONG PERIOD THAT EASTERN OUTDOOR IS A SUMMERSET DISTRIBUTOR, SUMMERSET AND EASTERN OUTDOOR WORK TO DEVELOP THE SUMMERSET BRAND TO THEIR MUTUAL BENEFIT. 18

H. EASTERN OUTDOOR IS BLINDSIDED BY AMD'S DECISION TO TERMINATE EASTERN OUTDOOR'S DISTRIBUTORSHIP. 19

LEGAL ARGUMENT 21

I. THE TRIAL COURT ERRED BY GRANTING AMD'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING EASTERN OUTDOOR'S CLAIMS AGAINST AMD FOR VIOLATING THE NJFPA, TORTIOUS INTERFERENCE AND INDEMNIFICATION (PA6-PA7). 21

A. THE TRIAL COURT ERRED BY GRANTING AMD'S MOTION FOR SUMMARY JUDGMENT ON EASTERN OUTDOOR'S NJFPA CLAIM BECAUSE THE TRIAL COURT ERRONEOUSLY ADDED A REQUIREMENT TO THE NJFPA THAT DOES NOT EXIST IN THE STATUTE (2T 18:18-19:8). 21

B. THE TRIAL COURT ERRED BY GRANTING AMD'S MOTION FOR SUMMARY JUDGMENT ON EASTERN OUTDOOR'S TORTIOUS INTERFERENCE AND INDEMNITY CLAIMS BY FAILING TO CONSIDER ANY OF THE FACTS IN THE RECORD PREVENTING SUMMARY JUDGMENT ON BOTH

CLAIMS. (2T 18:18-19:16; PA6-PA7). 36

II. THE TRIAL COURT ERRED BY DENYING EASTERN OUTDOOR'S MOTION TO AMEND THE TRIAL COURT'S SUMMARY JUDGMENT ORDER BECAUSE THE NEW EVIDENCE SUBMITTED AND ACCEPTED BY THE TRIAL COURT REQUIRED THE DENIAL OF SUMMARY JUDGMENT (PA10-PA11; 4T 5:4-7:7) 37

III. THE TRIAL COURT ERRED BY DENYING AMD'S IMPROPER SECOND DISPOSITIVE MOTION – AMD'S MOTION TO BAR—"AS MOOT," RATHER THAN WITH PREJUDICE FOR VIOLATING THE TRIAL COURT'S CASE MANAGEMENT ORDER (PA8-PA9) 38

CONCLUSION 39

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order on Motion for Summary Judgment, dated March 27, 2023 …………… (Pa6)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated February 27, 2023 . (1T)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated March 27, 2023 …. (2T)

Order on Motion to Bar Expert Opinion of Tammy Hersh,
dated March 27, 2023 ………………………………………………….. (Pa8)

Order on Motion for Reconsideration, dated July 17, 2023 ………………... (Pa10)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated July 7, 2023 …….. (3T)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated July 17, 2023 …… (4T)

TABLE OF AUTHORITIES

Page(s)

Cases

Atl. City Coin & Slot Service Co.. Inc. v. IGT,
14 F. Supp. 2d 644 (D.N.J. 1998) 33

Beilowitz v. Gen. Motors Corp.,
233 F. Supp. 2d 631 (D.N.J. 2002) 26, 32, 33

Cooper Distrib. Co. v. Amana Refrigeration, Inc.,
63 F.3d 262 (3d Cir. 1995) 33

Cummings v. Bahr,
295 N.J. Super. 374 (App. Div. 1996) 37

Emergency Accessories & Installation, Inc. v. Whelen Eng'g Co.,
Civil Action No. 09-2652, 2009 U.S. Dist. LEXIS 46956 ....23, 24

Engines, Inc. v. MAN Engines & Components,
Civil Action No. 10-277, 2010 U.S. Dist. LEXIS 76541 (D.N.J. July 29, 2010) 32

In re Faber Assocs.,
Docket No. 16-cv-2821, 2016 U.S. Dist. LEXIS 202763 (D.N.J. Dec. 13, 2016) 24, 35

Flagg v. Essex Cnty. Prosecutor,
171 N.J. 561 (2002) 37

Goldsworthy v. Browndorf,
2011 N.J. Super. Unpub. LEXIS 2277 (App. Div. Aug. 24, 2011) 24

Harter Equip., Inc. v. Volvo Constr. Equip. N. Am., Inc.,
2003 U.S. Dist. LEXIS 27210 (D.N.J. Sept. 24, 2003) 24, 35

Instructional Sys., Inc. v. Computer Curriculum Corp.,
614 A.2d 124 (N.J. 1992) 22, 26, 28, 32

Lithuanian Commerce Corp. v. Sara Lee Hosiery,
179 F.R.D. 450 (D.N.J. 1998) 26, 27

McPeak v. S-L Distrib. Co.,
Civil Case No. 12-348, 2014 U.S. Dist. LEXIS 10794 (D.N.J. Jan. 29, 2014) 24, 30

Neptune T.V. & Appliance Serv., Inc. v. Litton Sys., Inc.,
190 N.J. Super 153 (App. Div. 1983) 30, 31

Nostrame v. Santiago,
213 N.J. 109 (2013) 36

Ocean City Express Co., Inc. v. Atlas Van Lines, Inc.,
194 F.Supp.3d 314 (D.N.J. 2016) 35

Rios v. Meda Pharm., Inc.,
247 N.J. 1 (2021) 21

State v. Steele,
430 N.J. Super. 24 (App. Div. 2013) 37

Worthy v. Kennedy Health System,
446 N.J. Super 71 (App. Div. 2016) 21

Statutes

New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 et seq. ....*passim*

Other Authorities

FTC Franchise Rule, 16 C.F.R. 436.8 28

FLORIDA FRANCHISE LAW, SBP FL-CLE 13-1 28

BUS. FRANCHISE GUIDE (CCH) ¶ 6421 28

43 Fed. Reg. 59614 28

PRELIMINARY STATEMENT

In the middle of 2008, Will Evertz and Patrick Farrell, the original co-owners of Third-Party Plaintiff/Defendant Eastern Outdoor Furnishings' ("Plaintiff" or "Eastern Outdoor"), flew to California to meet with the head of Third-Party Defendant AMD Direct, Inc. ("Defendant" or "AMD") and non-party Tony Rodriguez, to discuss working together to launch a new brand that brought outdoor furnishings (Mr. Rodriguez's background) and grill products (Mr. Straubel's background) under one brand: "Summerset." At this meeting, these four individuals not only discussed the formation of the new "Summerset" brand – selling both furniture and grills – but also specifically that Eastern Outdoor would be the distributor back east and develop the "Summerset" brand awareness out of nothing. Eastern Outdoor did exactly this, and from 2009 to 2019, worked tirelessly to build the "Summerset" brand into a thriving and well-established brand with an established customer base, all while serving as the exclusive distributor of Summerset products in New Jersey, and one of a few select distributors on the east coast.

In 2019, however, Eastern Outdoor was blindsided when AMD, mere months after reconfirming its commitment to Eastern Outdoor as AMD's wholesale distributor, abruptly terminated Eastern Outdoor's decade-long distributorship, and handed over Eastern Outdoor's wholesale distributor rights to Eastern Outdoor's direct competitor, along with the goodwill and wholesale customer base Eastern Outdoor had spent years cultivating. As a result, Eastern Outdoor filed suit against AMD for, inter alia, violating the New Jersey Franchise Practices Act, N.J.S.A. 56:10-1 et seq. (the "NJFPA"), which generally prohibits manufacturers from -- like here -- terminating distributors in New Jersey where the relationship between manufacturer and distributor satisfies six specific requirements of the NJFPA. These six requirements are as follows: (a) a "written arrangement" between the manufacturer and distributor; (b) the grant of a "license" by the manufacturer to the distributor; (c) a "community of interest" between the manufacturer and distributor; (d) the "contemplat[ion] or require[ment]" that the distributor would establish or maintain a New Jersey place of business; (e) more than $35,000 in annual gross sales of the manufacturer's products; and (f) a showing that "more than 20% of the franchisee's gross sales are intended to be or are derived from" the relationship.

This appeal arises from the Trial Court's grant of AMD's Motion for Summary Judgment on Eastern Outdoor's NJFPA claim against AMD, where the Trial Court held that Eastern Outdoor could not establish, as a matter of law, that a "written **agreement**" existed between Eastern Outdoor and AMD. Accordingly, the Trial Court reasoned, Eastern Outdoor could not satisfy the first element of the NJFPA's six element test. The plain language of the NJFPA, however, does not require an "agreement," but rather only requires a "written **arrangement**," as recognized by both the New Jersey Supreme Court as well as several other New Jersey courts. As set forth below, Eastern Outdoor produced several documents that satisfy this minimal evidentiary standard, and thus summary judgment was not proper.

Furthermore, the Trial Court improperly granted summary judgment on Eastern Outdoor's two remaining counts – for tortious interference and indemnity – without explanation, despite material facts in the record below that should have prevented such a decision as a matter of law. The Trial Court also erred by denying Eastern Outdoor's Motion to Amend the Court's order granting summary judgment.

Finally, the Trial Court erred when it denied AMD's improperly filed second dispositive motion – styled as a "Motion to Bar" Eastern Outdoor's expert testimony – as moot, rather than with prejudice, for failing to comply with the Trial Court's Case Management Order requiring any such motion to be filed by January 20, 2023.

Accordingly, Eastern Outdoor respectfully requests reversal (or modification) of the Trial Court orders: (1) granting AMD's Motion for Summary Judgment; (2) denying as "moot", rather than with prejudice, of AMD's Motion to Bar, and (3) denying Eastern Outdoor's Motion to Amend pursuant to R. 4:49-2.

PROCEDURAL HISTORY[1]

On or around November 11, 2020, N.A.R. Inc, Assignee of First Western Credit ("N.A.R.") filed a lawsuit against Eastern Outdoor. (Pa12). N.A.R. alleged that Eastern Outdoor had failed to pay for product allegedly purchased from AMD, and, as the assignee of the purported debt, demanded payment. (See id.).

Eastern Outdoor filed an Answer in response to N.A.R.'s Complaint[2], as well as a Third-Party Complaint against AMD. (Pa22). In the Third-Party Complaint, Eastern Outdoor alleged, inter alia, that AMD unlawfully terminated Eastern Outdoor as AMD's Summerset distributor just after AMD sold Eastern Outdoor the product at issue in N.A.R.'s Complaint, and specifically filed claims against AMD for: (1) violation of the NJFPA, (2) tortious interference, and (3) indemnification.

On December 21, 2022, the Trial Court entered a Case Management Order, which ordered all "dispositive motions shall be filed by January 20, 2023." (Pa701-Pa702). On January 20, 2023, AMD filed a Motion for Summary

[1] Transcript of Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated February 27, 2023, hereinafter "1T". Transcript of Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated March 27, 2023, hereinafter "2T." Transcript of Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated July 7, 2023, hereinafter "3T." Transcript of Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated July 17, 2023 hereinafter "4T."

[2] N.A.R. and Eastern Outdoor subsequently resolved N.A.R.'s claim against Eastern Outdoor, and N.A.R. dismissed its Complaint against Eastern Outdoor. N.A.R., therefore, is not a participant in this appeal.

Judgment, seeking to dismiss all three of Eastern Outdoor's claims against AMD. (Pa46-Pa681). Eastern Outdoor filed timely opposition. (See id.)

On February 17, 2023, well after the January 20, 2023 deadline for dispositive motions, AMD filed another dispositive motion, which it styled as a "Motion to Bar" the expert opinion of Eastern Outdoor's damages expert, Tammy Hersch. (Pa682-Pa693). In this motion, AMD asked the Trial Court – just as AMD did in its Motion for Summary Judgment – to dismiss Eastern Outdoor's case in its entirety, this time because AMD claimed Eastern Outdoor could not establish any damages as a matter of law. Indeed, AMD even filed an additional Statement of Material Facts with this new dispositive motion. (Pa686).

The Trial Court scheduled oral argument on both AMD's Motion for Summary Judgment and Motion to Bar on February 27, 2023, and then again on March 27, 2023. (See 1T 3:2-75:9 and 2T 3:2-6; see also, Pa6-Pa9). By order dated March 27, 2023, the Trial Court granted AMD's Motion for Summary Judgment in its entirety, noting on the face of its order that the Trial Court granted summary judgment for the reasons placed on the record at oral argument. (Pa6-Pa7). Notably, during the February 27, 2023 and March 27, 2023 oral argument, the Trial Court held that Eastern Outdoor's NJFPA claim failed as a matter of law because the Trial Court determined that Eastern Outdoor could not establish a "written agreement," but did not address any basis for dismissing Eastern Outdoor's tortious interference and indemnity claims. (See 2T 18:18-19:16).

Based on the Trial Court's decision to grant AMD's Motion for Summary Judgment, the Trial Court denied AMD's Motion to Bar "as moot". (Pa9). The Trial Court did not address that AMD's Motion to Bar, which AMD admitted sought dispositive relief, was barred based on the plain language of the Case Management Order requiring such a motion to be filed by January 20, 2023. (See Pa701-Pa702).

Subsequent to the Trial Court's grant of AMD's Motion for Summary Judgment, on April 17, 2023, Eastern Outdoor filed a Motion to Amend the Trial Court's March 27, 2023 order granting summary judgment, pursuant to R. 4:49-2. The basis for the motion was, inter alia, that (a) Eastern Outdoor, subsequent to the Trial Court's March 27, 2023 order, received new documents from a third-party subpoenaed during discovery, but who mistakenly failed to timely provide all responsive documents in his possession (Pa732-928); and (b) the Trial Court's mistaken requirement that the NJFPA required a "written agreement" between Eastern Outdoor and AMD that expressly granted a license, when the language of the NJFPA simply requires a "written arrangement."

The Trial Court held oral argument on Eastern Outdoor's Motion to Amend on July 7, 2023 and July 17, 2023. (See 3T 3:23-4:3 and 4T 3:13-16). By order dated July 17, 2023, the Trial Court denied Eastern Outdoor's Motion to Amend, for the reasons placed on the record during oral argument. (Pa10-Pa11). Specifically, the Trial Court held that, despite acknowledging that the NJFPA does not require a "written agreement," and despite holding that Eastern Outdoor's newly received documents should be considered, the Trial Court's prior ruling was still not "palpably incorrect." (4T 7:3-7).

Accordingly, Eastern Outdoor has filed the instant appeal of the following Trial Court orders: (1) the grant of AMD's Motion for Summary Judgment; (2) the denial as "moot", rather than with prejudice, of AMD's Motion to Bar, and (3) the denial of Eastern Outdoor's Motion to Amend pursuant to R. 4:49-2.

STATEMENT OF MATERIAL FACTS

The following facts were adduced during discovery in the Trial Court:

A. The Birth of Eastern Outdoor And The Summerset Brand.

As testified to by both William Evertz, the President of Eastern Outdoors, and non-party Patrick Farrell (the company's former 50% owner), the Summerset brand did not exist prior to the formation of Eastern Outdoor. (See Pa248-Pa255 at T14:7-21:21). Specifically, in 2008, Will Evertz, Patrick Farrell, Jeffrey Straubel and Tony Rodriguez met in California to discuss bringing outdoor furnishings (Mr. Rodriguez's background) and grill products (Mr. Straubel's background) under one brand: "Summerset." (See id.) As testified to by Mr. Farrell, prior to this trip to

California, Will Evertz and Mr. Farrell had been "brainstorming for a while" regarding starting their own business. (See Pa249 at T15:4-8).

At this meeting, these four individuals not only discussed the formation of the new "Summerset" brand – selling both furniture and grills – but also specifically that Eastern Outdoor would be the distributor on the east coast of the United States and develop the brand awareness out of nothing. As explained by Mr. Farrell, "the whole conversation started about bringing everything together under one label, the Summerset brand name. And then we were going to be the east coast distributor." (Id. at T15:13-16). Over the next ten years, Eastern Outdoor would be the exclusive distributor of Summerset products in New Jersey, and one of a few select distributors on the east coast. (See Pa25 at ¶ 3).

That the "Summerset" brand was born at this meeting in 2008 is also evidenced by Jeffrey Straubel's myriad corporate filings. Specifically, in July 2008, "Summerset Outdoor Products Inc." was incorporated in the State of California. (See Pa199). Later, in July 2009, Mr. Straubel amended this corporate filing, naming this entity "Summerset Outdoor Living, Inc." and signing as Summerset Outdoor Living, Inc's President. (See Pa198). During that same month, Mr. Straubel also registered the "Summerset Outdoor Living" mark with the United States Patent and Trademark Office. (See Pa232-Pa233). Such mark's filing date is listed as "July 9, 2009." (See id.).

Moreover, Jeffrey Straubel testified that AMD, since 2002, was the holding company for all of Jeffrey Straubel's brands, including Summerset. (Pa1631-Pa1633 at T26:20-28:15). Indeed, the documentary evidence procured in the Trial Court confirms that AMD – controlled by Jeffrey Straubel (see id.) – was the entity controlling the Summerset brands throughout the relationship with Eastern Outdoor. (See e.g., P805-P806, email from "AMD Finance" to Eastern Outdoor; Pa749-750, email with subject line "AMD Direct Media Kit (patrick@eofus.com)" from "The Summerset Grills & Alturi Lifestyles Family").

