STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	FOR THE 13th JUDICIAL CIRCUIT
	)	
BA HOLDINGS, INC.,	)	Case No. 2023-CP-2302302
	)	
Plaintiff,	)	**ORDER**
	)	
v.	)	
	)	
ZAY N LIMO, LLC, SHARIF FARHAN, and MOHAMMAD FARHAN,	)	
	)	
Defendants,	)	
	)	

This matter is before the Court on Defendants Zay N Limo, LLC, Sharif Farhan, and Mohammad Farhan's Motion for Partial Summary Judgment as to all Claims Asserted in the Complaint by Plaintiff BA Holdings, Inc. (including Breach of Contract, Breach of Guaranties, and Unjust Enrichment), and Plaintiff's Motion for Leave to Amend the Complaint (which proposed amended pleading included a second plaintiff, BA Greenville, LLC, also represented by Plaintiff's counsel of record and commonly owned by Dustin Pelletier). On October 10, 2023, the Court held a hearing on both motions. Considering the motions to be interrelated, the Court first heard arguments on Plaintiff's subsequently filed motion, and then heard arguments on Defendants' earlier filed motion, and took both motions under advisement together before making its rulings. Based on the oral arguments and the Court's review of the submissions by the parties and the entirety of the record, Defendants' motion is hereby GRANTED, and Plaintiff's motion is DENIED.

As more fully set forth below, there is no genuine issue as to any material fact before the Court. Taking the evidence in a light most favorable to Plaintiff, the record reveals that Plaintiff never had the rights, at issue, to sell a Big Air franchise or an Anderson territory, nor did it have

the right to own and operate any franchises. Though Plaintiff's assignee and proposed second plaintiff, BA Greenville, LLC, did have the right to own and operate one franchise, it too did not have the right to sell a Big Air franchise or an Anderson territory, nor did it have the authority to open an additional franchise. Accordingly, all claims asserted in the Complaint, whether based on the express written contract attached as Exhibit 1 thereto or the alternative theory of unjust enrichment made therein, are disposed of as a matter of law, with prejudice. The Court has also fully considered, in a light most favorable, the proposed amended pleading and would summarily dispose of it on the same legal grounds, both as to Plaintiff and Plaintiff's assignee and proposed second plaintiff, BA Greenville, LLC, thereby making Plaintiff's motion clearly futile and moot.

LEGAL STANDARD

Leave to Amend

Under Rule 15(a), SCRCP, "leave shall be freely given when justice so requires and does not prejudice any other party." "Although leave to amend should generally be 'freely given,'. . . it may be denied where the proposed amendment would be futile." *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012).

Partial Summary Judgment

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

The legal standard on a motion for partial summary judgment is set forth in Rule 56, SCRCP.

In pertinent part, Rule 56 (c), SCRCP, provides:

> …The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law…

Construing this rule, just this year, the Court of Appeals held:

> We now clarify that the 'mere scintilla' standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166.

The Kitchen Planners, LLC v. Friedman, 2020-001669 (Ct. App. August 23, 2023).

Further, under Rule 56(e), SCRCP:

> …an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56 (g), SCRCP, prohibits the improper use of affidavits to avoid summary judgment and unnecessarily protract litigation:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 56 (d), SCRCP, in pertinent part, allows for partial summary judgment:

> If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy

> and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"Courts and commentators have stated that a partial summary judgment under Rule 56[] is an appropriate procedure whereby a court can narrow the scope of trial." *Limehouse v. Resolution Trust Corp.*, 862 F.Supp. 97 (D.S.C. 1994). "Chief among the functions of summary judgment are those of avoiding long and expensive litigation productive of nothing and curbing the danger that threat of such litigation will be used to harass or to coerce settlement." *Id*

FINDINGS OF MATERIAL FACT NOT SUBJECT TO GENUINE DISPUTE

The contract at issue in both motions before the Court is entitled "Assignment and Assumption Agreement," and it is attached as Exhibit 1 to both the Complaint and the proposed amended pleading (the "Contract"). The Contract was entered into by and between, and executed by, Plaintiff BA Holdings, Inc. and Defendant Zay N Limo, LLC (with accompanying guaranties signed by the other Defendants Sharif Farhan and Mohammad Farhan), on February 18, 2021.

Exhibit 1 *FINAL FOR EXECUTION*

ASSIGNMENT AND ASSUMPTION AGREEMENT

This Assignment and Assumption Agreement ("Agreement") dated as of January 29, 2021 ("Effective Date"), is entered into by and between BA HOLDINGS, INC., a South Carolina corporation ("Assigning Party") and ZAY N LIMO, LLC, a South Carolina limited liability company ("Assuming Party").

