No. COA 18-164 14th JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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PURNIMA SANGHRAJKA,	)	
	)	
and	)	
	)	
CARY FOODS, INC.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	From Durham County
v.	)	No. 17-CVS-3173
	)	
FAMILY FARE, LLC,	)	
	)	
and	)	
	)	
M.M. FOWLER, INC.,	)	
	)	
Defendants-Appellees.	)	

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BRIEF OF DEFENDANTS - APPELLEES

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STATEMENT OF THE CASE

On May 12, 2017 Appellants filed the complaint in this action asserting claims against Appellees for Unfair and Deceptive Trade Practices, Rescission, Fraud, Negligent Misrepresentation and Breach of Covenant of Good Faith and Fair Dealing. All of these claims directly relate to, and arise out of, the Franchise Agreement and the First Amendment between the parties (both as defined in the Statement of Facts

below), both of which Appellants admittedly signed and had full knowledge of the contents of on December 19, 2013, nearly three and a half years prior to their filing this action.

On July 17, 2017 Appellees filed a 12(b)(6) motion and alternative 12(c) motion, seeking to dismiss all of Appellants' claims with prejudice. The basis for the Appellees' motion to dismiss was that the applicable one-year contractual statute of limitations in the Franchise Agreement expired before Appellants asserted their claims more than three and a half years after they accrued.

The hearing on Appellees' motions to dismiss was heard on September 11, 2017. On September 29, 2017 the Superior Court issued a written order granting Appellees' motion to dismiss and dismissing all of Appellants' claims with prejudice on the grounds that all claims in the Complaint were untimely and barred by the one-year contractual statute of limitations contained in the Franchise Agreement.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appellees concur with Appellants' statement of grounds for appellate review. The Superior Court's granting of Appellees' motion to dismiss is a final judgement subject to appeal pursuant to N.C. Gen. Stat. §7A-27(b).

STATEMENT OF THE FACTS

For a number of years prior to the Fall of 2013, Appellee Family Fare, LLC ["Family Fare"] had contract operator agreements with a number of different entities across North Carolina relating to and permitting those contract operators to operate Family Fare convenience stores. (R p 6; ¶ 9). Appellants Purnima Sanghrajka ["Ms.

Sanghrajka"] and Cary Foods, ["Cary Foods"] [collectively "Appellants"] were one of the contractor operators, operating a Family Fare convenience store located on Garrett Road in Durham, North Carolina ["Garrett Road Store"]. (R p 5; ¶ 7).

In the Fall of 2013, Family Fare decided to convert all of the contractor operators to franchisees. (R p 6; ¶¶ 9-10). Mr. Lee Barnes, an owner of Family Fare, had meetings with the various contractor operators to discuss conversion to a franchise relationship. (R pp 6, 8; ¶¶ 10, 15).

According to Ms. Sanghrajka, Mr. Barnes met with her for the first time in late November 2013 (or early December 2013) to discuss conversion from the contract operator model to the franchise model. (R pp 8-9; ¶ 15). During this meeting, according to Ms. Sanghrajka's admissions in her Complaint, Mr. Barnes:

- Presented Ms. Sanghrajka with the Franchise Disclosure Document ["FDD"] for the new Family Fare franchisees. (R pp 9, 10; ¶¶ 16, 22; R pp 21-195);

- Told Ms. Sanghrajka that as a requirement of Family Fare's franchise offering to Ms. Sanghrajka, and her business Cary Foods, she must commence operations of a second store located on Raleigh Road in Chapel Hill, North Carolina [referred to herein as the "Glen Lennox Store"] in addition to continuing operations of the Garrett Road Store. (R pp 9; ¶17);

- Told Ms. Sanghrajka that there was no option of not operating the Glen Lennox Store, and that the franchise offering to her was a "single franchise package" and that Family Fare would not allow the conversion of Cary Food's Garrett Road Store to a franchise unless Ms. Sanghrajka and Cary Foods agreed to take the Glen Lennox Store as part of a single franchise relationship. (R pp 9-10; ¶19);

According to Ms. Sanghrajka, the next time that she met with Mr. Barnes was on December 19, 2013. (R p 10; ¶23). At this meeting, Mr. Barnes undisputedly presented Ms. Sanghrajka with a number of documents for execution relating to the

new Family Fare franchise relationship, including the Family Fare Franchise Agreement (R pp 217-256) ["Franchise Agreement"], store leases and other franchise documentation previously disclosed to her in the defendants' FDD documentation." (R p 10; ¶ 23). Consistent with the discussions in their meeting several weeks before, Mr. Barnes also reminded Ms. Sanghrajka at the December 19, 2013 meeting that if she wanted to be a franchisee she must operate, as a franchisee, both the Garrett Road Store and the Glen Lennox Store. (R p 11; ¶¶ 25-27).