B. Documentary Evidence Establishes That Eastern Outdoor Was Directly And Integrally Involved With The Development Of The Summerset Brand, Which Included Several "Summerset' Sub-Brands.

Email correspondence from August 2008 – produced by former co-owner of Eastern Outdoor, Patrick Farrell –confirms that, from the very outset of the relationship, Eastern Outdoor, Jeffrey Straubel and Tony Rodriguez worked together to develop the "Summerset" brand, which included multiple sub-brands. Specifically, an email dated August 22, 2008, from Tony Rodriguez to Eastern Outdoor's then co-owner, Patrick Farrell, attaches the four logos that were being considered under the "Summerset" branding. (Pa756-Pa758). Indeed, these logos include the sub-brands: "Summerset Outdoor Living," "Summerset Outdoor Products," "Summerset Outdoor Furnishing," and "Summerset Grills & Burners."

(Pa758). Tony Rodriguez expressly references all of these Summerset brands as being under the umbrella of "[o]ur program." (Pa756).

The evidence before the Trial Court also overwhelmingly demonstrated the interdependence and symbiotic relationship between Eastern Outdoor and the Summerset owners from the outset. For example, in August 2008, Patrick Farrell emailed Tony Rodriguez for Mr. Rodriguez's input on the **Eastern Outdoor** logo – confirming that Eastern Outdoor was formed contemporaneously with, and to support the launch of, the Summerset brand -- to which Tony Rodriguez replied "[l]ogo looks good." (Pa759-Pa760; see also, Pa764-Pa771). Tellingly, in the same email, Tony Rodriguez wrote to Patrick Farrell how he, in coordination with Jeffrey Straubel, could work together with Eastern Outdoor to support the Summerset furniture and grills ***together and as a team***, writing:

> What we can do on the Catalog is have ***our logos and address'***. This will really get the program going for the ***East Coast operation***. Jeff [Straubel] is working hard also on the grill and accessory catalog. The new line of grills look great so ***we*** are now able to offer 6 grills and I believe over 12 accessories for the Islands.
>
> As far as patio, we have 6 lines of furniture and I have increased our tables to almost 40, which gives us a huge choice in all four heights.

(Pa759) (emphasis added). Tony Rodriguez would repeatedly refer to Eastern Outdoor in correspondence as the East Coast operation of the Summerset brand. (See Pa763) (August 2008 email to Eastern Outdoor's Patrick Farrell where Tony Rodriguez writes "look forward to the new East and West Coast operations.")

In October of 2008, Tony Rodriguez and Jeffrey Straubel's design agency -- Murrieta Design – further established that Mr. Rodriguez and Mr. Straubel were directly coordinating with – and relying on -- Eastern Outdoor to establish and develop the Summerset brand, ***with both Eastern Outdoor and Summerset branding to appear on the initial catalogs for the new Summerset line of products***. (See Pa776-779). Notably, by email dated October 12, 2008, a representative of the Murrieta Design agency emailed Patrick Farrell, copying Tony Rodriguez and Jeffrey Straubel, a PDF "proof" of one of the proposed catalogs, writing:

> Pat, We need to know if you would like your fax number. Please verify and reply with any corrections. **Tony/Jeff** please verify placement and/or advise.

(Pa776) (emphasis added). Critically, the attached proposed catalogue was titled: "Summerset Outdoor Living ***by Eastern Outdoor Furnishings***," emphasizing the direct connection and symbiotic relationship between Summerset and Eastern Outdoors. (Pa778) (emphasis added). The back of the catalogue also noted (1) the availability of other "Summerset" catalogs, including the "Professional Grills Catalog," and (2) the Summerset "Contact" being "Eastern Outdoor Furnishings." (Pa779). The 2009 Summerset Professional Grills Catalog also followed the same structure, with the title "Summerset Professional Grills by Eastern Outdoor Furnishings," and the back cover noting the "Contact" for Summerset Professional

Grills as "Eastern Outdoor Furnishings." (Pa650, Pa665). These written documents directly confirmed an "arrangement" existed between AMD, the manufacturer of the Summerset brand, and Eastern Outdoor.

During this initial birth period of Summerset, Tony Rodriguez notably represented all of the Summerset sub-brands, including Summerset Professional Grills, and specifically worked side-by-side with Jeffrey Straubel to represent the Summerset brand. For example, in December of 2009, Tony Rodriguez sent an email to Eastern Outdoor (and others), copying Jeffrey Straubel, with the subject line "Container program for Grills and Components." The email provides, in part:

> Good Day.
>
> We have completed our pricing for 2009 first quarter based on the current raw materials price and exchange rate. The prices in the spreadsheet are for our distributor container buyers only; as we have already published price guide for our dealers. Should you desire to prepare your own dealer prices then those published please let us know and we can have our designer update the price guides for you and then you can reprint them with all your information.
>
> Regards,
> Tony

(Pa785-Pa786). Attached to this email is a distributor price sheet for grills and grill accessories. (Pa787-Pa788).

Indeed, further confirming that Summerset's grill-focused sub-brand (Summerset Professional Grills) and Summerset's furniture focused-sub-brand (Summerset Outdoor Living) were merely two brandings under one entity owned and controlled by Jeffrey Straubel (AMD), Patrick Farrell received one invoice to pay "[Eastern Outdoor's] part" for both initial catalogs. (See Pa791 – Pa792).

C. Jeffrey Straubel Confirms, In Writing, That An Arrangement Exists Between Summerset And Eastern Outdoor Such That Eastern Outdoor Is Summerset's "Trusted Partner" In Developing The Summerset Brand.

At the start of Jeffrey Straubel's relationship with Eastern Outdoor, Mr. Straubel established, in writing, an express arrangement with Eastern Outdoor for the development and sale of Summerset products. Specifically, by emailed dated January 19, 2009, Mr. Straubel wrote, in part:

> Okay, Will. [T]his (the corrected invoice Tony [Rodriguez] just sent) is reflecting your cost of the cart in question. . .
>
> **Please approach this relationship with the understanding that we are in it together.** There is not an attempt to get rich quick or with [Eastern Outdoor]. **We understand your value and respect your market area and of course you and Patrick [Farrell] as trusted partners in this endeavor**. We will do everything we can to be consistent in this statement. . . .

(Pa789) (emphasis added).

Further confirming Eastern Outdoor's critical and integral role in the creation of the Summerset brand, Eastern Outdoor was even the initial owner of the website "summersetoutdoorliving.com." (Pa575). This is evidenced by the email from Patrick Farrell to Tony Rodriguez, dated June 9, 2009, where he writes:

> Hey Tony,

> Here is the transfer codes for SUMMERSETOUTDOORLIVING.COM. I guess we have no more leverage with you guys!!!
>
> thanks,
>
> Patrick

(Pa798-Pa800). Moreover, that same year, Tony Rodriguez further confirmed his and Jeffrey Straubel's reliance on Eastern Outdoor for the development of the brand, writing, in an email to Patrick Farrell:

> …I must tell you, we are really getting excited for this [Eastern Outdoor] operation. Jeff [Straubel] and I were discussing today that we need to discuss territory and really put a solid program of support together now that you are going to carry the entire line.

(Pa914).

D. AMD Expressly, In Writing, Grants Eastern Outdoor Permission To Use AMD's Intellectual Property To Sell Summerset Product.

In January 2013, the "Summerset Grills & Alturi Lifestyles Family" sent an email to Eastern Outdoor, which provided "AMD Direct" Summerset images for the sale of Summerset products, and designated Eastern Outdoor as part of the "Summerset . . . Family" who assists with the "creat[ion] and distribut[ion]" of Summerset product. (P749-P750).

E. Several Summerset-Branded Entities – All Owned By Jeffrey Straubel – Supply Summerset Products To Eastern Outdoor Under The "Summerset" Label And Publicly Confirm That An Arrangement Exists Between Summerset And Eastern Outdoor.

The "Summerset Outdoor Living" entity sold both outdoor furniture and grills, as established by pages pulled from its website in 2012. (See Pa195). Additionally, Summerset Outdoor Living expressly listed "Eastern Outdoor Furnishings" as the "**[Summerset's] East Coast Office**" and "**distributor"** on its website. (See id. at Pa194) (emphasis added). Furthermore, the Summerset Outdoor Living website further referenced Eastern Outdoors as its **"East Coast . . . Director of Sales,"** further emphasizing to the public that Eastern Outdoor was a true arm of Summerset Outdoor Living. (See id. at Pa196) (hyperlink at bottom of page, as demonstrated by gray box at bottom left of document, for "East Coast" directs consumer to "@eofus.com" email address, an Eastern Outdoor contact email). In other words, "Summerset" was not merely advertising Eastern Outdoor as a distributor, but as a critical component of the company and brand itself.

At the same time, Jeffrey Straubel also owned and operated the "Summerset Professional Grills" brand. (See Pa188) (Jeffrey Straubel email signature reflecting "Summerset Professional Grills"). This brand also ran a website and sold Summerset Professional Grills, just as the Summerset Outdoor Living website did. (See Pa197). Indeed, the Summerset Professional Grills website linked to the Summerset Outdoor Living website (bottom right corner of page), and the logos for the "Summerset Outdoor Living" and "Summerset Professional Grills" are nearly identical. (See id.).

From the start, Eastern Outdoor distributed Summerset branded products – both furniture and grills – under both brandings, which operated for all practical purposes as a single unit. Eastern Outdoor also publicly advertised to the consuming public its special relationship with the Summerset brand. For example, ***in 2012, Patrick Farrell's email signature block emphasized that Mr. Farrell was uniquely representing the Summerset brand products, displayed as follows:***

> **Patrick Farrell**
> **Summerset Outdoor Living**
> 11 Vreeland Ave.
> Totowa, NJ 07512
> www.SummersetOudoorLiving.com
> www.SummersetGrills.com
> www.AlturiLifestyles.com [another product put out by Summerset]

(See Pa188-Pa189). This signature block contains the Eastern Outdoor address, paired with the Summerset-owned websites, once again confirming the unique, special relationship between Jeffrey Straubel's Summerset entities and Eastern Outdoor. Additionally, in the years to come, Eastern Outdoor would also provide business cards to their customers with both the Eastern Outdoor name and Summerset branding side-by-side (see Pa553), as well as wrap Eastern Outdoor's trucks with both the Eastern Outdoor and Summerset branding, continuing to emphasize the deep ties between the companies. (see Pa152 at ¶ 59).

F. Initially, Eastern Outdoor Revolves Its *Entire* Business And Marketing Efforts On The Development Of The Summerset Brand, Which Had *Zero* Market Share Prior To Eastern Outdoor's Involvement.

Critically, at the time Eastern Outdoor obtained the distribution rights for Summerset products, ***Eastern Outdoor was not selling a single other product*, confirming, inter alia, that Eastern Outdoor intended 100% of its initial sales to be derived from Summerset products.** (See Pa258 at T24:6-9). Accordingly, Eastern Outdoor put enormous efforts into developing the unknown Summerset brand, to both Summerset and Eastern Outdoor's mutual benefit (and at the expense of building/investing in other brands or products). (See Pa831)(Patrick Farrell writing to Jeffrey Straubel, in part, "I would really like to convey how much work we have put in to the brand recognition for "Summerset" in the northeast.") Indeed, Patrick Farrell testified as follows:

> Q. . . . [D]id Eastern outdoor Furnishings have anything to do with developing the Summerset Brand?
>
> [Objection to form.]
>
> A. Absolutely. I mean, we spent a fortune on trade shows and landscaper shows and advertising and marketing. We did the Pool & Spa shows out in Vegas, Orlando.
> I mean, [it] was 15, 20 grand just to bring in the stuff 'cause these kitchens were so heavy. And we used to go out of pocket. . . And like, that's the off season . . .
>
> **We brought it to market. I tell people we brought Summerset to market in '09. You know, east coast distribution.**

(Pa255-256 at T21:22-22:22) (emphasis added). Mr. Farrell went on to testify that Eastern Outdoor's move into building frames for grills – as an eventual ancillary business --was an outgrowth of seeking another marketing avenue to push the Summerset brand:

> A. We taught all the hardscapers in the northeast who used – built out of block- we started framing them to move all the – doing all the pre-framing, so that became an ancillary business. . . Because just to sell that stainless, you know, we'd make it to all their specs and sell it to all the hardscapers and landscapers. . .
>
> I think we would end up spending 40 or 50 grand on marketing . . . I think we tried to do, like, around 10 percent. So some years, you know, 100 grand in marketing . . .shows were expensive. Shows were probably 30, 50 grand a year. You know, each one. And you don't even count the labor, driving the stuff there. But just what they cost. And you know, they were very expensive, building the brand.

(See Pa257-Pa258 at T23:3-24:5).

G. Over The Decade Long Period That Eastern Outdoor Is A Summerset Distributor, Summerset And Eastern Outdoor Work To Develop The Summerset Brand To Their Mutual Benefit.

Eastern Outdoor worked tirelessly, with the support of Summerset, to promote the Summerset product lines for the mutual benefit of Eastern Outdoor and Jeff Straubel's Summerset companies. For example, Eastern Outdoor attended numerous trade shows – all over the country – to promote Summerset products, with Eastern Outdoor's branding displayed next to Summerset's branding. (See Pa541, Answer to Interrogatory No. 6). Eastern Outdoor also routinely posted on social media to similarly promote the brand. (See Pa579 – Pa596). Eastern

Outdoor also invested in wrapping its trucks with Summerset branding, created printed marketing materials and video testimonials for the Summerset brand. (See Pa541, Answer to Interrogatory No. 6). Furthermore, Eastern Outdoor also built – with its own funds and manpower – numerous displays for Summerset dealers in the North East at no cost to the dealers, to catapult the promotion of the Summerset brand. (See id.)

Likewise, Jeffrey Straubel and Summerset coordinated efforts with Eastern Outdoor. For example, Jeffrey Straubel offered to promote Eastern Outdoor's "EOK" outdoor kitchen framework, agreeing that promotion of this Eastern Outdoor product would be to the mutual benefit of Summerset and Eastern Outdoor. (See Pa190-Pa191) (Jeff Straubel stating: "Hey [W]ill, we would be glad to push the EOK with Summerset! I'll start thinking of a strategy to meet with a few of the players!"). Moreover, when Eastern Outdoor would promote the Summerset brand on social media, the AMD social media account would comment on such posts, showing its support. (See Pa579).

H. Eastern Outdoor Is Blindsided By AMD's Decision To Terminate Eastern Outdoor's Distributorship.

As of the summer of 2018, AMD was affirmatively representing to Eastern Outdoor that AMD had every intention of continuing the decade-old relationship with Eastern Outdoor. Indeed, at the end of July 2018, Jeff Straubel expressly wrote to Will Evertz that "I'm not trying to find new distributors, I'm trying to expand our sales with the two I've committed to over the years." (Pa176). In reliance on such comments, Eastern Outdoor continued to place orders with AMD for product, such as the product at issue in Plaintiff N.A.R.'s original underlying action against Eastern Outdoor. (See Pa16).

Nevertheless, despite acting as a dutiful Summerset brand distributor for nearly a decade, Eastern Outdoor was subsequently shocked when it was advised toward the end of 2018 that AMD had decided to terminate its distributor rights. (See Pa177).

Thereafter, by letter dated March 1, 2019, AMD expressly agreed to take back the product placed in this last order. (See Pa168-Pa169) ("As discussed, we are willing to take back, at a minimum, the order shipped to you in December.") Notably, in this letter, Jeffrey Straubel of AMD expressly refers to "the [Eastern Outdoor] distributor arrangement," tracking the exact language required by the NJFPA. (Pa168).

Thereafter, despite Eastern Outdoor's multiple attempts to ship back this order, AMD blocked Eastern Outdoor's attempts to do so. In subsequent years, Eastern Outdoor paid hundreds of thousands of dollars to store this AMD product, while attempting to have AMD make good on its written promise to take back the product. (Pa164-Pa166).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING AMD'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING EASTERN OUTDOOR'S CLAIMS AGAINST AMD FOR VIOLATING THE NJFPA, TORTIOUS INTERFERENCE AND INDEMNIFICATION (PA6-PA7).

The Appellate Division reviews a trial court's grant of summary judgment "de novo," and affords no special deference to the trial court's ruling on the law. Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021); see also, Worthy v. Kennedy Health System, 446 N.J. Super 71, 86 (App. Div. 2016) (trial court's conclusion of law on summary judgment motion is "a determination [] 'not entitled to any special deference' and is subject to de novo review"). To that end, the Appellate Division applies the same standard for summary judgment as the Trial Court. Id. Specifically, the Appellate Division must review and determine: "[1] whether there are genuine issues of material fact and, if not, [2] whether the moving party is entitled to summary judgment as a matter of law." Worthy, 446 N.J. Super at 85 (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Indeed, as instructed by the New Jersey Supreme Court, "[i]t is only when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Worthy, 446 N.J. Super at 86 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

A. The Trial Court Erred By Granting AMD's Motion for Summary Judgment On Eastern Outdoor's NJFPA Claim Because The

Trial Court Erroneously Added A Requirement To The NJFPA That Does Not Exist In The Statute (2T 18:18-19:8).