. . .

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date.

BA HOLDINGS, INC.

By: 2/18/21
Name: Dustin Pelletier
Title: President

ZAY N LIMO, LLC

By: 2/18/21
Name: Mohammad Farhan
Title: Member

The Contract began with Plaintiff's claim to own and to have the right to sell franchise rights in Anderson, South Carolina, incorporating by reference Plaintiff's agreement with the franchisor, Big Air Franchising, LLC.

RECITALS

Assigning Party desires to assign to Assuming Party all its rights, including exclusive marketing rights, to the Anderson County, South Carolina territory (the "Anderson Territory") owned by Assigning Party pursuant to its franchise agreement with ©Big Air Franchising, LLC (the "Franchise Agreement"). The Anderson Territory is more fully described as zip codes. See, Exhibit A.

. . .

8.5 Interpretation. For purposes of this Agreement: (a) the words "include," "includes"

. . .

schedules and exhibits referred to herein are an integral part of this Agreement to the same extent as if they were set out verbatim herein.

The Contract purported to sell, assign, grant, convey, and transfer such franchise rights, title, duties, and obligations.

1. Assignment and Assumption.

1.1 Assignment. Assigning Party irrevocably sells, assigns, grants, conveys and transfers to Assuming Party all of Assigning Party's right, title and interest in and to the Anderson Territory.

1.2 Assumption. Assuming Party unconditionally accepts such assignment and assumes all of Assigning Party's duties and obligations related to the Anderson Territory on and after the Effective Date.

The Contract also included representations and warranties, made by Plaintiff, about its authority, as of the effective date of the Contract, to sell, assign, grant, convey, and transfer such franchise rights, title, duties, and obligations, and its full performance of and compliance with its agreement with the franchisor.

4. Representations and Warranties.

4.1 Assigning Party's Representations and Warranties. Assigning Party represents and warrants as follows:

(a) It is duly organized, validly existing and in good standing under the laws of the State of South Carolina.

(b) It is qualified and licensed to do business and in good standing in every jurisdiction where such qualification and licensing is required for purposes of this Agreement.

(c) It has the full right, corporate power, and authority to enter into this Agreement and to perform its obligations hereunder.

(d) It has taken all necessary corporate action to authorize the execution of this Agreement by its representative whose signature is set out at the end hereof.

(e) When executed and delivered by it, this Agreement will constitute the legal, valid, and binding obligation of Assigning Party, enforceable against it in accordance with its terms and not subject to defenses.

(f) It is the sole legal and beneficial owner of the all the rights to the Anderson Territory on the Effective Date, free and clear of any lien, security interest, charge or encumbrance, except for the rights of ©Big Air Franchising, LLC to the Anderson Territory.

(g) The Franchise Agreement is in full force and effect on the Effective Date. No event or condition has occurred that is an event of default or termination under the Franchise Agreement. There are no material disputes pending or, to its knowledge, threatened related to any rights or obligations transferred by this Agreement.

(h) It has performed all of its obligations under the Franchise Agreement that are required to be performed on or before the Effective Date.

The Contract provided that its consideration involved the exchange of the purported assignment in return for (expectedly, ten years or more) of monthly royalties and fees: 1% of monthly gross sales + 5% of monthly net profits + $5,000 per month.

2. Consideration.

2.1 For the entire time Term, Assuming Party agrees to pay the following to Assigning Party as consideration for the assignment of the Anderson Territory:

(a) A sum equal to 1% of the monthly gross sales of Assuming Party. The first payment will be made on the 10th day of the month immediately following the month of the Effective Date and will continue the 10th day of each successive month during the Term. Gross sales will be calculated for the monthly immediately preceding the payment date.

(b) A sum equal to 5% of the monthly net profits of Assuming Party. Net profits will be calculated by taking the gross revenue and subtracting expenses. Expenses include normal operating expenses and excludes Owner personal expenses, salaries of Owners greater than $45,000 in the aggregate, new major equipment expenses greater than $5,000 per purchase, and bonuses, if any. The first payment will be made on the 10th day of the month immediately following the month of the Effective Date and will continue the 10th day of each successive month during the Term. Net profits will be calculated for the monthly immediately preceding the payment date.

(c) A monthly management fee of Five Thousand and 00/100 ($5,000.00). The first payment will be made on the 10th day of the month immediately following the month of the Effective Date and will continue the 10th day of each successive month during the Term.

The Contract included an entire agreement clause (aka merger or integration), superseding all else.

8.8 Entire Agreement. This Agreement, together with all related exhibits and schedules, is the sole and entire agreement of the parties to this Agreement regarding the subject matter contained herein and therein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, regarding such subject matter.