Ms. Sanghrajka also alleges that on December 19, 2013, in addition to presenting her with the Franchise Agreement and other documents referenced above, Mr. Barnes for the first time presented her with a document captioned, "First Amendment to Family Fare Franchise Agreement" ["First Amendment"]. (R p 11; ¶25; R pp 196-199 ["First Amendment"]).[1] The First Amendment made the following relevant modifications and amendments (among others) to the Franchise Agreement contained in Family Fare's standard FDD:

- Paragraph 1 of the First Amendment replaced Paragraph 1 of the Franchise Agreement in its entirety to specifically reference that instead of granting one franchise location as provided for in the Franchise Agreement, Ms. Sanghrajka and Cary Foods were granted two franchise locations, the Garrett Road Store and the Glen Lennox Store (R p 196);

- Paragraph 3 of the First Amendment amended Paragraph 5(a) of the Franchise Agreement to lower the initial franchise fee for the Garrett Road Store from $5,000 to $4,000 and provide that the initial franchise fee for the Glen Lennox Store would be $0.00 (R p 197);

[1] Mr. Barnes denies that he had not previously presented the First Amendment to Ms. Sanghrajka. Mr. Barnes contends the First Amendment was presented to Ms. Sanghrajka on November 27, 2013 (R pp 6-7), but understands that for purposes of a 12(b)(6) or 12(c) motion Appellants' allegations must be taken as true. Appellees' Statement of Facts is set forth with this understanding.

- Paragraph 6 of the First Amendment amended Paragraph 14(b) of the Franchise Agreement to include a listing of hours for both franchise locations (R pp 197-198);

- Paragraph 9 of the First Amendment required that any transfer by Appellants of their franchise rights pursuant to Paragraph 26 of the Franchise Agreement would require transfer of both locations (R p 198); and

- Paragraph 10 of the First Amendment amended Paragraph 26(ix) of the Franchise Agreement in its entirety to provide that Appellants agree to pay Family Fare a transfer fee of **50% of the purchase price of the franchise interest being purchased** instead of the 10% transfer fee set forth in the Franchise Agreement. (R pp 198-199). [Emphasis added].

It is undisputed based on Appellants admissions in the Complaint that the Franchise Agreement and the First Amendment were in fact physically presented to Ms. Sanghrajka on December 19, 2013. (R pp 11-12; ¶¶ 25-27, 31). Ms. Sanghrajka admits that on December 19, 2013 she signed the Franchise Agreement and the First Amendment in her individual capacity and on behalf of Cary Foods. (R pp 11-12; ¶¶ 28, 31; R p 199).

Appellants make no allegation in the Complaint that Ms. Sanghrajka did not notice, read, have the opportunity to read, or otherwise have full knowledge of the 50% transfer fee set forth in Paragraph 10 of the First Amendment. To the contrary, Appellants admit that on December 19, 2013 Ms. Sanghrajka (i) was fully aware of the 50% transfer fee requirement, (ii) knew the 50% transfer fee in the First Amendment was different than the 10% transfer fee requirement previously disclosed in early December as part of the FDD, and (iii) signed the Franchise Agreement and First Amendment. (R p 11; ¶¶ 25-28).

Despite her alleged objections and distaste for the 50% transfer fee, Appellants operated both the Garrett Road Store and the Glen Lennox Store for two and a half years after signing the Franchise Agreement and the First Amendment. (R p 12; ¶ 32). Indeed, it was only pursuant to the First Amendment that Plaintiff was authorized to operate either of the stores as a franchisee. (R pp 9-10, 27; ¶¶ 17-19, 27).

More than two and a half years later, in September 2016, Ms. Sanghrajka informed Mr. Barnes that she intended to sell her franchise interest in both the Garrett Road Store and the Glen Lennox Store to a third party. (R p 12-13; ¶ 33). In connection with the Appellants' sale of their franchise interests, Mr. Barnes told Ms. Sanghrajka that Family Fare expected Appellants to pay the 50% transfer fee clearly contained in the First Amendment signed by Ms. Sanghrajka on December 19, 2013. (R p 13; ¶ 34). Ms. Sangrajka had actual knowledge of the 50% transfer fee requirement since signing the First Amendment on December 19, 2013 (R p 11; ¶ 26-27), but nevertheless contended that Appellants should only have to pay a 10% transfer fee. (R pp 12-13; ¶¶ 33-35).