The Trial Court misapplied the plain language of the NJFPA by placing extra requirements on the "written arrangement" element of the NJFPA, which do not appear anywhere in the statute. Accordingly, Eastern Outdoor respectfully submits that the Trial Court's grant of summary judgment must be reversed.

As emphasized by the New Jersey Supreme Court, the NJFPA's protections extend to more "than the prototypes of hamburger stands" or automobile dealerships, and there is no requirement that the parties use the "franchise" label in their dealings. Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 137-138 (N.J. 1992). Rather, the NJFPA provides six requirements for a business relationship to fall under the umbrella of the Act's protections. See N.J.S.A. 56:10-3, 56:10-4. Notably, in 2010, the New Jersey Legislature reconfirmed the NJFPA should not be interpreted based on stereotypes of what constitutes a franchise, amending the Act to expressly warn that "courts have in some cases more narrowly construed the Franchise Practices Act than was intended by the Legislature." N.J.S.A. 56:10-2.

Critically, the text of the NJFPA itself also specifically singles out distribution arrangements as requiring protection under the NJFPA, providing, in part: "**The Legislature finds that these protections are necessary to protect not only retail businesses, but also wholesale distribution franchisees that,**

through their efforts, enhance the reputation and goodwill of franchisors in this State." Id. (emphasis added)

Pursuant to the NJFPA, a "franchise" is a business arrangement which meets each of the following elements: (a) a "written arrangement" between the franchisor and franchisee; (b) the grant of a "license" by the franchisor to the franchisee; and (c) a "community of interest" between the franchisor and franchisee. N.J.S.A. 56:10-3. To qualify for the protections of the NJFPA, three additional requirements must also be met, namely: (a) the "contemplat[ion] or require[ment]" that the franchisee would establish or maintain a New Jersey place of business (the "place of business requirement"); (b) the franchisee must have more than $35,000 in annual gross sales of the franchisor's products; and (c) "where more than 20% of the franchisee's gross sales are intended to be or are derived from" the franchise. N.J.S.A. 56:10-4.

Where these six statutory requirements are met, a franchisor cannot terminate a franchisee without sufficient notice and good cause, regardless of whether the franchisor believes such termination is in the best interest of the franchisor's business. See N.J.S.A. 56:10-5.

The NJFPA therefore, creates, generally, an exception to the general rule that two businesses are free to terminate their business relationship according to the terms of their contract. See N.J.S.A. 56:10-5; see also, Emergency Accessories

& Installation, Inc. v. Whelen Eng'g Co., Civil Action No. 09-2652, 2009 U.S. Dist. LEXIS 46956, note 6 (D.N.J. June 3, 2009) Indeed, "the NJFPA was aimed at curbing the tendency of franchisors to unduly profit from their superior economic and bargaining positions when negotiating agreements with potential franchisees." McPeak v. S-L Distrib. Co., Civil Case No. 12-348, 2014 U.S. Dist. LEXIS 10794, at *9 (D.N.J. Jan. 29, 2014); see also Goldsworthy v. Browndorf, 2011 N.J. Super. Unpub. LEXIS 2277, at *9 (App. Div. Aug. 24, 2011) (explaining that the NJFPA "reflects the legislative concern over long-standing abuses in the franchise relationship, caused by the power disparity between franchisors and franchisees").

Notably, regarding the two financial requirements of the NJFA – more than $35,000 in annual gross sales and "more than 20% of the franchisee's gross sales [] intended to be or [] derived from" the franchise – financial information from the entirety of the parties' relationship is not required. Instead, the $35,000 figure only looks at a 12 month period (see N.J.S.A. 56:10-4), while the "20% requirement" has no specific time frame, and a number of courts have held can be proven by a mere small window of the business relationship. See In re Faber Assocs., Docket No. 16-cv-2821, 2016 U.S. Dist. LEXIS 202763 (D.N.J. Dec. 13, 2016) ("Importantly . . the 20% requirement does not feature a time period to determine whether the 20% threshold [is] met"); see also, Harter Equip., Inc. v. Volvo Constr. Equip. N. Am., Inc., 2003 U.S. Dist. LEXIS 27210 (D.N.J. Sept. 24, 2003) ("The

Court finds that by its plain language, the statute does not set forth any particular time period within which to make the determination of whether the franchisee's gross sales satisfy the 20% requirement.").

Here, the Trial Court granted AMD's Motion for Summary Judgment on Eastern Outdoor's NJFPA claim for a single, narrow reason. Specifically, the Trial Court held that Eastern Outdoor did not satisfy one of the six factors necessary for the NJFPA to apply to the relationship between AMD and Eastern Outdoor – the writing requirement -- explaining as follows:

> [S]ummary judgment is to be granted because the Court finds there is no **written agreement** for a definite or indefinite period in which a person grants to another person a license to use a trade name, trade mark, service mark, et cetera.
>
> Clearly, Eastern Outdoor Furnishings did use their logo and they used their trade name, trade mark but there is a – it was a tacit approval. **There doesn't – there has not been presented a – any kind of writing that grants the third-party plaintiff permission to use it.** I'm sure they had permission **but there is no written agreement** granting that and for that reason, I am going to grant the summary judgment motion.

(2T 18:20-19:8) (emphasis added).

This is the wrong standard. The NJFPA does not require a "written agreement" that grants a license. Instead, the plain language of the NJFPA defines a franchise relationship, in relevant part, as a "written **arrangement**" between two entities or individuals. N.J.S.A. 56:10-3 (emphasis added).

To be sure, the New Jersey Supreme Court has recognized that the NJFPA does not require an agreement or contract, and that one or multiple writings could constitute a written "arrangement" under the statute. Specifically, in Instructional Sys., Inc., the New Jersey Supreme Court held that the existence of a franchise is only a question of law "when the entire relationship between the parties may be deduced from ***their written arrangements***." Instructional Sys., Inc., 614 A.2d at 136 (emphasis added).

In keeping with this directive, multiple courts have also held that the writing does not have to grant the license, and that a "license" – in the context of the NJFPA -- can simply be determined based on the parties' conduct. See e.g., Beilowitz v. Gen. Motors Corp., 233 F. Supp. 2d 631, 639 (D.N.J. 2002) ("For purposes of the NJFPA, a license may be found to exist based on a longstanding business relationship, even absent an explicit contractual grant of authority").

For example, in Lithuanian Commerce Corp. v. Sara Lee Hosiery, 179 F.R.D. 450, 470 (D.N.J. 1998), the Court expressly rejected the notion that the "license" must be provided in a writing, ***and instead recognized that the term "license" as used in the NJFPA is vastly different than the traditional use of the term***. Specifically, the Court noted that that New Jersey Supreme Court has instructed courts to use the following standard for when a "license" has been granted under the NJFPA:

> At a minimum, the term 'license' means that the alleged franchisee must use the name of the franchisor in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the ... licensor and licensee by which the licensor vouches, as it were, for the activity of the licensee.

Lithuaninan Commerce Corp., 179 F.R.D. at 471 (quoting Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 352 (1992)). Critically, the Lithuanian court explained as follows:

> The statutory definition of a franchise would appear to require that the license appear in the written arrangement. See N.J.S.A. 56:10–3a (defining franchise as "a written arrangement ... in which a person grants ... a license") . . . **Nevertheless, when interpreting that term, the Third Circuit *and the New Jersey Supreme Court* have consistently contemplated conduct beyond the confines of the written agreement. See, e.g., Instructional Systems, 130 N.J. at 352, 614 A.2d 124 (defining "license" in terms of "a reasonable belief on the part of the consuming public"); Cooper Distributing, 63 F.3d at 272 (holding that "a reasonable jury could have inferred the existence of a 'license' based on various aspects of the lengthy ... relationship" between the parties). Therefore, I must do the same.**

179 F.R.D. at Footnote 9 (emphasis added).

To be sure, the Lithuanian Court rightfully recognized that the "written arrangement" requirement of the NJFPA is merely a minimal evidentiary hurdle, finding that two letters merely designating a business as an authorized dealer of products in certain locations could satisfy the NJFPA's writing requirement. See id.

Indeed, the Federal Trade Commission's "Franchise Rule", 16 C.F.R. 436, is instructive on this point, as this federal franchising regulation was first broached for discussion the very same year that the NJFPA was enacted, 1971. See Instructional Sys., Inc., 614 A.2d at 132 (NJFPA passed in 1971); see also, 43 Fed. Reg. 59614, at 59,622 ("[o]n November 11, 1971, the [Federal Trade Commission ('FTC')] announced the initiation of a proceeding for the promulgation of a trade regulation rule relating to disclosure requirements and prohibitions concerning franchising"). The FTC's "Franchise Rule," which governs franchise disclosure requirements across the country, also references written "arrangements," notably exempting any relationship from the Franchise Rule's requirements where "[t]here is no written document that describes any material term or aspect **of the relationship or arrangement."** 16 C.F.R. 436.8 (emphasis added).

Notably, the FTC, in an advisory opinion, has stated that a writing under this provision is extremely broad, and includes writings such as:

- handwritten notes made during sales presentations;
- sales receipts;
- price lists;
- canceled checks;
- a fact sheet or other promotional materials describing the franchise; and
- correspondence referring to material terms.

FLORIDA FRANCHISE LAW, SBP FL-CLE 13-1 (citing BUS. FRANCHISE GUIDE (CCH) ¶ 6421). Indeed, the FTC's Franchise Rule Compliance Guide similarly explains as follows:

> The [Franchise Rule] exempts purely oral relationships that lack any written evidence of a material term of the franchise relationship or agreement, as a matter of policy, to avoid problems of proof in its enforcement. However, ***the exemption does not apply when there is any writing, even if unsigned, with respect to a material term, such as a purchase invoice for goods or equipment***.

FTC Franchise Rule Compliance Guide, at 9 (emphasis added).

In other words, all that is required to constitute a "writing" under this national franchise regulation, passed during the same time frame as the NJFPA, is, for example, a mere purchase invoice. This is compelling evidence that the NJFPA's "written arrangement" must be construed as equally broad. Indeed, in light of the New Jersey legislature's 2010 amendment to the NJFPA expressly warning that New Jersey courts have been construing the NJFPA too narrowly, Eastern Outdoor respectfully submits that there is no basis to construe a "written arrangement" under the NJFPA any narrower than the federal Franchise Rule.

To be sure, as set forth in detail above, the Trial Court had several documents before it that would readily satisfy the NJFPA's minimal "written arrangement" requirement. In addition to multiple invoices, which, as noted above, would "check the box" for the FTC's Franchise Rule (<u>see</u> <u>e.g.</u>, Pa16), Eastern Outdoor submitted, by way of example and without the limitation, the following: (a) an email from Jeffrey Straubel to Will Evertz in 2009 wherein Mr. Straubel expressly states that AMD and Eastern Outdoor are "trusted partners" in the development of the Summerset brand (Pa789); (b) multiple AMD-owned websites referring to Eastern Outdoor as Summerset's East Coast point of contact, distributor, Director of Sales, or the like (Pa194-Pa196); (c) written catalogues, produced by AMD, expressly titled as "Summerset . . . by Eastern Outdoor Furnishings" (Pa650, Pa778); and (d) Jeffrey Straubel's own letter referring to the "distributor arrangement" that existed between AMD and Eastern Outdoor (see Pa97-Pa98).

It was therefore error to determine that Eastern Outdoor could not satisfy – as a matter of law – the NJFPA's "written arrangement" requirement.

Furthermore, although the Trial Court did not address whether Eastern Outdoor satisfied the remaining five elements of the NJFPA, to be sure, as set forth above and below, the voluminous facts submitted to the Trial Court should have precluded summary judgment on Eastern Outdoor's NJFPA claim against AMD.

First, regarding a "license," for purposes of the NJFPA, a "license" is granted by "the use of another's trade name in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the trade name licensor and licensee by which the licensor vouches, as it were, for the activity of the licensee in respect of the subject of the trade name." McPeak., 2014 U.S. Dist. LEXIS 10794 at *12 (quoting Neptune T.V. & Appliance Serv., Inc. v. Litton Sys., Inc., 190 N.J. Super 153, 160 (App. Div. 1983). Indeed, in Neptune T. V., the New Jersey Appellate Division found that a license had been granted where a brand designated another company as an "authorized" service center, holding as follows:

> . . . by its designation of [plaintiff] as an authorized service center and its authorization to Neptune to hold itself out as such in its advertising, [defendant] gave its imprimatur to [plaintiff's] business enterprise in respect of [defendant's] product and induced the consuming public to expect from [plaintiff] a uniformly acceptable and quality controlled service endorsed by [plaintiff] itself. Under these circumstances we are persuaded that the extent of [defendant's] authorization to [plaintiff] to use the [defendant's] name was sufficient to constitute a license as contemplated by the Act.

Neptune T.V., 190 N.J. Super at 160-61.

Here, it is difficult to envision or more compelling case of a grant of a "license" under the NJFPA. As set forth above, Patrick Farrell's signature block alone – in an email to Jeffrey Straubel, who did not object to such a signature block – is conclusive evidence that Eastern Outdoor held itself out to the public as an authorized arm of the Summerset team and brand. Similarly, Summerset's catalogues titled "Summerset . . . by Eastern Outdoor Furnishings", as well as Sumerset's multiple websites touting Eastern Outdoor as a distributor, Director of Sales and/or east coast sales office for the Summerset brand, also confirm the existence of a "license" pursuant to the NJFPA.

Second, regarding the "community of interest" element of the New Jersey Franchise Practices Act, a "community of interest" exists "when the terms of the agreement between the parties ***or*** ***the nature of the franchise business*** requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skills that will be of minimal utility outside the franchise." Instructional Sys., 130 N.J. at 359 (quoting Cassidy Podell Lynch, Inc. v. Snyder General, 944 F. 2d 1131, 1143 (3d Cir. 1991) (emphasis added); see also Beilowitz, 233 F. Supp. 2d at 640 (same).

The New Jersey Supreme Court further explained that:

> What characterizes community of interest is the potential for abuse that is triggered ***when the reputation and good will of the network, created primarily by the efforts of each of the individual franchisees, passes back to the franchisor without compensation to the franchisee…***

130 N.J. at 358 (emphasis added).

Notably, courts have held that investments can constitute franchise-specific investments ***even if not specifically required by agreement between parties***. See Engines, Inc. v. MAN Engines & Components, Civil Action No. 10-277, 2010 U.S. Dist. LEXIS 76541, at *21-22 (D.N.J. July 29, 2010). As explained by the Court in Engines:

> The Court's inquiry ***is not limited to the four-corners of the [] Agreement***, ***nor should it be***. The New Jersey Supreme Court has instructed that the putative franchise should be evaluated according to "the terms of the agreement between the parties or the nature of the franchise business. . . . " Instructional Systems, 130 N.J. at 359 (emphasis added). ***Business relationships evolve, and are not necessarily fully captured by their foundational contract***.

Id. (emphasis added). Additionally, both monetary and nonmonetary investments constitute investments in the context of the NJFPA. See id. at *18 (both "tangible and intangible" investments relevant to community of interest analysis)

All of the above reflects the public policy goal of the Legislature, which is to protect franchisees from unfair actions by the franchisor that would cause them to waste their investment in the relationship:

> [O]nce a business has made substantial franchise-specific investments (which are of minimal utility outside the franchise), it loses virtually all of its bargaining power .... Specifically, the franchisee cannot do anything that would risk termination, because that would result in a loss of much or all of the value of its franchise-specific investments.

Cooper Distrib. Co. v. Amana Refrigeration, Inc., 63 F.3d 262, 269 (3d Cir. 1995) (quoting Instructional Sys., 130 N.J. at 357)).

For example, in Beilowitz, the District Court found that a community of interest existed where (a) the plaintiff enhanced the goodwill of defendant by selling defendant's products for over twenty-three years, increasing defendant's product sales, and sponsoring local events with defendant's mark displayed alongside plaintiffs name; (b) made substantial franchise-specific investments in defendant's inventory; and (c) derived a substantial portion of its business from sales of defendant's products. 233 F. Supp. 2d at 631. Other courts have held similarly. See Atl. City Coin & Slot Service Co.. Inc. v. IGT, 14 F. Supp. 2d 644, 662 (D.N.J. 1998) (granting preliminary injunction under similar circumstances).

Here, once again, there is overwhelming evidence that a "community of interest" existed between Summerset and Eastern Outdoor. Indeed, it is hard to imagine a more textbook example, as Eastern Outdoor has presented evidence that Eastern Outdoor was instrumental in the ***creation*** of the Summerset brand, and then literally ***built the Summerset brand from nothing*** in the eastern portion of the United States. Moreover, as set forth above, Eastern Outdoor formed and developed its business around promoting the Summerset brand. There is also substantial evidence of coordinated marketing efforts, with Summerset even agreeing to market Eastern Outdoor's EOK system to the parties' mutual benefit. Accordingly, at minimum, the question of whether a "community of interest" exists between the parties must be presented to the trier of fact.