The Contract also included an amendment clause, requiring a writing signed by each party to the Contract.

8.9 Amendment and Modification. No amendment to this Agreement is effective unless it is in writing, identified as an amendment to this Agreement, and signed by an authorized representative of each party to this Agreement.

The Contract also included a no third-party beneficiaries clause, limiting the benefits of the Contract to its parties.

8.12 No Third-Party Beneficiaries. This Agreement benefits solely the parties to this Agreement and their respective permitted successors and permitted assigns and nothing in this Agreement, express or implied, confers on any other Person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

After initiating this action and suing Defendants in this Court based on the Contract, Plaintiff has since admitted it was not a proper party to the Contract (which it drafted). Plaintiff

adopted a new position: that BA Greenville, LLC, an entity that Plaintiff is the sole and controlling member of, should have entered into the Contract with Defendants instead of Plaintiff.

> 34. As to Paragraphs 67 through 73 of the Counterclaims, Plaintiff admits only that the proper party to the Assignment and Assumption Agreement should have been BA Greenville, LLC and that Plaintiff is the sole and controlling member of BA Greenville, LLC. Plaintiff denies the remaining allegations of Paragraphs 67 through 73.

Mid-litigation, on August 14, 2023, Plaintiff then purported to clean up the Contract by unilaterally creating and executing a new document, without Defendants.

> Attached is a copy of an Assignment of Contract by which BA Holdings, Inc. assigned its interest in the Zay N Limo agreement to BA Greenville, LLC in order to clean up the error in that agreement. Pursuant to Rule 11, I am asking for Defendants' consent to allow us to amend our pleadings to address this issue and name BA Greenville, LLC as a plaintiff. Please let me know if Defendants will consent to the amendment.

Plaintiff's newly created document is titled as an assignment.

> **ASSIGNMENT OF CONTRACT**
>
> THIS ASSIGNMENT OF CONTRACT (this "Assignment") is made and entered into as of August 14, 2023, by and between BA Holdings, Inc. ("Assignor") and BA Greenville, LLC ("Assignee").

Dustin Pelletier signed the newly created document for both the Plaintiff and the new assignee, which he commonly owns and controls.

> IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date first written above.
>
> BA HOLDINGS, INC.
>
> Dustin Pelletier
> President
>
> BA GREENVILLE, LLC
>
> Dustin Pelletier
> Member

The newly created document renames the Contract, changing it from "Assignment and Assumption Agreement" to "Territory Release Agreement." It likewise recharacterizes the intent

of the Contract, stating that Plaintiff "intended to release certain rights of Assignee" by entering into the Contract. By contrast, the word "release" appears nowhere in the Contract, which, as already discussed, instead purports to sell franchise rights and title owned by Plaintiff and to transfer and convey Plaintiff's franchise duties and obligations to Defendants.

> 4. Assignor entered into that certain Assignment and Assumption Agreement with Zay N Limo, LLC ("Zay N Limo"), dated January 29, 2021 (the "Territory Release Agreement"), pursuant to which Assignor intended to release certain rights of Assignee, including exclusive marketing rights, to the Anderson County, South Carolina territory conferred to Assignee by Big Air Franchising, LLC under the Franchise Agreement.

The newly created document then purports to make the new assignee the "substitute counterparty" to the Contract and the party that in "effect" made the representations and warranties therein "as of" the time they were made.

> 5. Assignor inadvertently included itself as the contracting party in the Territory Release Agreement. Assignor now desires to assign to Assignee all its right, title, and interest in and to the Territory Release Agreement (the "Assigned Interests").
>
> 6. Assignee desires to become the substitute counterparty to the Territory Release Agreement with Zay N Limo and to assume and perform all the debts, liabilities, and obligations of Assignor in respect of the Assigned Interests under the Territory Release Agreement, and the other agreements, documents and materials that govern the rights and obligations of Assignor under the Territory Release Agreement, from and after the date hereof (collectively, the "Assumed Obligations").
>
> . . .
>
> Section 4. Representations and Warranties. Assignee hereby affirms that the representations and warranties set forth in the Territory Release Agreement are true and correct in all material respects as to Assignee on and as of the date hereof with the same effect as if made on the effective date of the Territory Release Agreement.

In its proposed amended complaint, Plaintiff alleges that the Contract was "in error in at least two ways," and that one of these errors is corrected by the newly created document. Plaintiff does not allege that the other error is corrected or that any of the other errors it alludes to are corrected.