Family Fare's consent was required for the transfer. (R p 13; ¶ 34; pp 245-246). On December 1, 2016, Family Fare, Cary Foods, Ms. Sanghrajka and the third party purchaser of Appellants' franchises, Deepen Parikh and his entity Prudena, Inc., entered into an agreement entitled "Agreement and Conditional Consent to Transfer" in order to permit Appellants and Mr. Parikh to close on the purchase and sale of the franchises. (R p 13; ¶ 35; pp 258-264).

On December 1, 2016, Plaintiff finalized the sale of both of her franchise locations to a third party for $333,233.09 more than her initial franchise investment of $16,766.91. (R pp 12-13; ¶¶33-35; pp 208-209; ¶ 33). Even subject to the 50% transfer fee complained about in this action, Appellants netted $175,000 from the sale of their franchises. (R pp 13; ¶ 35; pp 258-260).

STANDARD OF REVIEW

A statute of limitations defense is properly granted pursuant to a Rule 12(b)(6) motion to dismiss "if it appears on the face of the complaint that such a statute bars the claim." *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 339-40, 714 S.E.2d 770, 776 (2011) *quoting Horton v. Carolina Medicorp, Inc.* 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). In a Rule 12(b)(6) motion, a court may consider documents specifically referenced in the complaint even if it is the defendant that presents those documents to the court. *Robertson v. Boyd*, 88 N.C. App. 437, 441, 363 S.E.2d 672, 675 (1988). Similarly, a dismissal pursuant to Rule 12(c) is appropriate if the pleadings establish no material issue of fact. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 495 (1974). The Court of Appeals decides appeals from orders granting Rule 12(b)(6) and 12(c) motions *de novo*. *Stunzi*, 214 N.C. App. 332, 335, 714 S.E.2d 770, 773 (2011); *Toomer v. Branch Banking & Trust Co.,* 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005).

ARGUMENT

I. The One-Year Limitation Period in the Franchise Agreement.

There is no dispute based on Appellants' own admissions in the Complaint that on December 19, 2013 Ms. Sanghrajka had full, actual knowledge of the 50% transfer fee requirement and the fact that it was different than the 10% transfer fee requirement contained in the FDD. (See pp. 4-6 above). Based on this and other clear admissions by the Appellants in their Complaint, all of their claims against Appellees were properly dismissed as they were brought more than two and a half years after the expiration of the contractual statute of limitations contained in the Franchise Agreement.

Section 33(b) of the Franchise Agreement provides for a one-year contractual limitations period applicable to all of Appellants' claims in this action. Specifically, the Franchise Agreement provides that:

> Any and all claims and actions arising out of or relating to this agreement, the relationship of franchisee and Family Fare, or franchisee's operation of the franchised store, brought by franchisee against Family Fare, shall be commenced within one (1) year from the occurrence of the facts giving rise to such claim or action, or such claim or action shall be barred.

In their Opening Brief, Appellants do not address or dispute the decision by the Superior Court that the one-year contractual statute of limitations is enforceable and applicable to the matters at issue in Appellant's lawsuit. (See e.g., "Issues Presented" at pp. 1-2 of Appellants' Opening Brief). By failing to address or make any argument in their Opening Brief that the one-year contractual limitation period

is not enforceable, Appellants have abandoned any such issue or argument on appeal. N.C. App. R. 28(b)(6).

Despite the Appellants' abandonment of the issue, it is nevertheless clear that North Carolina courts have routinely recognized that contractual limitations periods, even when less than an otherwise applicable limitations period prescribed by statute, are enforceable. *See, e.g., Boyd v. Bankers & Shippers Ins. Co.*, 245 N.C. 503, 515, 96 S.E.2d 703, 712 (1957)(upholding twelve month contractual limitation period in insurance contract); *Hawks v. Arstark & Co.*, 2007 N.C. App. LEXIS 2514, *9 (N.C. Ct. App. Dec. 18, 2007)(upholding one-year contractual limitations period in house inspection agreement); *Badgett v. Fed. Express Corp.*, 378 F. Supp. 2d 613, 623 (M.D.N.C. 2005)(citing various North Carolina law and upholding one-year contractual limitations in employment agreement).