Finally, the Eastern Outdoor readily satisfied the NJFPA's 20% requirement[3], which applies "where more than 20% of the franchisee's gross sales are ***intended to be or are derived from*** such franchise." N.J.S.A. 56:10-4 (emphasis added). Notably, as set forth above, there is no set time period for the calculation of this 20%.

By the plain language of the statute, a party's mere "intention" – an issue for the trier fact -- regarding sales can satisfy this element of the NJFPA. Indeed, in

[3] Eastern Outdoor does not address the NJFPA's "$35,000" and "place of business" requirement, because neither were contested by AMD before the Trial Court.

Ocean City Express Co., Inc. v. Atlas Van Lines, Inc., 194 F.Supp.3d 314, 323-324 (D.N.J. 2016), the District Court of New Jersey held that a company that established as little as 2.71% of gross sales still satisfied the 20% requirement of the NJFPA, explaining:

> …even a cursory inspection of the factual record makes plain that the parties—***or at least [the putative franchisee]*** —intended for ***[the putative franchisee]*** to derive more than 20% of its gross sales from the [relationship]. Indeed, in 2008, [the putative franchisee] "booked" $3 million worth of shipments with [the putative franchisor], ***and from that fact alone, this Court can reasonably infer that the parties intended for [putative franchisee's] gross sales under the Agency Agreement to eclipse 20% of its overall revenues . . .*** 194 F. Supp.3d. at 323-324 (emphasis added); see also, In re Faber Assocs., Docket No. 16-cv-2821, 2016 U.S. Dist. LEXIS 202763 (D.N.J. Dec. 13, 2016) ("Importantly . . the 20% requirement does not feature a time period to determine whether the 20% threshold [is] met"); Harter Equip., Inc. v. Volvo Constr. Equip. N. Am., Inc., 2003 U.S. Dist. LEXIS 27210 (D.N.J. Sept. 24, 2003) ("The Court finds that by its plain language, the statute does not set forth any particular time period within which to make the determination of whether the franchisee's gross sales satisfy the 20% requirement.").

Here, there is overwhelming evidence that Eastern Outdoor intended well over 20% of its revenue to come from the Summerset brand and AMD product. First, as stated above, at the outset of the relationship, Eastern Outdoor intended ***100%*** of its revenue to come from Summerset products. Second, just as in the Oceans case above, a cursory review of Eastern Outdoor's purchases of AMD product since 2014 establishes that Eastern Outdoor intended Summerset sales to be well over 20% of its total company revenue in any given year. (See Pa1932-1937). Finally, on top of this, Eastern Outdoor's ***actual*** sales figures establish that, in recent years, virtually every year the percentage of sales derived from Summerset products eclipsed 20%. (See Pa1982).

Finally, as AMD did not present any viable evidence of "good cause" to terminate Eastern Outdoor – let alone conclusive evidence as a matter of law – AMD's motion for summary judgment should have been denied.

B. The Trial Court Erred By Granting AMD's Motion For Summary Judgment On Eastern Outdoor's Tortious Interference and Indemnity Claims By Failing To Consider Any Of The Facts In The Record Preventing Summary Judgment On Both Claims. (2T 18:18-19:16; Pa6-Pa7).

At oral argument, the Trial Court did not address Eastern Outdoor's tortious interference claim against AMD. (See 2T 3:2-19:20). This claim should not have been dismissed, as facts in the record support Eastern Outdoor's claim. Specifically, a tortious interference claim will lie where a claimant can demonstrate that defendant "intentionally and improperly interfere[d] with another's prospective contractual relation . . . whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation." Nostrame v. Santiago, 213 N.J. 109 (2013). Here, Eastern Outdoor has presented facts that establish that AMD, despite expressly telling Eastern Outdoor in the summer of 2018 that AMD was "committed" to continuing the relationship with Eastern Outdoor, subsequently stripped Eastern Outdoor of its wholesale distributorship months later, and gave the goodwill and customer-base to Eastern Outdoor's competitor. This interference with Eastern Outdoor's existing and prospective wholesale customers gives rise to a claim for tortious interference, and should not have been dismissed as a matter of law.

Similarly, Eastern Outdoor's claim for indemnity – based on the facts that Eastern Outdoor could not be liable to Plaintiff N.A.R if Eastern Outdoor could establish wrongdoing by AMD – could not have been dismissed at the summary judgment stage. Accordingly, Eastern Outdoor respectfully requests that both claims be reinstated.

II. THE TRIAL COURT ERRED BY DENYING EASTERN OUTDOOR'S MOTION TO AMEND THE TRIAL COURT'S SUMMARY JUDGMENT ORDER BECAUSE THE NEW EVIDENCE SUBMITTED AND ACCEPTED BY THE TRIAL COURT REQUIRED THE DENIAL OF SUMMARY JUDGMENT (PA10-PA11; 4T 5:4-7:7)

The standard for reviewing a Trial Court's denial of a motion for reconsideration is abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996) ("[T]he standard of review where there is a denial of a motion for reconsideration ... is 'abuse of discretion.'") Under the "abuse of discretion" standard, the Court "may find an abuse of discretion when a decision 'rest[s] on an impermissible basis' or was 'based upon a consideration of irrelevant or inappropriate factors.'" State v. Steele, 430 N.J. Super. 24, 34–35 (App. Div. 2013) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). The

New Jersey Supreme Court has instructed that "a functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002).

As set forth above, the Trial Court impermissibly added a requirement to the NJFPA statute that is plainly not included in the statute, a "written agreement." The Trial Court also did not provide any explanation as to why the multiple writings Eastern Outdoor submitted did not satisfy the "written arrangement" requirement of the NJFPA. Accordingly, Eastern Outdoor respectfully submits that there are no "good reasons" for the Appellate Division to defer to the Trial Court's decision. Accordingly, Eastern Outdoor respectfully requests that the Trial Court's denial of Eastern Outdoor's Motion to Amend be reversed.

III. THE TRIAL COURT ERRED BY DENYING AMD'S IMPROPER SECOND DISPOSITIVE MOTION – AMD'S MOTION TO BAR—"AS MOOT," RATHER THAN WITH PREJUDICE FOR VIOLATING THE TRIAL COURT'S CASE MANAGEMENT ORDER (PA8-PA9)

The Trial Court denied AMD's "Motion to Bar" as moot, when the Trial Court should have denied AMD's "Motion to Bar" with prejudice because AMD filed this motion in direct violation of the Trial Court's Case Management Order.

Specifically, the parties were required to file all "dispositive motions" by January 20, 2023. AMD did, in fact, file a dispositive motion on January 20, 2023, which is the subject of this appeal. On February 17, 2023, however, AMD filed a second dispositive motion, this one stylized as a "Motion to Bar" Eastern Outdoor's damages expert report and testimony, and seeking dispositive relief in connection with same. (See Pa682-693). Indeed, confirming that AMD did not hide the fact that this was a second dispositive motion, AMD even submitted a "Statement of Material Facts" in support of its motion, only applicable to dispositive motions. (Pa686). AMD did not provide any explanation as to why such motion was filed in direct violation of the Trial Court's scheduling order.

Accordingly, the Trial Court should have denied AMD's motion, with prejudice, rather than as moot. As it stands, the Trial Court's order leaves open the possibility that the parties will have to spend the time and resources to address an improper, second dispositive motion, should the other orders being appealed be reversed. Eastern Outdoor respectfully requests that this possibility be foreclosed, and therefore modify the Trial Court's order on AMD's Motion to Bar as being a denial with prejudice.

CONCLUSION

For these reasons, the Court should REVERSE the Trial Court's orders: (1) granting AMD's Motion for Summary Judgment; (2) denying as "moot", rather than with prejudice, of AMD's Motion to Bar, and (3) denying Eastern Outdoor's Motion to Amend pursuant to R. 4:49-2.

Respectfully submitted,

By: s/ Marisa Rauchway Sverdlov

Dated: December 8, 2023

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<table>
<tr>
<td>N.A.R., INC, Assignee of First Western Credit,
Plaintiff,
vs.

EASTERN OUTDOOR FURNISHINGS a.k.a. JC PARTNERS LLC

Defendant/Third-Party Plaintiff,
vs.

AMD DIRECT, INC. D/B/A SUMMERSET PROFESSIONAL GRILLS

Third-Party Defendant.</td>
<td>SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-003990-22

Sat below:
Hon. Thomas F. Brogan, J.S.C.
DOCKET NO.: PAS-L-3511-20</td>
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THIRD-PARTY DEFENDANT-RESPONDENT'S AMENDED BRIEF AND APPENDIX IN OPPOSITION TO THIRD-PARTY PLAINTIFF-APPELLANT'S APPEAL

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

STATEMENT OF FACTS 4

A. There was no written arrangement between the parties and there was no granting of a license from AMD to EOF 4

B. There was no community of interest between AMD and EOF 6

C. EOF's Motion to Amend failed to demonstrate it met the requirements of the NJFPA. 10

LEGAL ARGUMENT 11

POINT I 11

THE TRIAL COURT PROPERLY FOUND THERE WAS NO WRITTEN ARRANGEMENT TRANSFERRING A LICENSE AT THE SUMMARY JUDGMENT LEVEL AND UNDER THE MOTION TO AMEND THE SUMMARY JUDGMENT ORDER 11

A. The trial court correctly granted summary judgment in favor of AMD because there was no issue of material fact as to Appellant's failure to show a written arrangement between the parties. 13

B. The trial court correctly ruled that any alleged "new" documents submitted with EOF's Motion to Amend the March 27, 2023 Summary Judgment Order Pursuant to Rule 4:49-2 did not demonstrate there was a written arrangement between the parties. 23

POINT II 29

APPELLANT MISREPRESENTS THE RECORD AS THE TRIAL COURT CLEARLY FOUND THERE WAS NO WRITTEN ARRANGEMENT BETWEEN THE PARTIES AS DEFINED BY THE NJFPA. 29

POINT III 33

EOF FAILS TO MEET THE OTHER REQUIREMENTS OF THE NJFPA 33

POINT IV 36

AT BEST, EOF WAS A DISTRIBUTOR, NOT A FRANCHISEE . 36

POINT V 38

EOF FAILED TO SUBSTANTIVELY OPPOSE AMD'S MOTION FOR SUMMARY JUDGMENT AS TO THE TORTIOUS INTERFERENCE AND INDEMNIFICATION CLAIMS AND EOF'S CONCESSIONS AS TO ITS REVENUES AND ABSENCE OF A CONTRACT SIMILARLY DOOM EOF'S CLAIMS. 39

POINT VI 40

THE APPEAL AS TO AMD'S MOTION TO BAR IS UNTIMELY AND MUST BE DISMISSED 40

CONCLUSION 41

TABLE OF AUTHORITIES

PAGE(S)

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 12
Brill v. The Guardian Life Insurance Company of America,
142 N.J. 520 (1995) 11, 12, 13
Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 12
Colt Industries, Inc. v. Fidelco Pump & Compressor Corp.,
844 F.2d 117 (1988) 19
Engines, Inc. v. MAN Engines & Components, Inc.,
2010 WL 3021871 (D.N.J. July 29, 2010) 17, 24
Finlay & Assocs., Inc. v. Borg-Warner Corp.,
146 N.J. Super. 210 (Law. Div. 1976) 14, 19, 20, 21, 37, 38
In re McCarron,
2011 WL 6218934 .... 23, 24
Instructional Sys., Inc. v. Computer Curriculum Corp.,
130 N.J. 324 (1992) 19, 20, 21, 22, 27, 37
Judson v. Peoples Bank and Trust Co. of Westfield,
17 N.J. 57 (1954) 11
Katz v. Holzberg,
2013 WL 5946502 (D.N.J. Nov. 4, 2013) 39
Lawmen Supply Co. of New Jersey, Inc. v. Glock, Inc.,
330 F. Supp. 3d 1020, 1034 (D.N.J. 2018) 22, 36
Liberty Sales Assocs., Inc. v. Dow Corning Corp.,
816 F.Supp. 1004 (D.N.J. 1993) 36, 37
Lithuanian Com. Corp. v. Sara Lee Hosiery,
179 F.R.D. 450 (D.N.J. 1998) 27, 28
M.M. v. M.W.,
2021 WL 6015784 (N.J. Super. Ct. App. Div. Dec. 21, 2021) 40
Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio,
475 U.S. 574 (1986) 12
Neptune T.V. & Appliance Serv., Inc. v. Litton Sys., Inc.,
190 N.J.Super. 153 (App.Div.1983) 19, 34
Nieder v. Royal Indem. Ins. Co.,
62 N.J. 229 (1973) 33

Orologio of Short Hills, Inc. v. Swatch Grp. (U.S.) Ltd., Inc.,
2015 WL 4496653 (D.N.J. July 23, 2015) 16, 18, 21
Ramos v. Browning Ferris Indus. of South Jersey,
103 N.J. 177 (1986) 39
Regent Care Center, Inc. v. *Hackensack City*,
20 N.J. Tax 181, 185 (2001) 24
Singer v. Beach Trading Co.,
379 N.J. Super. 63 (App. Div. 2005) 39
State v. Jones,
232 N.J. 308 (2018) 33
State v. Robinson,
200 N.J. 1 (2009) 33
Vosough v. Kierce,
437 N.J. Super. 218 (App. Div. 2014) 39
Zaman v. Felton,
219 N.J. 199 (2014) 33

STATUTES

N.J.S.A 56:10-1 31
N.J.S.A. 56:10-3 .... 2, 14, 18, 34
N.J.S.A. 56:10-4 .... 34, 35, 36

RULES

Rule 2:4-1(a) 40
Rule 2:4-3(e) 40
Rule 4:46-2 .... 11, 12
Rule 4:49-2 .... 3, 23

PRELIMINARY STATEMENT

This is a case about a simple business relationship between Appellant Eastern Outdoor Furnishings a.k.a. JC Partners LLC ("EOF" or "Appellant") and Respondent AMD Direct, Inc. d/b/a Summerset Professional Grills ("AMD" or "Respondent"), which EOF improperly seeks to elevate to that of a franchise. Simply put, AMD manufacturers grills and grill accessories branded as Summerset Grills and EOF bought some of AMD's grills to sell for its business, which includes a lucrative "outdoor living" business selling much more than just grills. EOF's bread and butter are its sale of Easy Outdoor Kitchen ("EOK") systems, which are outdoor kitchens that include stone islands, steel framework, cabinetry, fire features, LED lighting, grills and non-grill components from other manufacturers aside from AMD, and outdoor furniture. Importantly, the EOK systems are not specific to AMD grills and any grill can be used in the kitchen systems.

This is not a case about a franchisor and franchisee. Nonetheless, EOF filed suit under the New Jersey Franchise Practices Act ("NJFPA" or "the Act") alleging that AMD wrongfully terminated the relationship between the parties. The NJFPA defines a franchise as "*a written arrangement* for a definite or indefinite period, in which a person grants to another person a *license* to use a trade name, trademark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." N.J.S.A. 56:10-3 (emphasis added).

The trial court rightfully found (twice) that EOF was not a franchisee of AMD and was therefore not entitled to the protections of the NJFPA. The record supports the trial court's decisions. As Appellant did in the lower court, it seeks to cloud undisputed facts and binding law, bypass the record evidence, and create a franchise where none exists. EOF attempts to complicate a straightforward statute that has clear requirements. As the trial court held, EOF did not provide evidence of a written arrangement between the parties transferring a license. Appellant failed to meet the very first requirement under the NJFPA, and so its case was dismissed. In addition, as the judge in the lower court alluded, EOF failed to show it met the "community of interest" factors mandated by the statute. As a result of all these shortcomings, EOF fell woefully short in opposing AMD's motion for summary judgment. Even when it introduced "new" documents in a motion to amend the summary judgment order, the trial court similarly found the new documents fell short and did not meet the NJFPA threshold. It its final desperate attempt to prejudice AMD and the Court, Appellant misrepresents the record on appeal and argues that the trial court added the requirement of a written *agreement* (as opposed to a written arrangement). The record evidence, including four days of oral argument, demonstrates the court properly held that there was no written *arrangement*.

PROCEDURAL HISTORY

EOF filed a Third-Party Complaint against AMD Direct, the primary claims of which allege a breach of the New Jersey Franchise Practices Act. [1] On January 13, 2023, AMD filed a Motion for Summary Judgment to dismiss Appellant's third-party complaint in its entirety ("Motion for Summary Judgment"). (Pa46). EOF opposed the motion (Pa160) and the trial court heard lengthy oral argument on February 27, 2023, (T1) and again on March 27, 2023 (T2). On March 27, 2023, the trial court issued its oral opinion and an Order granting AMD's Motion for Summary Judgment thereby dismissing Appellant's claims against EOF with prejudice. (Pa6). On the same date, the trial court denied as moot AMD's Motion to Bar the Expert Opinion of Tammy Hersh ("Motion to Bar"). (Pa8).