9. The Assignment Agreement is in error in at least two ways: (a) BA Greenville should be the counterparty, not BAH; and (b) it should provide for the assignment of the Anderson Territory back to BAF instead of assigning it directly to Zay.

. . .

~~14.~~24. On August 14, 2023, BAH, in an attempt to correct the error identified in Paragraph 9(a), above, assigned its right, title, and interest in the Assignment Agreement to BA Greenville. A copy of that assignment is attached hereto as **Exhibit 3**.

Dustin Pelletier's affidavit Plaintiff filed in opposition to Defendants' motion for partial summary judgment characterizes the same as being "mistakes" that "I made" and an "attempt to rectify my error."

21. When drafting the Assignment Agreement, I made two mistakes: (a) I inadvertently included BAH as the counterparty when it should have been BA Greenville; and (b) the Assignment Agreement should have provided for release of the Anderson Territory back to BAF instead of assigning it directly to Zay N Limo.

22. BAH has since assigned the Assignment Agreement to BA Greenville to attempt to rectify my error. A copy of that assignment is attached as Exhibit B.

During discovery, it appears Plaintiff also produced the agreements between itself and the franchisor (incorporated by reference in the Contract) and between its new assignee of the Contract and the franchisor (which Plaintiff now contends should have been the agreement incorporated by reference in the Contract).

The first agreement referenced above, between Plaintiff and the franchisor, authorized Plaintiff to act as a sales agent for the franchisor and entitled it to receive 50% of the franchise fees and royalties paid to the franchisor from the franchisor in the form of sales commissions.

REGIONAL DIRECTOR AGREEMENT

This Regional Director Agreement ("**Agreement**") is entered into and made effective as of the 1st day of April, 2018, by and between **Big Air Franchising, LLC,** a California limited liability company, with a principal place of business at 999 Corporate Drive #215, Ladera Ranch, California 92694 ("**Franchisor**") and BA Holding INC, located at P.O. Box 171592, Spartanburg, SC 29301 ("**Regional Director**").

. . .

5.2. Sales Service Commission Payments. The Sales Service Commission shall depend upon the source of the franchise lead. If the lead is generated solely and independently by Regional Director, then the Sales Services Commission shall be an amount equal to fifty percent (50%) of the Initial Franchise Fees paid to Franchisor. If the lead is generated by any other source, then Franchisor will deduct the commission Franchisor pays to a third party for that lead from the Initial Franchise Fee and pay Regional Director a Sales Service Commission equal to fifty percent (50%) of the remaining balance of the Initial Franchise Fee. If a sales lead is generated solely and independently by Regional Director prior to Regional Director completing the Initial Regional Director Training Program and the Franchisee Training Program and/or complying with all other obligations required to be met prior to opening the RD Business, Franchisor will deduct the commission Franchisor pays to a third party for that lead from the Initial Franchise Fee and pay Regional Director a Sales Service Commission equal to fifty percent (50%) of the remaining balance of the Initial Franchise Fee. Franchisor retains the sole right to determine the source of the lead, and Franchisor's determination shall be final. Regional Director will also be required to contribute to the Franchise Development Fund in accordance with Section 4.2. The Sales Service Commissions will be payable to Regional Director within twenty (20) days after the Franchise Sales Conditions have been fulfilled, provided that the Initial Franchise Fees have not been deposited into an escrow or impound account, in which case, the Sales Service Commission will be payable to Regional Director within ten (10) days after Franchisor has received funds out of escrow, from the impound account or received funds that were previously deferred. Regional Director shall not receive any Sales Service Commission for franchises sold on or before the date of this Agreement or for Big Air Trampoline Businesses owned and operated by Franchisor, its affiliates or designees ("**Company Businesses**") in the RD Development Area, if any.

. . .

5.4. Commission on Royalty Payments. Franchisor shall pay to Regional Director, within twenty (20) days of the end of the month, fifty percent (50%) of all royalty payments ("**Royalties**") actually received from each Franchisee in the RD Development Area during the previous month ("**Royalty Commission**"). Regional Director shall be entitled to receive Royalty Commissions each month unless Regional Director has failed to perform, in any material respect, the services described in Section 8 during the prior month including, but not limited to, the conducting of periodic inspections and the filing of written reports as required by Section 8.6.

Plaintiff concedes in its proposed amended complaint that this agreement with the franchisor gave it no right to sell franchise rights.

2. BAH became the Regional Developer for BAF for the State of South Carolina pursuant that certain Regional Director Agreement, dated April 1, 2018 (the "RD Agreement"). Pursuant to the RD Agreement, BAH is responsible for advertising, recruiting, screening, and reviewing prospects for Big Air trampoline business franchises within the State of South Carolina and receives a commission on the franchise fees paid by new franchisees. However, BAH does not have authority to sell BAF franchises.