Similarly, courts in a number of other jurisdictions have had the opportunity to address contractual limitation periods specifically in franchise agreements and have upheld those contractual limitations periods. *See, e.g., Hays v. Mobil Oil Corp.*, 930 F.2d 96, 99-100 (1st Cir. 1991)(upholding one-year contractual limitations period in franchise agreement); *Progressive Foods, LLC v. Dunkin' Donuts, Inc.*, 491 Fed. Appx. 709, 712, (6th Cir. 2012)(upholding two year contractual limitation period in franchise agreement); *Cooler Ink Solutions, Inc. v. Blue Ocean Holdings, Inc.*, 2015 U.S. Dist. LEXIS 181375, *2 (M.D. Tenn. Aug. 19, 2015)(upholding one year contractual limitation period in franchise agreement); *Peterson v. Sprock*, 2009 U.S. Dist. LEXIS 13310, *16-18, 2009 WL 383582 (N.D. Ga. Feb. 11, 2009)(dismissing

claims of certain plaintiffs because their claims first set forth in the amended complaint fell outside of contractual limitations period of one year in franchise agreement).

The well-established law in North Carolina is that statutes of limitations are "inflexible and unyielding," operating "without reference to the merits of plaintiff's cause of action" and a court has no discretion in considering whether a claim is barred by the statute of limitations. *Congleton v. Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970). Thus, the crucial question is only what date should be used to determine if the claims are barred. *Id*.

In this matter, based on Appellants' clear admissions in their Complaint, each of their claims against Appellees accrued no later than December 19, 2013. What is more, each of the claims relate to and arise out of the Franchise Agreement and/or the business relationship between Appellants, as franchisees, and Family Fare, as franchisor, and are therefore expressly subject to the one-year contractual limitations period in Section 33(b) of the Franchise Agreement. By filing this lawsuit on May 12, 2017, Appellants missed the one-year contractual limitation by nearly two and a half years.

II. Appellants' Fraud, Negligent Misrepresentation, Rescission and Breach of Good Faith and Fair Dealing Claims Accrued on December 19, 2013 and are All Barred by the Contractual Statute of Limitations.

It is undisputed, and Appellants have clearly admitted, that on December 19, 2013 Ms. Sanghrajka met with Mr. Barnes to sign the Franchise Agreement for Appellants' operation, as franchisee, of the two Family Fare franchise locations – the

Garrett Road Store and the Glen Lennox Store. (R p 11; ¶¶ 25-28). It is also undisputed and admitted that on that date, Ms. Sanghrajka actually signed the First Amendment. (R p 11; ¶ 28). Appellants' own admissions in the Verified Complaint clearly establish that on December 19, 2013 Ms. Sanghrajka (a) saw the First Amendment and knew it contained the 50% transfer fee requirement, (b) knew that the 50% transfer fee requirement was different than the 10% transfer fee requirement previously disclosed to her by Mr. Barnes in the Family Fare FDD and (c) knew that Mr. Barnes was requiring the execution of the First Amendment in order for Appellants to have the opportunity to operate either of the franchise locations. (R p 11; ¶¶ 25-28).

It simply cannot be disputed that if, as alleged, Appellees committed fraud, negligence misrepresentation or breached any applicable covenant of good faith and fair dealing (all of which are denied), Ms. Sanghrajka nevertheless had <u>full and actual</u> knowledge of all of the alleged fraudulent acts, misrepresentation and bad faith acts by December 19, 2013. Appellants did not file this action against Appellees until May 12, 2017 – nearly three and a half years after gaining full and actual knowledge of Appellees' alleged wrongful action and well beyond the contractual limitations period described in Section I above.[2]

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[2] Appellants' claims for fraud, negligent misrepresentation, rescission and breach of covenant of good faith and fair dealing even fall well outside of the statutory three year limitations period applicable to each of these claims. *See* N.C. Gen. Stat. §1-52(9)(fraud and mistake); *Jefferson-Pilot Life Co. v. Spencer*, 336 N.C. 49 442 S.E.2d 316 (negligent misrepresentation); *Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 333, 777 S.E.2d 272, 277 (N.C. 2015) (breach of covenant of good faith and fair dealing).

A. The fraud and negligent misrepresentation claims accrued on December 19, 2013 and are barred.

The limitations period for claims of fraud and negligent misrepresentation accrue at the time of the discovery of the facts constituting the fraud or the misrepresentation. *See* N.C. Gen. Stat. §1-52(9); *Jefferson-Pilot Life Co. v. Spencer*, 336 N.C. 49, 56, 442 S.E.2d 316, 319 (1993). Based on Appellants' admissions in their Complaint, Appellees either fraudulently or negligently misrepresented the transfer fee in the FDD disclosed to Appellants in late November or early December 2013. (R pp 10-11; ¶¶ 22-23, 26). Even if there was fraud or negligence at the time of the disclosure of the FDD with respect to the transfer fee (which is denied), Appellants' unquestionably gained full and actual knowledge of the 50% transfer fee when Ms. Sanghrajka was presented with, and signed, the First Amendment on December 19, 2013. *See, e.g., Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 341, 714 S.E.2d 770, 777 (2011)(dismissing fraud claim based on statute of limitations and holding that fraud accrued on date plaintiff signed a disclosure of non-conformity document regarding his lemon car since there was no allegation that plaintiff was incapable of reading the document at the time of signing or was otherwise prevented from reading the document by defendant).