On April 17, 2023, Appellant filed a Motion to Amend the March 27, 2023 Summary Judgment Order pursuant to Rule 4:49-2 ("Motion to Amend"). (Pa732a). The motion specifically stated that EOF was seeking to amend the trial court's March 27, 2023 Order granting Third-Party Defendant's Motion for Summary Judgment. (Pa732a). It did not include any reference to the March 27, 2023 Order on AMD's Motion to Bar. Again, the trial court conducted oral argument on two separate days

[1] This case arises out of a Book Account Complaint filed on November 13, 2020, by Plaintiff N.A.R., Inc., Assignee of First Western Credit ("N.A.R.") against Defendant/Third-Party Plaintiff. (Pa13). NAR and EOF settled their claims and filed a stipulation of dismissal on May 17, 2023.

– first on July 7, 2023 (T3) and again on July 17, 2023 (T4). On July 17, 2023, the trial court issued its oral Opinion and denied Appellant's Motion to Amend the Order. (Pa10a). Plaintiff filed the Notice of Appeal and accompanying Case Information Statement on August 30, 2023 indicating that it appealed the grant of AMD's Motion for Summary Judgment on March 27, 2023; the denial of EOF's subsequent Motion to Amend on July 17, 2023; and the Court's disposition of AMD's Motion to Bar on March 27, 2023. (Pa8a).

STATEMENT OF FACTS

A. There was no written arrangement between the parties and there was no granting of a license from AMD to EOF

EOF conceded that there was no franchise agreement between the parties. (Pa71). There was also no formal agreement between AMD and EOF. (Pa1910). AMD routinely gave its logo to dealers and distributors for marketing purposes, but it never gave EOF a license to use its intellectual property. (Pa1910). AMD and EOF did not have a written arrangement requiring that EOF sell a certain amount of Summerset Grills' products or that imposed limitations on the volume of grills EOF could sell from another grill manufacturer. (Pa1295). There was also no written arrangement that precluded EOF from selling other grills in a retail or wholesale capacity. (Pa1288, 1289).

As to marketing and advertising, there was no written arrangement between AMD and EOF with respect to policies on how EOF should use AMD's trademark, proprietary images or marks, or how EOF should display or use the Summerset Grills' name. (Pa1290). EOF and AMD had no written arrangements as to how EOF displayed AMD grills, how EOF advertised at its Totowa, New Jersey location, and there were no written arrangements regarding displays at trade shows or restricting EOF's ability to display or sell non-AMD grills at trade shows. (Pa1291; Pa1294; Pa1296). AMD and EOF did not have any written arrangement whereby AMD limited EOF's marketing and advertising materials for other branded grills. (Pa1294). Furthermore, there were no written requirements that AMD imposed on how EOF should display Summerset Grills at the EOF showroom, AMD did not require EOF dedicate a minimum amount of square footage to displaying AMD products, and there was no written arrangement prohibiting EOF from displaying other brands at its showroom. (Pa1285; Pa1289; Pa1296).

Moreover, AMD and EOF did not have any written arrangement as to how EOF displayed Summerset Grills' banners in its showroom or whether EOF displayed banners from other manufacturers. (Pa1298; Pa1302). There was no written arrangement whereby AMD dictated which Summerset Grills EOF could order and/or sell, and there was no budget imposing any spend that EOF was required to make to promote AMD products. (Pa1300). AMD and EOF did not have any written arrangements whereby the parties shared costs related to advertising. (Pa1303). There was nothing in writing whereby AMD controlled EOF as to sales, marketing, and/or promotion of Summerset Grills. (Pa1308). AMD and EOF did not have any written arrangement where AMD imposed any requirements on EOF regarding EOF's social media postings. (Pa1366). Finally, AMD and EOF did not have any written arrangement regarding control of the standards for EOF's hiring practices or for EOF's employees' conduct. (Pa1344). Succinctly put, AMD and EOF did not have any written arrangement in which AMD controlled anything whatsoever regarding EOF's business. (Pa1309).

B. There was no community of interest between AMD and EOF

EOF makes Easy Outdoor Kitchens ("EOK"), which are outdoor kitchen systems and include steel frames, steel and flex tracks, screws, baseboards, electric boxes, and stainless-steel vents. (Pa1074). EOF buys all of the raw materials, and EOF-employed framers build the outdoor kitchens at their Totowa, New Jersey location. (Pa1075). Grills, refrigerators, among other accessories, are then built into the kitchen system by EOF and/or its contractors. (Pa1076). Veneer stones, tiles, countertops, and cabinetry were also included in the EOK system by EOF and/or its contractors. (Pa1136; Pa1074). The EOK systems are largely customized by EOF. (Pa1467). EOF's sales also include outdoor furniture, fire features, and LED lighting. (Pa1207). AMD had no knowledge of the EOK systems. (Pa1722). Jeff Straubel, the CEO of AMD, testified that EOF made islands and AMD made grills. (Pa1769; Pa1117). AMD was not involved in the build or design of the EOK systems. (Pa1322). When ordering a EOK system, EOF's customers could specify a grill that was not a Summerset Grill. (Pa1323). There was no written requirement that EOF use AMD products in its EOK systems. (Pa1347).

Jeff Straubel testified that he had little interest in Mr. Evertz's business dealings. (Pa1767). Jeff Straubel first went to the EOF showroom in either 2017 or 2018, and it was the first and only time he saw EOF's operation. (Pa1647, Pa1859). Jeff Straubel saw Mr. Evertz about three times in the time that EOF bought AMD's products. (Pa1684). Up until 2017 or 2018, there were no requirements for EOF to stay on as a distributor. (Pa1678). In 2017 or 2018, the only requirement was for EOF to sell more in line with real distributor numbers because they were selling at a dealer level. (Pa1679).

AMD did not control EOF's pricing of products. AMD had suggested pricing for its products, which EOF did not follow. (Pa1695; Pa1910). EOF does not have any prices listed on the products in its showroom. (Pa1354). AMD is not aware of where, how and for what price EOF sells its grills. (Pa1783). EOF received distributor pricing from AMD but sold directly to the customer as a dealer and therefore made significant profit margins. (Pa1781). As to EOF specifically, AMD was not aware of EOF's customers. AMD had no control over how EOF sold their products. (Pa1383). EOF did what they wanted when they wanted. (Pa1780).

EOF sold other grills that were not manufactured by AMD. (Pa1274; Pa1278). Specifically, starting in the 2017 through 2018 timeframe, customers could come to the EOF showroom in Totowa, New Jersey and could physically see or go through a catalog and buy Al Fresco, Grand Turbo, Twin Eagle or Summerset grills. (Pa1281). AMD did not put any restrictions on distributors and dealers as to sales of competitors' products. (Pa1773). Dealers and distributors carry multiple lines of products. (Pa1778). Specifically, as to EOF, AMD did not limit its ability to sell other grills. (Pa1285). AMD did not impose any requirements on EOF as to the amount of personnel EOF needed to devote to the sale of AMD products, or how many people EOF needed to send to trade shows to promote Summerset Grills. (Pa1368). When Mr. Evertz was specifically asked whether there were any ways in which "AMD controlled EOF in regard of the sales, marketing, promotion of Summerset Grills," Mr. Evertz responded:

> Never really controlled, just we had a very open relationship, we would talk about where we should go and everything like that. But they never would dictate where it has to go or anything like that. But we usually agreed on where we should go advertise and put our ideas and money behind.

(Pa1308).

EOF's costs related to marketing of AMD was of mutual benefit to both parties. EOF's costs to promote AMD at trade shows and contractor nights included a mutual promotion of EOF products and the EOK system. Mr. Evertz testified:

> Q. Was everything you just described costs that were incurred by EOF specifically to promote the Summerset brand and, in other words, not to promote any other aspect of EOF's business?
>
> A. In -- there were, in conjunction -- I'm sure you're aware that we build the Easy Outdoor Kitchen system that was built to house grills and everything like that.·So at -- either at the trade shows or at the contractor nights, it would run in conjunction with our Easy Outdoor Kitchen structure brand and how it correlated with the Summerset grill products.

(Pa1312).

Similarly, years ago EOF had a wrapped truck, which included mutual promotion of EOF and AMD in that it included Summerset Grills and logos in the picture, as well as EOK and EOF logos, and EOF's address. (Pa1361). EOF never had a truck solely wrapped in Summerset information and to promote AMD's product. (Pa1363). EOF never expended costs on social media targeted ads that would solely promote AMD's products. Mr. Evertz testified, "So obviously the ads would never be strictly 100 percent for Summerset. The reason for us spending the money and doing everything, it's to get sales back to EOF." (Pa1365). Importantly, EOF's displays at trade shows also included displays of outdoor furniture. (Pa1368). AMD did not impose any requirements on EOF regarding EOF's social media postings and it did not limit EOF's ability to mention other grill brands on social media. (Pa1366, Pa1367). AMD routinely gave its logo to dealers and distributors for marketing purposes. (Pa1699). AMD did not direct EOF's marketing at trade shows. EOF decided the information included in its catalogs. (Pa1692). AMD was not aware of EOF's marketing strategy at all. (Pa1865).

Further, AMD did not have access to EOF's financial books or records. (Pa1909). AMD had no right to inspect or audit EOF's financial books or records. (Pa1365). EOF did not provide any periodic reporting or financial reporting requirements to AMD regarding its business, and EOF was not required to provide AMD with any financial reporting of any kind as to its business and sales. (Pa1345).

AMD sent EOF a letter confirming the termination of their relationship on March 1, 2019. (Pa97a). EOF's termination of its business relationship with AMD did not stop EOF from pursuing any revenues it was pursuing before 2018. (Pa1511). Importantly, EOF's revenues increased after 2018 and the termination of its relationship with AMD. (Pa1512).

C. EOF's Motion to Amend failed to demonstrate it met the requirements of the NJFPA.

Based on the above, on March 27, 2023 the trial court granted Respondent's Motion for Summary Judgment thereby dismissing with prejudice Appellant's claims against AMD. As a result of the dismissal of EOF's claims, the trial court denied as moot AMD's Motion to Bar. On April 17, 2023, Appellant filed the Motion to Amend, which was solely based on the March 27, 2023 Order on the Motion for Summary Judgment. Appellant alleged it received "new" documents that demonstrated a written arrangement as defined by the NJFPA. Appellant did not move to amend the March 27, 2023 Order denying AMD's Motion to Bar. The "new" documents were not new at all. They ranged in date from 2008 through 2014. The documents were emails from nonparty Patrick Farrell. Most of the emails were between Mr. Farrell and another nonparty, Tony Rodriguez, and relate to an unrelated entity, International Outdoor Furnishings, which is not a party to this litigation. The trial court found that even accepting these new documents, Appellant failed to demonstrate it met the requirements of the NJFPA. On July 17, 2023, the court denied Appellant's Motion to Amend the March 27, 2023 Order.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY FOUND THERE WAS NO WRITTEN ARRANGEMENT TRANSFERRING A LICENSE AT THE SUMMARY JUDGMENT LEVEL AND UNDER THE MOTION TO AMEND THE SUMMARY JUDGMENT ORDER

The summary judgment procedure is designed to provide a prompt, businesslike, and inexpensive means of disposing of a case in which an examination of the pleadings, admissions, depositions, and affidavits show that there is no genuine issue of material fact which would require disposition at trial and that the moving party is entitled to a judgment as a matter of law. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 57, 74 (1954); Rule 4:46-2.

The standard for summary judgment was set by the New Jersey Supreme Court in Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520

(1995). In Brill, the Court determined that an alleged disputed issue of fact should not be considered "genuine" within the meaning of the phrase "genuine issue of material fact" in Rule 4:46-2, when such issue is "of an insubstantial nature." Brill, 142 N.J. at 529. In ascertaining the appropriate analysis that a court should conduct in order to determine what types of issues should be construed as "genuine" and what types should be deemed of "an insubstantial nature," the New Jersey Supreme Court adopted the more lenient federal standard of summary judgment predicated on the law espoused in Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio, 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (parallel citations omitted). Id. at 538-540. According to these holdings, when read together, a trial judge must conduct the same type of analysis in ruling on a motion for summary judgment as that in determining the propriety of a directed verdict under R. 4:37-2(b): "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533, 536, 540 citing Liberty Lobby, supra, (citations omitted). In weighing such evidence, the court is "to be guided by the same evidentiary standard of proof by a preponderance of the evidence or clear and convincing evidence - that would apply at a trial on the merits . . . ." Brill, 142 N.J. at 533-534, citing Liberty Lobby, supra, (citations omitted). The court must still grant all favorable inferences to the non-moving party. Brill, 142 N.J. at

536. However, the court may select inferences from the evidence to the extent that a "miscarriage of justice under the law" is not created. Id.

Thus, the standard for summary judgment requires the court to predicate its determination of the existence of a "genuine issue of material fact" on:

> whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Id. at 540.

Our Supreme Court further noted that it was important that a trial court ruling on a summary judgment motion not shut a deserving litigant from trial, but that it was just as important that the court not "allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Brill, 142 N.J. at 540-541. To send a case to trial, knowing that a rational jury can reach but one conclusion, would be "worthless" and "will serve no useful purpose." Id. at 541.

Based on the aforementioned analysis and as further detailed below, the trial court correctly held that Appellant failed to provide evidence that raises a genuine issue of material fact within the meaning of Brill.

A. The trial court correctly granted summary judgment in favor of AMD because there was no issue of material fact as to Appellant's failure to show a written arrangement between the parties.

On summary judgment, the trial court correctly held there was insufficient evidence of a written arrangement demonstrating the transfer of a license. The NJFPA defines a franchise as "a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." N.J.S.A. 56:10-3.

The Act delineates clear requirements that EOF must meet to be considered a franchise. The first requirement of the NJFPA is "a written arrangement for a definite or indefinite period" granting a license. N.J.S.A. 56:10-3. The term "grant" "relates to the requirement of a writing," the word "license" "implies a proprietary interest," and "[m]ere oral permission is not enough." See Finlay & Assocs., Inc. v. Borg-Warner Corp., 146 N.J. Super. 210, 219-20 (Law. Div. 1976), aff'd, 155 N.J. Super. 331 (App. Div. 1978). Furthermore, the Act's written arrangement requirement will not "be satisfied simply by furnishing the dealer with a limited license to use trademarked marketing and advertising materials." Id. at 219.

First, EOF concedes that it does not have a written agreement with AMD. EOF's corporate representative testified that there were no written arrangements between AMD and EOF with respect to policies on how EOF should use AMD's trademark, proprietary images or marks, or how EOF should display or use the

Summerset Grills' name, or as to how EOF displayed AMD grills and how EOF advertised at its Totowa, New Jersey location. There was no written arrangement regarding displays at trade shows or restricting EOF's ability to display or sell non-AMD grills at trade shows. AMD and EOF did not have any written arrangement whereby AMD limited EOF's marketing and advertising materials for other branded grills. EOF's corporate representative also testified that there were no written requirements that AMD dictated how EOF should display Summerset Grills at the EOF showroom, AMD did not require EOF dedicate a minimum amount of square footage to displaying AMD products, and there was no written arrangement prohibiting EOF from displaying other brands at its showroom. AMD and EOF did not have written arrangements as to how EOF displayed Summerset Grills' banners in its showroom or whether EOF displayed banners from other manufacturers. There was nothing in writing whereby AMD controlled EOF as to sales, marketing, and/or promotion of Summerset Grills. EOF's corporate representative also testified that AMD and EOF did not have any written arrangement where AMD imposed any requirements on EOF regarding EOF's social media postings. There was no written arrangement whereby AMD dictated which Summerset Grills EOF could order and/or sell, and there was no budget imposing any spend that EOF was required to make to promote AMD products. AMD and EOF did not have any written arrangements whereby the parties shared costs related to advertising.

Furthermore, AMD and EOF did not have a written arrangement requiring that EOF sell a certain amount of AMD's products or that imposed limitations on the volume of grills EOF could sell from another grill manufacturer. EOF's corporate representative testified that there was no written arrangement that precluded EOF from selling other grills in a retail or wholesale capacity. AMD and EOF did not have any written arrangement regarding control of the standards for EOF's hiring practices or for EOF's employees conduct. Importantly, EOF's corporate representative testified that AMD and EOF did not have any written arrangement at all in which AMD controlled any aspect of EOF's business. The CEO of AMD, Jeff Straubel, also testified that there was no formal agreement between AMD and EOF.

Instead, Appellant attempts to piecemeal together emails from nonparties regarding unrelated entities and companies to show that there was a written arrangement granting a license. See Orologio of Short Hills, Inc. v. Swatch Grp. (U.S.) Ltd., Inc., 2015 WL 4496653, at *5 (D.N.J. July 23, 2015), aff'd in part [as to the NJFPA], rev'd in part and remanded sub nom. Orologio of Short Hills Inc v. The Swatch Grp. (U.S.) Inc., 653 Fed. Appx. 134 (3d Cir. 2016) (holding that despite, the plaintiff's attempt to piecemeal written communication between the parties to qualify as a "written arrangement," the plaintiff was unable to point to any specific written arrangement as is required under the NJFPA).