The second agreement referenced above was between the franchisor and another franchisee, Plaintiff's new assignee of the Contract, BA Greenville, LLC.

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT is made this 7th day of October, 2017 day of, by and between **BIG AIR FRANCHISING, LLC**, a California limited liability company, located at 999 Corporate Drive #215, Ladera Ranch, California 92694 ("**Franchisor**") and **BA Greenville, LLC** located at 11 Ridgewood Drive, Greenville, SC 29615 ("**Franchisee**").

That agreement made it expressly clear that Plaintiff had no rights thereunder by reason of its membership interests in BA Greenville, LLC.

15.5 With and after each valid assignment of this Agreement pursuant to this Section 15, the assignee or assignees of Franchisee shall be deemed to be Franchisee under this Agreement and will be bound by and liable for all of Franchisee's existing and future obligations. No stockholder in any corporation, member in any limited liability company or partner in any partnership which becomes Franchisee shall have any rights under this Agreement by reason of his, her or its stock ownership, membership interest or partnership interest.

That agreement gave that franchisee the right, license, and duty to operate only "one" franchise business in a defined territory.

2. GRANT OF LICENSE.

2.1 Subject to all the terms and conditions of this Agreement, Franchisor hereby grants to Franchisee, and Franchisee accepts, for the term of this Agreement, the right and license ("**License**") to:

(a) Operate one Big Air Trampoline Business upon the terms and conditions of this Agreement in one territory described in **Attachment A** ("**Territory**");

. . .

DEFINITIONS

For the purposes of this Agreement, the following are hereby defined:

. . .

(c) **"Big Air Trampoline Business"** - means the business operations conducted or to be conducted by Franchisee consisting of selling and providing an indoor trampoline recreation and party center featuring trampolines, foam pits, rock climbing walls and other elements and the sale of related Products using Franchisor's System and in association with the Marks.

It appears that franchisee has always operated its "one" franchise business in Greenville, specifically, at its trampoline recreation center located at 36 Park Woodruff Drive (meaning that it had no right to operate a second one in Anderson, 37 miles away, and could not sell such a right that it did not own), which Plaintiff admitted in replying to allegations in Defendant's counterclaims.

19. Plaintiff admits the allegations of Paragraphs 24 through 27 of the Counterclaims. Plaintiff is the sole and controlling member of BA Greenville, LLC, which is a franchisee of Big Air Franchising, LLC.

. . .

26. One of the franchise agreements produced by Plaintiff is by and between BA Greenville, LLC, as franchisee, and Big Air Franchising, LLC, as franchisor, for a franchise business identified as #1703, which operates at 36 Park Woodruff Drive, Greenville, South Carolina 29607.

Without expanding the franchisee's right, license, and duty to operate only "one" franchise business in the defined territory, the agreement also included a provision stating that the franchisor or its affiliate would not establish or license another franchise business in a defined buffer territory of zip codes surrounding the one operating franchise business.

4. TERRITORY

4.1 During the Term and for so long as Franchisee is in compliance with all of its obligations hereunder, except as otherwise provided in this Agreement, and subject to Franchisor's reservation of rights as set forth in Section 4.2 and as provided in Section 4.4 **below**, neither Franchisor nor any Affiliate will establish or license another person or entity to establish a Big Air Trampoline Business using the Marks licensed to Franchisee within the Territory encompassed by the boundaries set forth in **Attachment A**, attached hereto and incorporated herein by reference. Except as otherwise specifically provided in this Agreement, this Agreement does not restrict Franchisor or its Affiliates and does not grant rights to Franchisee to pursue any of Franchisor's or its Affiliates other business concepts other than the Big Air Trampoline Business.

DEFINITIONS

For the purposes of this Agreement, the following are hereby defined:

(a) "**Agreement**" - means this agreement, attachments, and all instruments in amendment hereof.

(b) "**Affiliate**" - means any person or entity that controls, is controlled by, or is in common control with, Franchisor or Franchisee.

The agreement strictly prohibited and deemed "void" any attempted assignment of the franchisee's rights and duties, without compliance with numerous terms and conditions and restrictions therein, and "prior written approval" from the franchisor.