Without question, Plaintiff knew about the 50% transfer fee no later than December 19, 2013 (See admissions at R p 11; ¶¶ 25-28). From that point forward, Appellants' had <u>actual knowledge</u> of the harm to their franchise business from execution of the First Amendment with the 50% transfer addendum. That is, Appellants' had actual knowledge that the value of their franchises, at whatever time

in the future they might choose to sell, would be 40% less than the value of the franchises if only subject to a 10% transfer fee. Appellants' claims against Appellees for fraud and negligent misrepresentation are barred because the claims were filed more than two and a half years after the expiration of the contractual limitation period.

B. The rescission claim accrued on December 19, 2013 and is barred.

According to Appellants' allegations in Paragraph 43 of the Complaint (R p 15), their rescission claim is based on Appellees' alleged "wrongful actions" as described in the Complaint. This means that Appellants' claim for rescission of the First Amendment is based on Appellees' alleged fraud, deception, negligent misrepresentation and breach of covenant of good faith and fair dealing.

For the reasons set forth herein, all of those claims necessarily accrued on December 19, 2013 when Appellants knew with certainty of the existence of the 50% transfer fee applicable to both of their franchise locations. Since, under North Carolina law, it is the underlying action which dictates whether a rescission claim is timely, Appellants' rescission claim fails because it was brought nearly two and a half years after the expiration of the one-year contractual limitation. *See, e.g., Hinson v. United Fin. Servs.*, 123 N.C. App. 469, 473-74, 473 S.E.2d 382, 385-86 (1996)(it is the statute of limitations for the underlying wrong that determines when a claim for rescission is barred). On December 19, 2013, Appellants could have immediately filed a claim seeking rescission of the First Amendment based on the alleged unfair, deceptive, fraudulent and bad faith action of Mr. Barnes. Instead she chose to operate

both franchise locations for nearly three years while the statute of limitations expired.

C. The breach of covenant of good faith and fair dealing accrued on December 19, 2013 and is barred.

A cause of action for breach of the covenant of good faith and fair dealing which exists in all contractual relationships accrues at the time of the other related complained of action. *See, e.g., Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 405, 653 S.E.2d 181, 185-186, (2007)(claim accrued when other claims based on relevant facts occurred). Appellants allege generally in Paragraph 59 of the Complaint that the breach by Appellees consisted of the "misrepresentations, actions, and omissions" described in the Complaint. (R p 18). Thus, like Appellants' other claims, if any breach of the covenant of good faith and fair dealing occurred, it necessarily occurred on or before December 19, 2013 when Mr. Barnes is alleged to have misrepresented facts and/or given Ms. Sanghrajka no option but to sign the Franchise Agreement subject to the First Amendment containing the 50% transfer fee about which she now complains. Appellants' claims for breach of the covenant of good faith and fair dealing are barred because the claims were filed more than two and a half years after the expiration of the one-year contractual limitation period.

III. Appellants' Cause of Action for Unfair and Deceptive Trade Practices also Accrued on December 19, 2013 and is barred by the Contractual Statute of Limitations.

Like Appellants other claims, Appellants' unfair and deceptive trade practice claim arises directly out of the Franchise Agreement, the First Amendment and the parties' business relationship and accrued on December 19, 2013. The unfair and

deceptive trade practice claim is accordingly barred by the contractual one year limitations period. Taking Appellants allegations in the Complaint as true, they could have asserted a cause of action for unfair and deceptive trade practices on December 19, 2013 immediately after Ms. Sanghrajka signed the First Amendment – regardless, of the theory advanced in support of recovery.

Appellants' allegations that Mr. Barnes and Family Fare committed a *per se* violation of the unfair and deceptive trade practices statute unquestionably accrued at the latest on December 19, 2013 at the time of the alleged untimely disclosure (see Section III.A below). Nor can Appellants extend the accrual date for the unfair and deceptive trade practice claim by tying that claim to the alleged fraud, negligent misrepresentations or breach of covenant of good faith and fair dealing by Mr. Barnes (see Section III.B below).

Regardless of the legal theory for recovery, Appellants' alleged "actual injury" first occurred on December 19, 2013 and Appellants could have asserted a viable cause of action on that date. The "continuing wrong doctrine" is inapplicable to the facts and circumstances in this case and cannot save any of Appellants' claims, including but not limited to their unfair and deceptive trade practices (see Section III.B below).