In its opposition to Respondent's Motion for Summary Judgment, EOF referred to unrelated materials from over 10 years ago regarding an entirely different entity, Summerset Outdoor Living, which is not a party to this litigation. EOF cited to unrelated website postings and a listing of EOF as "Director of Sales" and as a distributor for Summerset Outdoor Living, *not* AMD. Summerset Outdoor Living is an unrelated corporate entity that is not a party to this suit. Summerset Outdoor Living sold outdoor furniture and grills and assorted merchandise. AMD d/b/a Summerset Professional Grills sold grills. That Jeff Straubel was a principal in both companies at one point does not make them the same company. As evidenced by the very corporate filings EOF submitted to the trial court, Summerset Outdoor Living and Summerset Professional Grills are separate corporate entities. EOF does not and cannot assert that they are the same company -- because they are not -- nor does EOF assert that it is a franchisee of both Summerset Outdoor Living and Summerset Professional Grills. EOF has chosen to pursue AMD d/b/a Summerset Professional Grills. Therefore, EOF's assertion that Summerset Outdoor Living's website post from over ten years ago can be attributed to AMD in the subject lawsuit ten years later is meritless. See Engines, Inc. v. MAN Engines & Components, Inc., 2010 WL 3021871, at *7 (D.N.J. July 29, 2010) (holding, "Business relationships evolve and are not necessarily fully captured by their foundational contract.").

Further, Jeff Straubel's reference to a "distributor arrangement" in the March 2019 termination letter does not itself constitute a retroactive written arrangement. Even if there was a distribution *arrangement* between the parties, it must be reduced to writing during the course of the relationship to create a franchise. See Orologio of Short Hills, Inc. v. Swatch Grp. (U.S.) Ltd., Inc., 2015 WL 4496653, at *5 (D.N.J. July 23, 2015), aff'd in part [as to the NJFPA], rev'd in part and remanded sub nom. Orologio of Short Hills Inc v. The Swatch Grp. (U.S.) Inc., 653 Fed. Appx. 134 (3d Cir. 2016) (holding that despite the plaintiff's attempt to piecemeal written communication between the parties to qualify as a "written arrangement," the plaintiff was unable to point to any specific written arrangement as is required under the NJFPA). The NJFPA requires "a written arrangement for a definite or indefinite period" granting a license. N.J.S.A. 56:10-3. A reference to a distribution arrangement in a letter issued *after* the termination of the relationship does not grant a license as defined under the NJFPA.

The seminal case of Instructional System, Inc. v. Computer Curriculum Corp. is instructive. The New Jersey Supreme Court held:

> [I]t is obvious that not every grant of permission to use a trademark in the sale of goods or services is a "license" within the meaning of the Franchise Act. For example, a department store that sells brand-name clothing or television sets cannot realistically market those products without using the distinctive name and trademark of the manufacturer.

> Setting aside the "community-of-interest" requirement, even if fifty percent of the department store's total revenue were derived from the sale of a particular brand of product, that circumstance would not render the arrangement a "license" within the meaning of the Act simply because the distributor is permitted to use the manufacturer's name to market the products. To define a "license" otherwise might convert every distributorship into a franchise. As the Third Circuit said in Colt Industries, Inc. v. Fidelco Pump & Compressor Corp., 844 F.2d 117, 120 (1988), "if this limited agreement constitutes a license to use a trademark, then any business selling a name brand product would, under New Jersey law, necessarily be considered as holding a license."

Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324, 352 (1992).

The Court went on to provide additional color to what constitutes a license in citing to Finlay and stating that "the term 'license' means 'to use as if it is one's own.'" Id. (citing Finlay, 146 N.J. Super. at 219). The Court further held that the "franchisee must use the name of the franchisor 'in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the . . . licensor and licensee by which the licensor vouches, as it were, for the activity of the licensee.'" Id. at 352–53 (citing Neptune T.V. & Appliance Serv., Inc. v. Litton Sys., Inc., 190 N.J.Super. 153, 160 (App.Div.1983)). Furthermore, "the cornerstone of a franchise system must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product." Id. at 354 (citing Id.)).

Finally, in reaching its conclusions, the Instructional System Court affirmed the findings in Finlay & Assocs., Inc. v. Borg-Warner Corp. and stated that "no license was found because the distributor had not conducted business under the manufacturer's name and the license means 'to use as if it is one's own.'" Instructional System, 130 N.J. at 353 (citing Finlay, 146 N.J. Super. at 220, aff'd, 155 N.J. Super. 331 (App. Div. 1978)). Here, EOF never did business in the name of AMD or Summerset Grills and all of its business always included the EOF name in some way. Simply distributing advertising materials or selling products with AMD's trademark is not enough to create a license for trademark use under the NJFPA. See Finlay, 146 N.J. Super. at 219 (holding that the Act's written arrangement requirement will not "be satisfied simply by furnishing the dealer with a limited license to use trademarked marketing and advertising materials.").

Based on the above, the trial court correctly held that AMD did not grant EOF a license and there was no written arrangement between the parties. EOF has alleged that because it sold Summerset Grills it somehow automatically obtained a license to use AMD's propriety information. EOF was simply permitted to use the manufacturer's name, here, Summerset, to market the products, AMD grills. Instructional Sys., 130 N.J. at 352 (holding that "not every grant of permission to use a trademark in the sale of goods or services is a "license" within the meaning of the Franchise Act."). Permission to use a manufacturer's name to market products does not turn a potential distributorship relationship into a franchise or as the New Jersey Supreme Court held, “then any business selling a name brand product would, under New Jersey law, necessarily be considered as holding a license.” Id. Further, AMD routinely gave its logo to dealers and distributors for marketing purposes, but AMD never gave EOF a license to its intellectual property. As stated above, simply sharing marketing and advertising materials, which is what AMD did, will not suffice as the basis for the transfer of a license. See Finlay, 146 N.J.Super. at 219–20. Distributing advertising materials of another’s products, or having those materials available, including catalogs, or participating in advertising or listing advertisements that certain individuals or businesses sell certain products, is not what is meant by a license to use the various items referred to in the statute. See Finlay, 146 N.J. Super. at 219. “Simply selling goods or distributing materials which bear manufacturer's name or trademark does not license use of trademark.” Id.; see also Orologio of Short Hills, Inc., 2015 WL 4496653, at *5 (holding that no license was granted to Orologio because Swatch merely provided Orologio with advertising materials such as window and counter displays).

In this case, EOF is akin to the hypothetical department store that sells name-brand clothing or televisions referenced by the New Jersey Supreme Court in Instructional Systems in that EOF’s business included other products, such as other branded grills and accessories, the EOK systems, outdoor furniture, fire features, and

LED lighting. See Instructional Sys., 130 N.J. at 352. EOF was not in the business of only selling AMD's products. As Jeff Straubel testified, EOF made islands [and entire outdoor entertaining areas] and AMD made grills. A grill was only one part of the EOK system that EOF makes which includes steel framework, baseboards, vents, stone countertops, and tile work. The steel framework, baseboard, vents, stone countertops, and tile work were done by EOF and other companies that EOF worked with, and AMD had no relationship with them. As such, EOF is not wrapping itself with the AMD trade name. See Lawmen, 330 F. Supp. 3d at 1034. Importantly, EOF did not solely advertise AMD products. Its advertisement always included EOF's business information, because as EOF's company representative, Mr. Evertz testified, the purpose of the advertising was to "get sales back to EOF."

Here, the trial court found that Appellant failed to meet the elements of the NJFPA. In making its ruling on Respondent's Motion for Summary Judgment, the court held that it did not see a written arrangement and noted that a written arrangement must be between the two companies. See 2T at 9:7-11. A written arrangement is not just a slogan or advertisements that are sent out in brochures to dealers, distributors, and others. See 2T at 7:6-11; 9:7-11. Indeed, all EOF demonstrated to the trial court was advertisements and emails pertaining to nonparties and unrelated companies from over 10 years ago.

B. The trial court correctly ruled that any alleged "new" documents submitted with EOF's Motion to Amend the March

27, 2023 Summary Judgment Order Pursuant to Rule 4:49-2 did not demonstrate there was a written arrangement between the parties.

On Appellant's Motion to Amend, the trial court correctly held there was no evidence of a written arrangement demonstrating the transfer of a license. Appellant's Motion to Amend alleged it found "new" documents demonstrating a written arrangement, which were nothing more than the same type of unrelated emails between nonparties and unrelated entities that it submitted to the trial court under the summary judgment motion. One month after the case was dismissed, and three months after discovery closed, EOF submitted those 179 pages of futile documents to the court, most of which were emails from nonparty Patrick Farrell to nonparty Tony Rodriguez regarding an unrelated entity, International Outdoor Furnishings. The documents EOF presented were not new because they were from 2008 through 2014; more than 10 years old at the time of the Motion to Amend.

For reconsideration of new evidence, the party must show the "new evidence or additional information not presented at the original proceeding [] would change the outcome." In re McCarron, 2011 WL 6218934, at *2 fn2 (N.J. Super. Ct. App. Div. Dec. 15, 2011). The Court's March 27, 2023 decision and Order granting AMD's Motion for Summary Judgment shows that it fully considered the arguments of the parties, heard lengthy oral argument, and ruled against EOF. EOF's arguments were already put before the Court and were found to be unpersuasive. Mr. Farrell's emails did not change the outcome because they did not demonstrate a written arrangement, contrary to EOF's assertions. See In re McCarron, 2011 WL 6218934 at *2.[2]

As set forth in the trial court, documents from over 10 years ago do not establish that EOF was a franchise of AMD or that there was a written arrangement between the parties. The Court rejected Appellant's additional document production in the Motion to Amend and the other evidence in the case on the Motion for Summary Judgment in finding that the record did not support a finding of a written arrangement between the parties. Even assuming *arguendo* that EOF helped start AMD back in 2008 or 2009, which is what EOF repeatedly and unsuccessfully argues, again, as set forth in Engines, Inc.: "Business relationships evolve and are not necessarily fully captured by their foundational contract." Engines, Inc. v. MAN Engines & Components, Inc., 2010 WL 3021871, at *7 (D.N.J. July 29, 2010). EOF's assertions from over 10 years ago do not reflect its diversified business, including the sales of Easy Outdoor Kitchen systems, which include stone islands,

[2] In fact, EOF's Motion to Amend was a *third* bite of the apple in submitting the same type of documents to the Court. See Regent Care Center, Inc. v. Hackensack City, 20 N.J. Tax 181, 185 (2001). EOF submitted last-minute documents on March 24, 2023, which was the Friday afternoon before oral argument for the summary judgment motion on Monday, March 27, 2023. The March 24, 2023 documents were redundant and were in the same spirit as the 179 pages EOF submitted in the Motion to Amend. The March 24, 2023 submission was a 2009 document; the documents before the trial court on the Motion to Amend were from 2008 through 2014.

steel framework, cabinetry, fire features, LED lighting, grills and non-grill components from other manufacturers aside from AMD, and outdoor furniture.

Similarly, here, the subject new documents from 2008 through 2014, do not demonstrate a written arrangement and certainly do not establish a franchise. Notwithstanding the outdated nature of the documents, the contents are much less useful or indicative of any agreement at all, and EOF disingenuously attempts to tie a new entity, International Outdoor Furnishings, to AMD and revive its attempt to somehow tie Summerset Outdoor Living (an unrelated nonparty entity) to AMD d/b/a Summerset Professional Grills (the only named third-party defendant in this case), which the trial court rejected in dismissing EOF's claims. First, most of the documents EOF presented on the Motion to Amend were from Tony Rodriguez, who was the president of International Outdoor Furnishings, another unrelated nonparty entity. Despite the trial court rejecting this argument in the underlying motion, EOF once again commingled an unrelated entity that is not a party to this case (Summerset Outdoor Living) with AMD and refers to AMD and Summerset Outdoor Living collectively as the "Summerset brand" in an effort to create a relationship that does not exist. Such baseless grouping is a relentless and continued misrepresentation of the clear evidence that these two entities are just that—two separate corporate entities.

EOF went further in the Motion to Amend in that it attempted to tie Tony Rodriguez and International Outdoor Furnishings to AMD.[3] There is absolutely no evidence that Tony Rodriguez or International Outdoor Furnishings were tied to AMD, or that Tony Rodriguez was or is a representative of AMD. The emails clearly indicate that Tony Rodriguez was the president of International Outdoor Furnishings and used an iofusa.com email domain, not an AMD or Summerset Grills email domain. EOF does not and cannot assert that either Summerset Outdoor Living or International Outdoor Furnishings are the same company as AMD -- because they are not. Therefore, EOF's assertion that Tony Rodriguez's emails from 15 years ago can be attributed to AMD in the subject lawsuit 15 years later is meritless. EOF conceded that it had no written arrangement with AMD, and the 179-page production submitted with the Motion to Amend did not fill that glaring and fatal void.

In deciding Appellant's Motion to Amend, the court held that the "new" documents did not satisfy the first requirement of the NJFPA, which requires a written arrangement. <u>See</u> T4 at 5:4-12; 7:3-7. The trial court based its opinion on the

[3] The documents EOF heavily relies on do not mention EOF at all. Any emails addressed to Patrick Farrell were from Tony Rodriguez, not Jeff Straubel. Yet, EOF argues that emails discussing a logo from Tony Rodriguez, president of International Outdoor Living, which is an unrelated company, somehow bind AMD. In addition, EOF blatantly mispresents the documents in that the emails are from Tony Rodriguez and not Jeff Straubel.

facts in Instructional Sys., Inc. v. Computer Curriculum Corp., 130 N.J. 324 (1992), and Lithuanian Com. Corp. v. Sara Lee Hosiery, 179 F.R.D. 450 (D.N.J. 1998). The trial court in this case noted that in Instructional Systems, the parties had an actual written agreement, so there was obviously a "written arrangement" as defined by the NJFPA. See T4 at 5:15-18. The Instructional Systems Court stated that the requirements and restrictions the defendant-franchisor imposed on the plaintiff-franchisee by way of a written contract between the parties was sufficient evidence of the granting of a license. Id. at 328. The Court noted that those requirements and restrictions were the following:

> [The] Reseller Agreement prohibited ISI from selling *any products* competitive with CCC products. Moreover, CCC prohibited ISI from developing or designing any products that might compete with CCC's products. Furthermore, CCC obligated ISI to educate and train users of CCC products on a continuing basis… [And the requirement] that ISI maintain and promote CCC's name, trademark, and logo.

Id. at 354.

The written contract and the material commercial restrictions that were present and dispositive in Instructional Systems are completely absent in this case, as the trial court noted. As the trial judge stated in its oral opinion, "there was testimony that EOF dealt with other brands too." See T4 at 6:16-7:3. Indeed, EOF conceded that AMD did not impose any requirements or restrictions as to sales, advertising, marketing, budgeting, promotions, or hiring practices. EOF concedes that it did not solely advertise AMD products and that its advertisement always included EOF's business information because the goal was to "get sales back to EOF."

Next, in relying on Lithuanian Commerce in its July 17, 2023 decision, the trial court noted that the alleged franchisee had a letter stating that it was a sole distributor. See T4 at 5:5-15. As the trial court highlighted, in Lithuanian Commerce, the plaintiff cited to two actual documents between the parties in the litigation. See Lithuanian Com. Corp. v. Sara Lee Hosiery, 179 F.R.D. 450, 470 (D.N.J. 1998). The first document said, "[p]lease be advised by this letter that [LCC] is the only business enterprise authorized to distribute L'eggs pantyhose in the nations of Lithuania and Latvia." Id. The second document said, "[t]his instrument is drafted by Sara Lee Hosiery, the owner of the L'eggs brand name and manufacturer of said pantyhose." Id.

Here, there were no such documents. The trial court correctly held there was no record evidence on the Motion for Summary Judgment evidencing a written arrangement transferring a license, and it also correctly held that that the new documents Appellant submitted with its Motion to Amend failed to meet the NJFPA threshold requirement. Much like the documents EOF put forth in opposition to the Motion for Summary Judgment, in its Motion to Amend, the "new" documents were outdated (from 2008 through 2014) and related to nonparties and unrelated companies. Documents from over 10 years ago do not establish that EOF was a franchise of AMD or that there was a written arrangement between the parties.

The trial court correctly held that there must be a written arrangement granting a license. There was no written arrangement, and Appellant's "new" documents fail to meet the threshold. The other emails in the last-ditch 179-page production from EOF that do not mention AMD or Jeffrey Straubel fail to change any of the material facts in this case—there is no written arrangement and transfer of a license between EOF and AMD. These new documents merely pile on to the same approach EOF unsuccessfully attempted in opposition to AMD's Motion for Summary Judgment. The emails simply refer to shipments and payments of products, product availability, and distributor and dealer pricing (which included other contacts in the email chain); this does not equate to a franchise agreement or written arrangement of any sort. It undoubtedly does not equate to the transfer of a license. Emails showing that the parties were doing business does not demonstrate a written arrangement and it does not demonstrate the transfer of a license. Appellant's herculean efforts to stretch the facts fall fatally short of the requirements of the NJFPA. This Court must affirm the trial court's holdings.

POINT II

APPELLANT MISREPRESENTS THE RECORD AS THE TRIAL COURT CLEARLY FOUND THERE WAS NO WRITTEN ARRANGEMENT BETWEEN THE PARTIES AS DEFINED BY THE NJFPA.