15.4 Franchisee understands and acknowledges that the rights and duties set forth in this Agreement are personal to Franchisee. Accordingly, this Agreement, Franchisee's rights and interests hereunder, the property and assets owned and used by Franchisee in connection with the Big Air Trampoline Business, and any shares, stock, membership or interest in any corporation, limited liability company, or other entity having an interest in the Big Air Trampoline Business, shall not be voluntarily or involuntarily, directly or indirectly sold, pledged, assigned, transferred, shared, subdivided, sub-franchised, encumbered or transferred in any way (including, without limitation, in the event of the death of Franchisee if Franchisee is an individual), in whole or in part, in any manner whatsoever without the prior written approval of Franchisor, which approval will not be unreasonably withheld or delayed, and compliance with all terms of this Section 15. Any unauthorized sale, assignment, transfer or other conveyance, by operation of law or otherwise, or any attempt to do so, shall be deemed void and grounds for termination of this Agreement by Franchisor.

The agreement includes several pages of conditions and restrictions. For example, the proposed assignment could not grant a subfranchise.

15.11 Franchisee shall not have the right to grant a subfranchise.

As another example, the franchisee was required to provide the franchisor with an exact copy of a purchase offer and give it a right of first refusal.

> 15.6 If Franchisee shall at anytime determine to sell, in whole or in part, the Big Air Trampoline Business, Franchisee shall obtain a bona fide, executed, written offer ("**Purchase Offer**") for the Big Air Trampoline Business together with all real or personal property, leasehold improvements and other assets used by Franchisee in its Big Air Trampoline Business from a responsible, arms' length, and fully disclosed purchaser and shall submit an exact copy of such Purchase Offer to Franchisor. Franchisor will have a right of first refusal to purchase the Big Air Trampoline Business as provided in Section 16.

Plaintiff admitted that the franchisor did not participate in the negotiation and execution of the Contract, nor give its "prior written approval" to the Contract.

> 22. As to Paragraph 41 of the Counterclaims, Plaintiff admits only that Big Air Franchising, LLC did not participate in the negotiation and execution of the Assignment and Assumption Agreement. Plaintiff denies the remaining allegations of Paragraph 41.

Plaintiff additionally admitted that it has provided no services of any kind or anything of value that it owns to earn the monthly fees it has demanded under the Contract or otherwise, by not timely responding to certain requests for admissions, under Rule 36, SCRCP.

> 1. Admit that BA Holdings, Inc. did not actually provide any management services for which it has demanded a monthly management fee of $5,000 in each of the months of April, May, June, and July of 2023 in its letters attached hereto as Exhibit 1.
>
> 2. Admit that BA Holdings, Inc. did not actually provide any services of any kind or anything of value that it owns for which Plaintiff has demanded a sum equal to 1% of monthly gross sales in each of the months of April, May, June, and July of 2023 in its letters attached hereto as Exhibit 1.
>
> 3. Admit that BA Holdings, Inc. did not actually provide any services of any kind or anything of value that it owns for which Plaintiff has demanded a sum equal to 1% of monthly gross sales in each of the months of April, May, June, and July of 2023 in its letters attached hereto as Exhibit 1.

The evidence submitted shows that Defendants have paid the franchisor, which has shared 50% of the franchise fees and royalties with Plaintiff in the form of sales commissions.

8. As to Paragraph 6 of the Counterclaims, Plaintiff admits only that Defendants entered into the Franchise Agreement with Big Air Franchising, LLC, and that agreement speaks for itself. Plaintiff denies all allegations of Paragraph 6 inconsistent with the Franchise Agreement and denies the remaining allegations of Paragraph 6.

. . .

10. As to Paragraph 8 of the Counterclaims, Plaintiff is informed and believes that Zay paid to Big Air Franchising, LLC the franchise fee required by the Franchise Agreement. Plaintiff's participation, if any, in the proceeds of the franchise fee paid to Big Air Franchising, LLC is governed by the Regional Director Agreement entered into by Plaintiff and Big Air Franchising, LLC, which speaks for itself. Plaintiff denies any allegations of Paragraph 8 inconsistent with the Franchise Agreement and the Regional Director Agreement and denies the remaining allegations of Paragraph 8.

Defendants have refused to pay anything extra to Plaintiff, or BA Greenville, LLC, under the Contract or otherwise. This issue is now squarely before the Court.

PROCEDURAL HISTORY

Plaintiff e-filed the summons and complaint on May 9, 2023 and Defendants accepted service of the same on May 12, 2023.

Together with the summons and complaint, Plaintiff served discovery requests on Defendants, namely, requests for admissions under Rule 36, SCRCP, to which Defendants timely responded pursuant to the rules on June 23, 2023.

Plaintiff made an initial production of documents, responding to Defendants' informal requests for documents relating to the Contract, on May 15, 2023.

Defendants timely filed and served their answer and counterclaims on June 8, 2023, to which Plaintiff filed its reply on August 7, 2023.