A. Alleged failure to timely disclose the First Amendment in violation of disclosure laws is barred by the one-year contractual limitation period.

On the face of the Complaint, it is clear that Appellant's unfair and deceptive trade practice claim is based solely on Family Fare's alleged failure to timely disclose

the First Amendment to Appellants as required by "The Franchise Rule" at 16 C.F.R. § 436.2(b). Specifically, Paragraph 38 of the Verified Complaint setting out Appellant's unfair and deceptive trade practice claims alleges only that Appellees are in "violation of franchise disclosure laws" which "comprise a *per se* violation of the North Carolina Unfair and Deceptive Trade Practices Act." (R p 14).

The only laws in the franchise context which might arguably be *per se* violations of the unfair and deceptive trade practice statute are the required franchise disclosure laws. 16 C.F.R. § 436.2(a). Appellant relies solely on these alleged *per se* violations and no further allegations are made in Appellants' Verified Complaint in support of their unfair and deceptive trade practice claim. (See absence of additional allegations at R p 14; ¶ 38-41).

The law in North Carolina and in other jurisdictions is clear that any cause of action arising out of a franchisor's failure to timely disclose franchise documents, which would include changes or amendments to franchise disclosure documents such as the First Amendment, accrue at the time of the alleged failure to timely disclose or execution of the franchise agreement. *See, e.g., Rich Food Services. v. Rich Plan Corp*., 2001 U.S. Dist. LEXIS 25955, *14, *16-17 (E.D.N.C. Nov. 19, 2001)(plaintiff's claim arising out of failure to make required disclosures pursuant to FTC Franchise Rule, 16 C.F.R. §§ 436.1 *et. seq*., accrued at the time defendant entered into the franchise agreement with plaintiffs); *Long John Silver's Inc. v. Nickelson*, 923 F. Supp. 2d 1004, 1013 (W.D. KY 2013)(plaintiff's claim against defendant under Minnesota Franchise Act for failure to timely register the required Franchise

Disclosure Document accrued at time of first email sent by defendant offering franchise opportunity); *Ellerling v. Sellstate Realty Sys. Network, Inc.*, 801 F. Supp. 2d 834, 840 (D. Minn. 2011)(same); *Robinson v. Wingate Inns Int'l, Inc.*, 2013 U.S. Dist. LEXIS 179997, *8, (D.N.J. Dec. 20, 2013)(fraud in the inducement claim arising out of representations made in Franchise Disclosure Document accrued on date of execution of franchise agreement).

Here, according to Appellants' Complaint, the unfair and deceptive trade practice claim relates solely to Mr. Barnes' alleged failure to timely disclose the First Amendment. (R p 14; ¶38). All of the alleged wrongful conduct about which Appellants complain occurred on or before December 19, 2013 – the date of the Appellants' execution of the Franchise Agreement and the First Amendment -- and this is the date of the accrual of all of Appellants' unfair and deceptive trade practice claims based on an alleged failure to disclose in violation of the FTC Franchise Rule. As such, Appellants' unfair and deceptive trade practice claim accrued no later than December 19, 2013 and is barred by the one-year contractual limitation.

B. Alleged "new" claims or theories not contained in Appellants' complaint are also barred by the one-year contractual limitations period.

Recognizing the certain fatal impact of the one-year statute of limitations on their unfair and deceptive trade practice claim arising out of Mr. Barnes' alleged failure to timely disclose the First Amendment pursuant to The Franchise Rule, Appellants have changed horses in a final, but nevertheless, unsuccessful attempt to save their unfair and deceptive claim from dismissal based on the contractual

limitations period. Appellants are limited to their pleadings and are barred from new theories at this stage in the litigation. *See, e.g., Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102-103 (2002)(in her pleadings plaintiff only asserted *res ipsa loquitor* in support of her negligence theory and having not withdrawn or amended said pleadings they have a "binding effect as to the underlying theory of plaintiff's negligence claim.")

Appellants' new theories, although not alleged as grounds in support of the unfair and deceptive trade practices cause of action in the Complaint, are that the same facts and circumstances which constitute Mr. Barnes' alleged (but denied) fraud, negligent misrepresentation, and breach of good faith and fair dealing by his requiring that Ms. Sanghrajka execute the First Amendment imposing the 50% transfer fee also constitute and support the claim for unfair and deceptive trade practices.