Appellant misrepresents the record as to the trial court's holding on March 27, 2023. The record does not support Appellant's misleading proposition that the trial court invoked a new requirement for a *written agreement*. During oral argument before issuing its opinion on March 27, 2023, the court stated the following regarding *written arrangements*:

> Here's what I don't -- here's what I really have an issue with, that there is a *written arrangement*, the very first one for a definite or indefinite period in which a person grants to another person now a license to use a trademark. . .I don't find that there was a *written arrangement*. . .I think the *written arrangement* has to be between the parties, not just something written like, you know, Summerset Grills by Outdoor -- by Eastern Outdoor Furnishings. That to me is just a -- that's a slogan, that is just an advertisement [sic].

T2 at 6:24-7:11.

> I'm thinking a *written arrangement* is between the two companies, not what is just advertised [sic] in brochures and in other literature that is sent out to other dealers, distributors and other folks.

Id. at 9:7-11.

> Well, I think the wording – well it's already been broadened because it doesn't say a contract, it says *written arrangement*. . . so they have already broadened it from a written contract, but I still think it has to be between the two parties.

Id. at 10:23-25; 11-2-4.

Finally, in issuing its oral opinion, the Court stated:

> Under NJSA 56:10-1 a franchise [is] defined as *a written arrangement* for a definite or indefinite period, in which a person grants to another person a *license* to use a trade name, trademark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise. . . It's clear that the two entities, the -- Eastern Outdoor Furnishings and [] AMD Direct did a lot of business together. . .[A]lthough, when this matter terminated, [EOF] moved on. And, however the question is, is whether they are considered a franchisor and franchisee. . . This Court concludes after reading everything, at least twice, that summary judgment is to be granted because the Court finds there is no *written agreement* for a definite or indefinite period in which a person grants to another person a license to use a trade name, trademark, service mark, et cetera.

Id. at 17:14-20; 18:9-24 (emphasis added).

As demonstrated above, Appellant misrepresents the record in stating that the trial court created a new requirement for a written agreement under the NJFPA. Contrary to Appellant's assertions, during oral argument, the trial court specifically noted the difference between a written contract and the broad term, "written arrangement," noting that Appellant failed to show evidence that it met the broad standard for a written arrangement transferring a license as defined under the NJFPA.

Furthermore, when issuing its July 17, 2023 oral opinion, the court noted the following regarding NJFPA and written arrangements, and its March 27, 2023 decision:

> I ruled in favor of AMD and found that – I granted summary judgment finding that the – the elements of New Jersey Franchise Practice Act hadn't been met. And specifically the components that have to be met is that the NJFPA defines a franchise as a *written arrangement* for a definite or indefinite period in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics and in which there is a community of interest in the marketing of goods and services at whole sale retail by a lease agreement or otherwise.

T4 at 3:25-4:11

> I don't find that there was a *written arrangement*...I find that there was no palpably incorrect decision by the Court in determining that there was no written arrangement that would have satisfied and created a franchise between Eastern Outdoor Furniture and AMD.

Id. at 6:16-17; 7:3-7.

Tellingly, in its Motion to Amend the March 27, 2023 Order, Appellant wrote the following:

> At the oral argument on March 27, 2023, this Court granted AMD's Motion for Summary Judgment based solely on the conclusion that Eastern Outdoor did not present evidence of a "*written arrangement*" wherein AMD granted Eastern Outdoor a "license."

As such, Appellant's argument is disingenuous. Although a feigned and failing argument, Appellant did not raise this argument in the lower court and is therefore barred from doing so before this Court. Unless an issue goes to the jurisdiction of the trial court or concerns matters of substantial public interest, the appellate court will not consider it. See State v. Jones, 232 N.J. 308, 321 (2018); Zaman v. Felton, 219 N.J. 199, 227 (2014); State v. Robinson, 200 N.J. 1, 20-22 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). See Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2021).

Even if the Court considered Plaintiff's misguided arguments, they fail for the same reasons stated above. The case law and statute hold that if there is no evidence of a written arrangement the analysis stops, so too, should this Court find that there was no error in the trial court's assessment, which evaluated the facts at the summary judgment phase and then again under a motion to amend an order, finding no written arrangement both times. There certainly was no written *agreement* in this case and as the trial court correctly held, there was no written *arrangement*. The supposed franchisee must meet each requirement of the NJFPA. Therefore, in finding there was no written arrangement, the trial court correctly dismissed all of EOF's claims against AMD.

POINT III

EOF FAILS TO MEET THE OTHER REQUIREMENTS OF THE NJFPA

EOF's claims still fail on the other NJFPA factors. In addition to a written arrangement between the parties and the transfer of a license, the NJFPA requires that the alleged franchisee show there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise, with the purported franchisor. N.J.S.A. 56:10-3. Furthermore, the NJFPA is only applicable to a franchise:

> (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey,[4] (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act,[5] and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise. . .

N.J.S.A. 56:10-4.

A showing of a "community of interest" mandates the franchisee demonstrate: (1) licensor's control over the licensee, (2) the licensee's economic dependence on the licensor; (3) disparity in bargaining power, and (4) the presence of a franchise-specific investment by the licensee. See N.J.S.A. 56:10-3; Neptune T.V. & Appliance Serv., Inc. v. Litton Microwave Cooking Prod. Div., Litton Sys., Inc., 190 N.J. Super. 153, 161 (App. Div. 1983).

EOF has alleged it was a franchisee of AMD, but in the underlying summary judgment motion, it conceded that it was not economically dependent on AMD, that it had no franchise-specific investments, and that AMD had no requirements for or control over EOF as to its advertising, marketing, sales, hiring practices or

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[4] AMD is not disputing that EOF meets the place-of-business requirement.
[5] AMD is not disputing that EOF meets the $35,000 requirement.

showroom practices. In other words, EOF conceded facts that showed it does not meet the requirements under the NJFPA, and it is, therefore, not entitled to the protections of the NJFPA. In fact, when issuing its oral decision regarding the Motion to Amend, the trial court also noted that EOF failed to meet the community of interest requirements and that it "dealt with other brands too." See T4 at 6:1624.

It is undisputed that EOF always had full ability and did in fact conduct business with other grill manufacturers and that AMD had no control over EOF and as such, there was no disparity in bargaining power. Moreover, EOF's business and revenues skyrocketed after "termination" by AMD—which is dispositive proof that EOF's grill business was not dependent upon AMD and fully transferable. There is no evidence that shows the "symbiotic" relationship EOF asserts but does not explain and leaves for the Court and AMD to figure out.[6] The undisputed facts show that EOF failed to prove the "community of interest" factors in the underlying motion for summary judgment.

Lastly, N.J.S.A. 56:10-4 requires that a purported franchisee show that more than 20% of its gross sales are intended to be or are derived from the franchise.

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[6] Even if EOF continued its misinformed assertion that it somehow helped "start" AMD, such a proposition presumably goes to goodwill, which EOF again failed to argue in the trial court. Even if it did, the New Jersey Supreme Court has held: "[t]o develop goodwill generally for a product cannot be enough to create a community of interest. Otherwise, any licensee distributing a brand-name product could claim it has a community of interest with its supplier." Instructional Systems, 130 N.J.at 358.

N.J.S.A. 56:10-4. The binding testimony of EOF's corporate representative, Tony Diamente, demonstrates that EOF failed to satisfy its burden to produce record evidence demonstrating by a preponderance of the evidence that its sales of AMD products made up more than 20% of its total revenues. EOF improperly combined sales figures for JC Partners LLC—the only party in this case—with that of yet another non-party, NJ Backyards, because it cannot and did not meet the 20% requirement otherwise. As such, EOF still fails to demonstrate that it meets the statutory requirements under the NJFPA and EOF's appeal falls short in all aspects.

POINT IV

AT BEST, EOF WAS A DISTRIBUTOR, NOT A FRANCHISEE

In its appellate brief, EOF repeatedly refers to itself as a distributor, and relies on Jeff Straubel's reference to a "distributor arrangement" in the March 2019 termination letter to support its unsupported proposition that it was AMD's franchisee. However, not every distributor is a franchisee. "What distinguishes a franchise from an ordinary distributorship is that the goodwill inherent in the name and mark attaches to the *entire* business of the seller, not just to the goods themselves." Lawmen Supply Co. of New Jersey, Inc. v. Glock, Inc., 330 F. Supp. 3d 1020, 1034 (D.N.J. 2018) (citing Liberty Sales Assocs., Inc. v. Dow Corning Corp., 816 F.Supp. 1004, 1010 (D.N.J. 1993) (emphasis added)). Courts have held:

> A manufacturer of branded goods will certainly not object, and may encourage, a distributor to use its name or mark

> to encourage sales. This kind of use does not turn a distributor or seller of goods into a licensee for purposes the Act. . . Rather, it is the obligation of the franchisee to promote the mark itself, as distinct from merely using it to make sales, which distinguishes a license meeting the Act's requirements from the right to use a mark that any reseller of goods gets when purchasing those goods from the owner of the mark.

Liberty Sales Assocs., Inc. v. Dow Corning Corp., 816 F. Supp. 1004, 1011 (D.N.J. 1993) (citing Instructional Systems, 130 N.J. at 352).

In Finlay & Assocs., Inc. v. Borg-Warner Corp., the Court evaluated a case where the parties had a distributorship agreement. Finlay & Assocs., Inc. v. Borg-Warner Corp., 146 N.J. Super. 210, 220 (Law. Div. 1976), aff'd, 155 N.J. Super. 331 (App. Div. 1978). "In a broad sense, any arrangement between manufacturer and seller or distributor or retailer to sell brand name product could be considered a 'franchise'; however, merely because there is sale or distribution agreement does not make it a franchise within purview of Franchise Practices Act." Id. at 218. In so holding, the Court noted the NJFPA's purpose of affording "protection against arbitrary cancellation of affected franchises and to deal with certain economic coercion." Id. In considering the Act's purpose, the Court held that the plaintiff continued its business under its own name without interruption since the termination of the distributorship. Id. The Court also noted that other manufacturers made comparable products that the plaintiff could purchase. Id. The Court concluded:

> in the present case there is no requirement for economic dependency except to the extent plaintiff by its own choice elected to concentrate on the line of merchandise it preferred for whatever business reasons, including profit motive. Here, plaintiff's business does not operate under the name of any 'franchisor,' but under the name 'Finlay & Associates, Inc.,' its own name.

Id.

The Finlay court determined that although the parties had a written distributorship agreement, the plaintiff was not a franchisee. Id. at 221. The circumstances in Finlay are analogous to the case at hand, however, here, there is no written agreement at all. Like Finlay, there is no evidence of economic dependence because EOF continued its business under the same name, without interruption, and increased its gross revenues since the termination of the relationship between the parties. Lastly, like Finlay, here, other manufacturers made comparable grills and EOF did in fact purchase grills from these other manufacturers during its relationship with AMD and after. Therefore, as the Court held in Finlay, this Court should find that EOF was not a franchise of AMD and at best was a distributor simply selling AMD's grills. EOF's claims against AMD must be dismissed in their entirety as the NJFPA is not applicable to their relationship.

POINT V

EOF FAILED TO SUBSTANTIVELY OPPOSE AMD'S MOTION FOR SUMMARY JUDGMENT AS TO THE TORTIOUS INTERFERENCE AND INDEMNIFICATION

CLAIMS AND EOF'S CONCESSIONS AS TO ITS REVENUES AND ABSENCE OF A CONTRACT SIMILARLY DOOM EOF'S CLAIMS.

In the underlying motion for summary judgment, EOF failed to cite to any case law or precedent in opposition to AMD's motion as to its tortious interference and indemnification claims. EOF conceded that it ended the relationship with AMD and made a business decision not to purchase any more products, although it was offered the same distributor pricing. EOF also conceded that its revenues increased after the termination of the relationship with AMD. As such, it had no damages. See Vosough v. Kierce, 437 N.J. Super. 218, 247 (App. Div. 2014). Damages are required for a tortious inference action. See Singer v. Beach Trading Co., 379 N.J. Super. 63, 81 (App. Div. 2005). As such, the trial court properly dismissed EOF's claims in their entirety.

Lastly, EOF conceded that it had no contract with AMD. An indemnification claim requires a contract or the presence of a special legal relationship. See Ramos v. Browning Ferris Indus. of South Jersey, 103 N.J. 177, 188-89 (1986). A "longstanding business relationship" is not enough to show that a special legal relationship exists for indemnification purposes. Katz v. Holzberg, 2013 WL 5946502, at *3 (D.N.J. Nov. 4, 2013). Therefore, the trial court properly dismissed EOF's claims in their entirety.

POINT VI

THE APPEAL AS TO AMD'S MOTION TO BAR IS UNTIMELY AND MUST BE DISMISSED

Appellant's Notice of Appeal as to the Motion to Bar is untimely. A Notice of Appeal must be filed within 45 days of the final order. Rule 2:4-1(a). The 45-day period is tolled while a motion for reconsideration is pending regarding the order from which the party seeks to appeal. M.M. v. M.W., 2021 WL 6015784, at *7 (N.J. Super. Ct. App. Div. Dec. 21, 2021) (citing Rule 2:4-3(e)). Rule 2:4-3(e) states that the running of the time for taking an appeal is tolled:

> **(e)** In civil actions on an appeal to the Appellate Division by the timely filing and service of a motion to the trial court for rehearing or to amend or make additional findings of fact pursuant to R. 1:7-4; or for judgment pursuant to R. 4:40-2; or for a new trial pursuant to R. 4:49-1; or for rehearing or reconsideration seeking to alter or amend the judgment or order pursuant to R. 4:49-2. The remaining time shall again begin to run from the date of the entry of an order disposing of such a motion.

Rule 2:4-3(e).

The Motion to Amend the Order was only as to the March 27, 2023 Order regarding AMD's Motion for Summary Judgment and did not address the March 27, 2023 Order regarding AMD's Motion to Bar. Therefore, Appellant does not get the benefit of the tolling provision as to the Order regarding AMD's Motion to Bar EOF's expert. Appellant's Notice of Appeal as to AMD's Motion to Bar EOF's expert is untimely because it should have been filed within 45 days of March 27, 2023 (by May 11, 2023). Appellant filed the Notice of Appeal of AMD's Motion to Bar EOF's expert on August 30, 2023, 111 days late. This part of EOF's appeal must be summarily dismissed.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the trial court did not err in granting Respondent's Motion for Summary Judgment and denying Appellant's Motion to Amend. Accordingly, the trial court's orders should be affirmed.

DATED: February 12, 2024

BOWMAN AND BROOKE LLP

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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-003990-22

N.A.R., INC., ASSIGNEE OF
FIRST WESTERN CREDIT,

Plaintiff,

—against—

EASTERN OUTDOOR FURNISHINGS
A.K.A. JC PARTNERS LLC,

Defendant/Third-Party Plaintiff-Appellant,

—against—

AMD DIRECT, INC., D/B/A SUMMERSET
PROFESSIONAL GRILLS,

Third-Party Defendant-Respondent.

CIVIL ACTION

ON APPEAL FROM THE ORDERS ENTERED MARCH 27, 2023 AND JULY 17, 2023, SUPERIOR COURT OF NEW JERSEY LAW DIVISION, PASSAIC COUNTY DOCKET NO. PAS-L-003511-20

SAT BELOW:
HON. THOMAS F. BROGAN
J.S.C.

REPLY BRIEF FOR DEFENDANT/ THIRD-PARTY PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF JUDGMENTS, ORDERS AND RULINGS II

TABLE OF AUTHORITIES III

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 2

STATEMENT OF MATERIAL FACTS 2

LEGAL ARGUMENT 2

I. AMD IGNORES BOTH LEGAL PRECEDENT AND THE FACTS BEFORE THE TRIAL COURT TO ARGUE THAT EASTERN OUTDOOR CANNOT ESTABLISH, AS A MATTER OF LAW, A "WRITTEN ARRANGEMENT" EXISTED BETWEEN EASTERN OUTDOOR AND AMD. 2

II. THE NEW JERSEY SUPREME COURT HAS SQUARELY REJECTED AMD'S PROFFERRED DEFINITION OF A "LICENSE" UNDER THE NJFPA. 5

III. AMD MISCONTRUES THE DEFINITION OF A "COMMUNITY OF INTEREST" AND THE NJFPA'S "20%" REQUIREMENT. 8

IV. EASTERN OUTDOOR OPPOSED AMD'S MOTION FOR SUMMARY JUDGMENT ON EASTERN OUTDOOR'S TORTIOUS INTERFERENCE AND INDEMNIFICATION CLAIMS BECAUSE MATERIAL FACTS BEFORE THE TRIAL COURT PRECLUDED SUMMARY JUDGMENT. 11

V. EASTERN OUTDOOR'S APPEAL OF THE TRIAL COURT'S ORDER ON AMD'S "MOTION TO BAR" WAS TIMELY BECAUSE SUCH ORDER WAS INTERLOCUTORY 12

CONCLUSION 12

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order on Motion for Summary Judgment, dated March 27, 2023 …………… (Pa6)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated February 27, 2023 . (1T)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated March 27, 2023 …. (2T)

Order on Motion to Bar Expert Opinion of Tammy Hersh,
dated March 27, 2023 ………………………………………………….. (Pa8)

Order on Motion for Reconsideration, dated July 17, 2023 ………………... (Pa10)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated July 7, 2023 …….. (3T)

Oral Opinion of the Hon. Thomas F. Brogan, J.S.C., dated July 17, 2023 …… (4T)

TABLE OF AUTHORITIES

Page(s)

Cases

Beilowitz v. Gen. Motors Corp.,
233 F. Supp. 2d 631 (D.N.J. 2002) 10

Instructional Sys., Inc. v. Computer Curriculum Corp.,
614 A.2d 124 (1992) 3, 6, 9

McGlynn v. State,
434 N.J. Super 23 (App. Div. 2014) 11

Ricci v. Ricci,
448 N.J. Super 546 (App. Div. 2017) 12

Statutes

N.J.S.A. 56:10-1 et seq. .... *passim*

Other Authorities

New Jersey Court Rule 2:4-1(a) 11

PRELIMINARY STATEMENT

In AMD Direct, Inc. d/b/a Summerset Professional Grills ("AMD") Brief, AMD proffers an improperly narrow interpretation of the New Jersey Franchise Practices Act's (the "NJFPA") "written arrangement" requirement, untethered from both the text of the NJFPA and controlling case law. Indeed, AMD's Brief is telling for its complete silence regarding: (1) the federal franchise legal framework that supports a mere "invoice" between two parties as satisfying evidence of a written arrangement, and (2) the documents Eastern Outdoor presented to the Trial Court that satisfy even AMD's proposed "written arrangement" requirements.