Defendant Zay N Limo, LLC served its first set of discovery requests on Plaintiff on June 8, 2023, including requests for admissions, interrogatories, and requests for production. Plaintiff made a request for a 30-day extension to respond to that discovery, to which Defendant Zay N Limo, LLC consented. Plaintiff then timely provided its responses to the requests for admissions on August 7, 2023; however, Plaintiff untimely provided its responses to the interrogatories and requests for production on August 11, 2023. Meanwhile, Defendant Mohammad Farhan served his first set of discovery requests on Plaintiff on August 3, 2023, including requests for admissions, interrogatories, and requests for production. It appears Plaintiff acknowledged receipt, but then did not timely respond to those discovery requests within 30 days or request an extension and no extension was ever agreed to by Defendants. 61 days after those discovery requests were served, on October 3, 2023, Plaintiff made an attempt to answer the requests for admissions, but did not attempt to respond to the corresponding interrogatories and requests for production.

On August 14, 2023, Plaintiff executed and produced its newly created document, discussed above, which assigned the Contract to BA Greenville, LLC and unilaterally attempted to amend the Contract. The same day, Defendants filed their Motion for Partial Summary Judgment. The motion was placed on the roster, on August 16, 2023, to be heard on October 10, 2023. Plaintiff filed its Motion for Leave to Amend its Complaint (attaching its proposed amended pleading) on September 25, 2023. Plaintiff filed its affidavit opposing partial summary judgment, two business days before the hearing, on October 6, 2023.

Both motions were heard by the Court on October 10, 2023. Considering the motions to be interrelated, the Court first heard Plaintiff's subsequently filed motion, and then heard Defendant's first filed motion. The Court took both motions under advisement together and carefully reviewed the record before making its rulings.

LEGAL ELEMENTS OF THE CLAIMS

The Complaint and proposed amended pleading both make claims for breach of contract and breach of guaranty relating to the same contract. The elements for these claims are as follows: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the claimant as a direct and proximate result of the breach. *See Fuller v. Eastern Fire & Cas. Ins. Co.*, 124 S.E.2d 602, 240 S.C. 75 (1962) ("This being an action for the breach of contract, the burden was upon the respondent to prove the contract, its breach, and the damages caused by such breach.").

The Complaint and proposed amended pleading also both make claims for unjust enrichment. "To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Inglese v. Beal*, 742 S.E.2d 687, 691, 403 S.C. 290 (Ct. App. 2013).

CONCLUSIONS OF LAW

After filing this lawsuit, Plaintiff conceded it has no valid legal claim against Defendants, as set forth above. The crux of the issue before the Court now is whether Plaintiff's newly created document can clean up the Contract to give Plaintiff's new assignee a valid legal claim to litigate further under Plaintiff's proposed amended complaint. The Court finds it cannot.

The Contract's express provisions – that it is the sole and entire agreement between the parties superseding all else; that it cannot be unilaterally amended; and that there are no third-party beneficiaries – control this decision under black letter contract law. *See* Black's Law Dictionary 880 (9th ed.2009) (defining an integration clause, also termed a merger clause, as "[a] contractual

provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract"); *Wilson v. Landstrom*, 315 S.E.2d 130, 281 S.C. 260 (Ct. App. 1983) ("A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement.") (citing Williston On Contracts § 633 (3d ed. 1961) and other authority); *Wilson*, 315 S.E.2d 130, 281 S.C. 260 ("The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing.") (citing *Armour Fertilizer Works v. Hyman*, 120 S.C. 375, 113 S.E. 330 (1922); *M'Dowall v. Beckly*, 9 S.C.L. (2 Mill) 265 (1818)); *Davis v. Kb Home of South Carolina Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), *aff'd in part, vacated in part*, 429 S.C. 634, 842 S.E.2d 653 (2014) ("[W]hen the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term to the agreement, even when the writing is silent as to the particular term sought to be established.") (citing *U.S. Leasing Corp.*, 294 S.C. at 318, 364 S.E.2d at 205; *Blackwell v. Faucett*, 117 S.C. 60, 65, 108 S.E. 295, 296 (1921) (noting if the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term thereto)); *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) ("The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed."); *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

Without Defendants' agreement, Plaintiff cannot unilaterally amend the sole and entire agreement between it and Defendants in the middle of this litigation. More particularly, Plaintiff

cannot rename the Contract, changing it from "Assignment and Assumption Agreement" to "Territory Release Agreement." Nor can Plaintiff recharacterize the intent of the Contract, stating that Plaintiff "intended to release certain rights of Assignee" by entering into the Contract. By contrast, the word "release" appears nowhere in the Contract, which, as shown, instead purports to sell franchise rights and title owned by Plaintiff and to convey and transfer Plaintiff's franchise duties and obligations to Defendants.