Even if these theories can be teased out of the unfair and deceptive trade practice allegations in the Complaint, as established in Section II above, all of the facts relating to Appellants' alleged (but denied) fraud, negligent misrepresentation, and breach of covenant of good faith and fair dealing were unquestionably and admittedly known to Appellants on December 19, 2013. North Carolina law is clear that:

> When a plaintiff bases his action for unfair and deceptive trade practices on fraud, "the action accrues at the time the fraud is discovered with the exercise of reasonable diligence."

Jackson v. Minn. Life Ins. Co., 275 F. Supp. 3d 712, 727 (E.D.N.C. 2017) *quoting Trantham v. Michael L. Martin, Inc.*, 228 N.C. App. 118, 126, 745 S.E.2d 327, 334 (2013). *See also*, *Ussery v. Branch Banking & Trust Co.,* 227 N.C. App. 434, 438-39, 743 S.E.2d 650, 654 (2013) *revs'd on other grounds*, *Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 777 S.E. 2d 272 (2014)(claim for unfair and deceptive trade practices based on misrepresentation claim accrues at time misrepresentation discovered).

Appellants' claim for unfair and deceptive trade practices based on fraud, negligent misrepresentation and/or breach of covenant of good faith and fair dealing accrued on December 19, 2013. As of this date, as shown by Appellants' own admissions in the Complaint, all of Mr. Barnes' alleged (but denied) wrongful action had occurred and Ms. Sanghrajka had full knowledge of the 50% transfer requirement and the fact that the 50% transfer requirement was different than the 10% transfer requirement contained in the FDD previously disclosed to Appellants. On that date, December 19, 2013, Appellants knew with certainty that if they chose to sell their franchise locations they would receive 40% less for the franchise locations than was previously disclosed to them in Family Fare's standard FDD.

C. Actual injury occurred on December 19, 2013 and the continuing wrong doctrine is inapplicable to the facts in this case.

On December 19, 2013 Appellants had the absolute right to bring a lawsuit against Appellees for fraud, negligent misrepresentation, breach of the covenant of good faith and fair dealing and any unfair or deceptive trade practices allegedly

arising out of all of those claims. Taking Appellants' allegations in the Complaint as true, they could have, on that very day, asserted a claim seeking to rescind the alleged wrongfully obtained First Amendment and requesting the Court declare the Appellants should only be subject to a 10% transfer fee.

It was therefore on December 19, 2013 that the statute of limitations began to run for **all** of Appellants' claims, including the unfair and deceptive trade practice claim. *See, e.g.*, *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962)(cause of action accrues as soon as the right to institute and maintain a suit arises"); *See also, Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, ___ N.C. ___, 802 S.E.2d 888, 892 (2017)("It is well settled that 'where the right of a party is once violated the injury immediately ensues and the cause of action arises.'") *quoting Sloan v. Hart*, 150 N.C. 269, 274, 63 S.E. 1037, 1039 (1909).

Following execution of the Franchise Agreement and First Amendment, Appellants chose to operate both franchise locations for nearly three years, incurring the benefit of the operation of those stores and ultimately negotiating a sale price for both franchise locations for $333,233.09 more than their initial franchise investment of $16,766.91. (R pp 12-13; ¶¶ 33-35; pp 208-209; ¶ 33). Appellants are not permitted to sit on their legal rights in this way.

In *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1984), a negligent construction case, the Supreme Court stated that, "[u]nder the common law, a cause of action accrues at the time the injury occurs, "even in ever so small a degree."' *Quoting Matthieu v. Gas Co.* 269 N.C. 212, 215, 152 S.E.2d 336, 339

(1967). In dismissing the plaintiff's negligence claim as untimely, the court holds that:

> The plaintiff in this case first complained of a leak in the roof within two months after occupying its newly built facility. The undisputed facts show that further complaints about leaks in many spots in the roof were made over five consecutive months in 1976 and 1977. These complaints clearly show that plaintiff, although perhaps not aware of the extent of the damage, knew that its roof was defective at least as early as April 1977. The statute of limitations does not require plaintiff to be a construction expert. [Citations omitted]. ***However, it does require that plaintiff not sit on its rights***. [Emphasis Added]

Id. at 493, 329 S.E.2d at 354.