Moreover, as set forth in detail below, AMD's arguments supporting the Trial Court's decision also fail because: (1) AMD improperly conflates the NJFPA's "written arrangement" requirement with its "license" requirement; (2) AMD ignores the mountain of evidence before the Trial Court that AMD and its owner, Jeffrey Straubel, owned and operated all of the "Summerset" brands and entities in the early critical years of the relationship between Summerset and Eastern Outdoor; (3) the NJFPA's plain language requires an assessment of the actions of other related individuals and entities in assessing the relationship between a putative franchisor and franchisee; (4) AMD omits critical material facts and law to argue that Eastern Outdoor – as a matter of law – cannot satisfy the remaining elements of a NJFPA claim; (5) Eastern Outdoor expressly opposed, on factual grounds, AMD's motion for summary judgment on its Tortious Interference and Indemnity claims; and (6) the Order on AMD's Motion to Bar was an interlocutory order, and therefore the current appeal is timely under the New Jersey Court Rules.

Accordingly, Eastern Outdoor respectfully requests reversal (or modification) of the Trial Court orders: (1) granting AMD's Motion for Summary Judgment; (2) denying as "moot", rather than with prejudice, of AMD's Motion to Bar, and (3) denying Eastern Outdoor's Motion to Amend pursuant to R. 4:49-2.

PROCEDURAL HISTORY

Eastern Outdoor respectfully refers to the Procedural History as set forth in Eastern Outdoor's Opening Brief.

STATEMENT OF MATERIAL FACTS

Eastern Outdoor respectfully refers to the Statement of Material Facts as set forth in Eastern Outdoor's Opening Brief.

LEGAL ARGUMENT

I. AMD IGNORES BOTH LEGAL PRECEDENT AND THE FACTS BEFORE THE TRIAL COURT TO ARGUE THAT EASTERN OUTDOOR CANNOT ESTABLISH, AS A MATTER OF LAW, A "WRITTEN ARRANGEMENT" EXISTED BETWEEN EASTERN OUTDOOR AND AMD.

In AMD's Brief, AMD asserts that the NJFPA requires "evidence of a written arrangement between the parties transferring a license." (Db2). AMD subsequently claims that Eastern Outdoor did not present such a document before the Trial Court, and instead "all EOF demonstrated to the trial court was advertisements and emails pertaining to nonparties and unrelated companies from over 10 years ago." (Db22). Neither of these assertions have any merit.

First, AMD wholly ignores – as did the Trial Court – that multiple courts, relying on the direction of the New Jersey Supreme Court in Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 352 (1992), have held that the NJFPA's "written arrangement" does not need to grant the "license" required by the Act. (See Pb26-Pb27). Instead, as explained at length in Eastern Outdoor's Opening Brief, the grant of a "license" can be inferred simply through analyzing the parties' conduct. (See id.).

Second, AMD, tellingly, fails to address that the current federal franchise framework – enacted during the same time period as the NJFPA – provides that a "written…arrangement" between a franchisor and franchisee can simply consist of a "price list" or "sales receipt." (Pb28-Pb29). Eastern Outdoor presented evidence of both documents (see e.g., Pa51a, Pa785-789, 792), as well as several other written documents establishing, in even greater detailer, the relationship between Eastern Outdoor and AMD. (See Pb9-Pb16).

Third, AMD entirely ignores that Eastern Outdoor presented to the Trial Court a document that satisfies even AMD's narrow definition of a writing that granted a license. Specifically, in January 2013, the "Summerset Grills & Alturi

Lifestyles Family" sent an email to Eastern Outdoor, which provided "AMD Direct" Summerset images and express permission to use such images for the sale of Summerset products, and designated Eastern Outdoor as part of the "Summerset . . . Family" who assists with the "creat[ion] and distribut[ion]" of Summerset product. (P749-P750).

Fourth, AMD attempts to discount the voluminous documents evidencing that AMD was the holding company of all of the "Summerset" sub-brands and entities in the early years of the development of the Summerset brand, and that Tony Rodriguez was, therefore, an agent of AMD and Jeffrey Straubel when communicating with Eastern Outdoor's then-owners, Will Evertz and Patrick Farrell. (See Pb7-Pb16). At minimum, such evidence creates an issue of material fact as to the relationship between and among all of the Summerset entities and individuals associated with same, and therefore all such documents could not have been discounted as a matter of law on summary judgment.

Fifth, AMD also ignores that the plain language of the NJFPA required the Trial Court, when assessing the conduct of a putative franchisor (AMD) and franchisee (Eastern Outdoor) to also assess the conduct of these entities' owners, management and other affiliates and agents. Specifically, the NJFPA expressly defines a "Franchisor" as a "person who grants a franchise to another person," and a "Franchisee" as a "person to whom a franchise is offered or granted." N.J.S.A

56:10-3(c) and (d). The NJFPA also – critically – defines a "person" broadly, to include, in relevant part, "a natural person, corporation, partnership, trust, or other entity and, in case of an entity, it shall include any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors, and other persons in active control of the activities of each such entity." N.J.S.A. 56:10-3. Accordingly, as Eastern Outdoor presented evidence to the Trial Court that AMD and Jeffrey Straubel had a majority interest in all of the "Summerset" branded entities – including Summerset Outdoor Living – then all of the conduct of any "Summerset" corporate representative must be imputed onto AMD. (See Pb7-Pb16).[1]

II. THE NEW JERSEY SUPREME COURT HAS SQUARELY REJECTED AMD'S PROFFERRED DEFINITION OF A "LICENSE" UNDER THE NJFPA.

Not only does AMD improperly attempt to conflate the NJFPA's minimal "written arrangement" requirement with the entirely separate "license" requirement, AMD provides the wrong standard for assessing whether a "license" has been granted.

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[1] AMD's assertion that "[t]here is absolutely no evidence that Tony Rodriguez or International Outdoor furnishings were tied to AMD, or that Tony Rodriguez was or is a representative of AMD (Db26)" is belied by the voluminous evidence presented to the Trial Court demonstrating otherwise, as specifically set forth at length in Eastern Outdoor's Opening Brief. (See Pb7-Pb16)

Specifically, AMD asserts that the New Jersey Supreme Court, in Instructional Sys., asserted that a "distributor [must] conduct[] business under the manufacturer's name," for a "license" to be granted under the NJFPA, and that "[h]ere, EOF never did business in the name of AMD or Summerset Grills and all of its business always included the EOF name in some way." (Db20). None of these assertions are true.

Instead, the Instructional Sys. Court held the exact opposite, asserting that the plain language of the NJFPA provides that a business does not need to operate under the name of the putative franchisor for a franchise relationship to exist under the NJFPA. Specifically, the New Jersey Supreme Court's majority, in rejecting the "alter ego" standard urged by the Dissent, asserted as follows:

> Our dissenting members . . . would insist that the identities of the two be merged; they look for an alter-ego relationship on the model of the franchise stereotypes-the McDonald's restaurants. That standard would require that such a business operate under the manufacturer's name before it fits the franchise definition. However, the inclusion of independently-named businesses is implicit in the Act's definition of franchise by the Act's limitation to a franchise "where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise." N.J.S.A. 56:10-4(3). Therefore, if only a "mirror-image" relationship could constitute a franchise, the Legislature would have added a superfluous requirement in the Act that the franchise sales constitute twenty percent of the entire business. The addition of that language, "more than 20%" of gross sales, seems to contemplate the creation of the "fractional franchise" . . . under which the franchisee operates under its own unique trade name.

Instructional Sys., 614 A.2d at 140.

To be sure, even under AMD's incorrect standard, Eastern Outdoor did, in fact, produce evidence of Eastern Outdoor marketing itself solely under the "Summerset" branding without reference to the Eastern Outdoor name, specifically the Eastern Outdoor co-owner's email signature block in 2012, which only referenced "Summerset" brands and did not make any reference to Eastern Outdoor. (See Pa188-Pa189).

Furthermore, the New Jersey Supreme Court's above-quoted directive also undercuts AMD's assertion that because Eastern Outdoor sold other products, Eastern Outdoor could not have received a "license" from (or have a "community of interest" with) AMD. (See Db22, Db27, Db35) (asserting "[i]mportantly, EOF did not solely advertised AMD products," and "there was testimony that EOF dealt with other brands too.") Once again, the NJFPA expressly permits 80% of a putative franchisee's business to be derived from other products or services, unrelated to the putative franchisor's goods or services, and therefore Eastern Outdoor's eventual sale of other products and services does not – and cannot – support a finding that Eastern Outdoor does not qualify for the protections of the NJFPA as a matter of law.

Finally, AMD simply sets up a strawman to assert that "EOF has alleged that because it sold Summerset Grills it somehow automatically obtained a license to use AMD's proprietary information". (Db20). This is not remotely tethered to

Eastern Outdoor's actual allegations and evidence submitted to the Trial Court in this case, which was outlined in detail in Eastern Outdoor's opening brief and included evidence such as, without limitation, that AMD produced catalogues for Eastern Outdoor to provide to the public that were titled "Summerset . . . by Eastern Outdoor Furnishings." It is difficult to envision a more straightforward example of a manufacturer/putative franchisor encouraging a putative franchisee to, as explained by the New Jersey Supreme Court, "use the name of the franchisor in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the. . . licensor and licensee by which the licensor vouches, as it were, for the activity of the licensee." (See Db19) (quoting Instructional Sys., 614 A.2d at 139.

III. AMD MISCONTRUES THE DEFINITION OF A "COMMUNITY OF INTEREST" AND THE NJFPA'S "20%" REQUIREMENT.

AMD similarly ignores additional evidence before the Trial Court, controlling precedent and the plain language of the statute to argue that Eastern Outdoor cannot – as a matter of law – satisfy other NJFPA requirements.

Specifically, regarding the "community of interest" requirement, AMD asserts that Eastern Outdoor has not alleged that Eastern Outdoor made any "franchise-specific investments." (Db34). This assertion is belief by virtually the entirety of the facts presented in Eastern Outdoor's Opening Brief, and specifically, without limitation, the evidence that Eastern Outdoor built – with its own funds and manpower – numerous displays for Summerset dealers in the North East at no cost to the dealers, to catapult the promotion of the Summerset brand (See Pa541, Answer to Interrogatory No. 6). AMD also ignores the numerous trade shows and marketing events and activities Eastern Outdoor took part in to develop a following for the Summerset line, at the expense of directing such time and expenses to another line. (Pb18-19). Additionally, Eastern Outdoor produced evidence that it was Eastern Outdoor's EOK system that was instrumental in obtaining and cultivating AMD/Summerset's relationship with Woodland Direct, an online retailer, to specifically grow Summerset Grills customer base by packaging Summerset Grills with EOK systems purchased on Woodland Direct's website. (See Pa177a, Pa554-Pa559) (Email correspondence between Will Evertz and Woodland Direct representatives, with subject line "Summerset Valentine Special," where Mr. Evertz references training Woodland Direct's staff and thanking Woodland Direct for agreeing to offer a package of Summerset grills with the EOK system).

Moreover, Eastern Outdoor invested in developing enormous, franchise-specific goodwill for AMD's Summerset products, which, as explained by the New Jersey Supreme Court and contrary to AMD's assertion otherwise, is a key factor to a finding of a franchise. See Instructional Sys., 614 A.2d at 148 (asserting "a critical factor in this case is the installed base of customers that [the putative franchisee] has built up over a twenty-year period"). To be sure, while AMD asserts Eastern Outdoor somehow "failed to argue in the trial court (Db at Footnote 6)" that Eastern Outdoor developed "goodwill" for AMD and the Summerset brand, this is nonsensical, as this argument is the basis for much of Eastern Outdoor's argument before the Trial Court, and is even expressly asserted in its Complaint. (See e.g., Pb7-Pb19; see also, Pa27-Pa29).

Furthermore, AMD alleges that Eastern Outdoor's revenue went up after termination, and that Eastern Outdoor was not damaged by AMD's termination. This is simply false. Not only do Eastern Outdoor's financial records demonstrate that its gross revenue went down in the year subsequent to the termination (see Pa1943-Pa1944), but Eastern Outdoor submitted an expert report establishing its damages and damages calculation (see Pa1974-Pa1990). At minimum, the financial effect on Eastern Outdoor is a question of fact that cannot be ascertained at the summary judgment stage of this proceeding.

Additionally, while AMD focuses on the "control" over Eastern Outdoor's operations, AMD ignores that courts have held "control" is not a necessary prerequisite for a finding of "community of interest." See e.g., Beilowitz v. Gen. Motors Corp., 233 F. Supp. 2d 631, 641 (D.N.J. 2002) ("the so-called 'control' test for 'community of interest' was ultimately not adopted by the New Jersey Supreme Court").

Finally, regarding the NJFPA's 20% requirement, AMD does not cite a single case or make any credible argument to undercut the straightforward law and evidence cited in Eastern Outdoor's Opening Brief establishing that, at minimum, this element of the statute could not possibly be decided in AMD's favor as a matter of law and must be assessed at trial.

IV. EASTERN OUTDOOR OPPOSED AMD'S MOTION FOR SUMMARY JUDGMENT ON EASTERN OUTDOOR'S TORTIOUS INTERFERENCE AND INDEMNIFICATION CLAIMS BECAUSE MATERIAL FACTS BEFORE THE TRIAL COURT PRECLUDED SUMMARY JUDGMENT.

AMD argues that Eastern Outdoor "failed to substantively oppose AMD's Motion for Summary Judgment as to tortious interference and indemnification" simply because "EOF failed to cite to any case law or precedent in opposition to AMD's motion as to its tortious interference indemnification claims." (Db38-39). AMD misconstrues Eastern Outdoor's entire argument before the Trial Court -- which is that the evidence submitted to the Trial Court precludes summary judgment on these claims. Eastern Outdoor respectfully, once again, refers to the facts presented in its Opening Brief, as submitted to the Trial Court. (See Pb36-Pb37).

V. EASTERN OUTDOOR'S APPEAL OF THE TRIAL COURT'S ORDER ON AMD'S "MOTION TO BAR" WAS TIMELY BECAUSE SUCH ORDER WAS INTERLOCUTORY.

New Jersey Court Rule 2:4-1(a) provides, in relevant part, that "appeals from final judgments of courts . . . shall be filed within 45 days of their entry." R. 2:4-1(a). Critically, the Appellate Division has instructed that a "final judgment" is only final where it "dispose[s] of all claims against all parties." McGlynn v. State, 434 N.J. Super 23, 29 (App. Div. 2014) (quoting Smith v. Jersey Cent. Power & Light Co., 421 N.J. Super 374, 383 (App. Div. 20110). Otherwise, an order is interlocutory, and all such interlocutory orders may be raised on appeal of a final judgment. See Ricci v. Ricci, 448 N.J. Super 546, 567 (App. Div. 2017) ("An appeal from a final judgment raises the validity of all interlocutory orders' previously entered in the trial court").

The Motion to Bar Order did not dispose of any claims against the parties, let alone all of the claims. Accordingly, this order was interlocutory, and therefore properly and timely appealed.

CONCLUSION

For these reasons, and the reasons set forth in Eastern Outdoor's Opening Brief, the Court should REVERSE the Trial Court's orders: (1) granting AMD's Motion for Summary Judgment; (2) denying as "moot", rather than with prejudice, of AMD's Motion to Bar, and (3) denying Eastern Outdoor's Motion to Amend pursuant to R. 4:49-2.

Respectfully submitted,

By: s/ Marisa Rauchway Sverdlov

Dated: February 28, 2024

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