Likewise, Plaintiff cannot now make its new assignee the "substitute counterparty" to the Contract and the party that in "effect" made the representations and warranties therein "as of" the date they were made by Plaintiff. The assignee steps into the assignor's shoes as of the time of the assignment and cannot change who entered into the agreement in the first place, and who made representations and warranties therein and what was their meaning and effect when made. *See Singletary v. Aetna Cas. & Sur. Co.*, 447 S.E.2d 869, 316 S.C. 199 (Ct. App. 1994) ("An assignee of a chose in action can claim no higher rights than his assignor had *at the time* of the assignment.")(emphasis added).

Also, Plaintiff is expressly barred by the Contract from advancing any arguments based on parol evidence to try to controvert, rewrite, or add to the Contract. Plaintiff's newly created document and proposed amended complaint both seem to try to do that, as does the affidavit that Plaintiff filed in opposition to this motion, by Dustin Pelletier. The four corners of the Contract drafted by Plaintiff and attached by Plaintiff to its Complaint and its proposed amended pleading control as a matter of law.

Notwithstanding, even assuming *arguendo* that none of the above contract law applies here, Plaintiff's new assignee, BA Greenville, LLC, would not have had the right to enter into the Contract with Defendants to begin with, either. Nor does it have any equitable right to restitution.

In sum, the two agreements with the franchisor produced by Plaintiff establish that neither Plaintiff, nor its new assignee, BA Greenville, LLC, were in the position to double sell and charge extra fees to Defendants for the rights and duties to open a new Big Air franchise business in Anderson. Attempting to do so was wrong and inequitable. Plaintiff only had the right to receive sales commissions equal to 50% of all franchise fees and royalties paid by Defendants to the franchisor (which it admittedly received). Plaintiff's new assignee of the Contract, BA Greenville, LLC, only had the right, license, and duty to operate the "one," already existing franchise business in Greenville; and numerous conditions and restrictions prohibited and rendered "void" any attempted assignment of the same without the franchisor's "prior written approval" (which it admittedly did not receive). Because neither Plaintiff, nor BA Greenville, LLC, had the rights they purported to sell Defendants and made representations and warranties about that were indisputably false, neither has a valid claim under the Contract or the alternative theory of unjust enrichment asserted in the Complaint and the proposed amended pleading.

Any issue that Plaintiff raises about Big Air Franchising, LLC breaching or amending its franchise agreement with BA Greenville, LLC (regarding the provision therein stating that the franchisor or its affiliate would not establish or license another franchise business in a defined buffer territory of zip codes surrounding the one operating franchise business) is between those parties – not Defendants. Moreover, Plaintiff, under common ownership with BA Greenville, LLC, and acting as a sales agent and affiliate of Big Air Franchising, LLC, was responsible for causing Big Air Franchising, LLC to sell Defendants their franchise business in Anderson, for which Plaintiff is already being rewarded with the right to receive 50% of the franchise fees and royalties paid by Defendants to the franchisor in the form of sales commissions.

Finally, by not timely responding to certain requests for admissions, as set forth above, under Rule 36, SCRCP, Plaintiff additionally admitted that it has provided no services of any kind or anything of value that it owns to earn the monthly fees it has demanded under the Contract or otherwise. *See* Rule 36, SCRCP ("The *matter is admitted* unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as stipulated in writing by the parties pursuant to Rules 29 and 6(b), the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney...") (emphasis added); *Nexstar Media Grp., Inc. v. Davis Roofing Grp.*, LLC, 431 S.C. 593, 848 S.E.2d 597 (Ct. App. 2020) ("This court has affirmed the seriousness of the ramifications for a failure to respond to requests in a timely matter."); *Moore, Matter of*, 494 S.E.2d 804, 329 S.C. 294 (1997) ("Because of this failure to reply, the Request for Admissions were deemed admitted.").

CONCLUSION

There is no genuine issue as to any material fact before the Court. For the reasons set forth above, Defendants' Motion for Partial Summary Judgment as to all Claims Asserted in the Complaint by Plaintiff BA Holdings, Inc. is GRANTED. Plaintiff's Motion for Leave to Amend the Complaint, which proposed amended pleading included a second plaintiff, BA Greenville, LLC, has been fully considered and is DENIED as futile and moot.

IT IS SO ORDERED.

Greenville Common Pleas

Case Caption: BA Holdings Inc vs. Zay N Limo LLC , defendant, et al

Case Number: 2023CP2302302

Type: Order/Summary Judgment

So Ordered

G.D. Morgan Jr.