This Court's decision in *Hinson v. United Fin. Servs.* 123 N.C. App. 469, 475, 473 S.E.2d 382, 386-87 (1996), dismissing the plaintiff's unfair and deceptive trade practice claim as untimely, is analogous to the facts in the present case and instructive. In *Hinson*, the plaintiff alleged the defendant finance company procured his signature on a promissory note by a wrongful threat of criminal prosecution. *Id*. at 471-72, 473 S.E.2d at 384-85. Similar to the facts in the present case, the undisputed facts in *Hinson* were that at the time of the plaintiff's execution of the promissory note obligating him to future payments he had actual knowledge of the facts and circumstances constituting the alleged fraud or deception which would support an unfair and deceptive trade practice claim. *Id*. at 474, 473 S.E.2d at 386. The *Hinson* Court held that because plaintiff had the right to institute and maintain a suit for unfair and deceptive trade practices on the date he signed the promissory

note, the claim accrued and the statute of limitations time period began to run on that date. *Id*. at 475, 473 S.E.2d at 386-87.

Here, Appellants seek to salvage their untimely claims by confusing the legal requirement of "actual injury" necessary to bring certain claims, including unfair and deceptive trade practices, with out-of-pocket "monetary damages." Actual injury is not always or necessarily equal to monetary damages:

> To the extent [Defendant] equates "actual injury" with out-of-pocket damages, that is not the law. Such a view would be inconsistent with N.C. Gen. Stat. § 75-16 (2005), which provides a person who was "injured" as a result of conduct in violation of Chapter 75 "shall have a right of action on account of such injury done, *and if damages are assessed* in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." The statute thus distinguishes between "injury" and "damages."

Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 423, 646 S.E.2d 381, 387-388 (2007); *See also, Poor v. Hill*, 138 N.C. App. 19, 34, 530 S.E.2d 838, 848 (2000)("Actual injury may include the loss of use of specific and unique property, the loss of any appreciated value of the property, and such other elements of damages as may be shown by the evidence.").

In *Canady v. Mann*, 107 N.C. App. 252, 261, 219 S.E.2d 597, 603 (1992) this court reversed summary judgment dismissing plaintiffs' unfair and deceptive trade practice claim on the grounds that a jury could find that loss of specific use of unique property and loss of the appreciated value of property constituted "actual injury." Importantly, in *Canady* the plaintiffs brought their claim for unfair and deceptive trade practices before actually selling or attempting to sell the real property and

potentially obtaining less than expected or promised by defendants, yet still were able to assert a claim for a jury. 107 N.C. App. at 255, 419 S.E.2d at 599. Ms. Sanghrajka and Cary Foods could have asserted the same type of claim against Appellees as early as December 19, 2013, but did not.

Furthermore, consistent with this Court's holding in *Hinson*, the fact that Appellee requested payment of the contractual 50% transfer fee when Appellants decided to sell their franchise locations three and a half years later is not a continuing wrong that extends the statute of limitations. It is, at best, only a result of the "continual ill effects" from Mr. Barnes' original alleged (but denied) wrongful action of requiring Ms. Sanghrajka to submit and agree to the 50% transfer fee on December 19, 2013. For the continuing wrong doctrine to apply there has to be continuing unlawful acts as distinguished from continued ill effects from an original wrongful act such as alleged by Appellants. *See, e.g., Birtha v. Stonemor*, N.C., LLC, 220 N.C. App. 286, 292, 727 S.E.2d 1, 7 (2012).

Analogously, the *Hinson* Court specifically held that the defendant's action of sending a late notice and attempting to collect on past due payments on the wrongfully procured promissory note signed by plaintiff was not a continuing wrong, but "at worst, an ill effect of the original wrong and is not a wrong in and of itself." *Hinson*, 123 N.C. App. at 475, 473 S.E.2d at 386. Accordingly, Mr. Barnes' request in 2016 that Appellants pay the contractual 50% transfer fee is not a continuing wrong, but an alleged continued ill effect from his purported unconscionable, unfair and bad faith actions which all occurred on or before December 19, 2013.

Other authority is equally analogous and instructive:

- In *Richardson v. Bank of Am*., N.A. 182 N.C. App. 531, 643 S.E.2d 410 (2007) this Court held the plaintiffs' unfair and deceptive trade practice claims arising out of the defendant bank's sale of single-premium credit insurance accrued at the latest at the closing on the loans because plaintiffs' claims were solely premised on defendants' actions before and at loan closing. *Id*. at 550, 643 S.E.2d at 423. The plaintiffs' payment of higher costs over the life of the loan did not constitute a continuing wrong that would extend the statute of limitations. *Id.*
- In *Faircloth v. Nat'l Home Loan Corp*., 313 F. Supp. 2d 544 (E.D.N.C. 2003) the federal district court dismissed as untimely plaintiff's claims against the defendant lending institutions for issuing mortgage loans allegedly containing illegal fees. The plaintiff argued the illegal fees were a continuing wrong because they were collected over time through loan payments, but the Court held that the statute of limitations for plaintiffs two statutory claims (interest statute and unfair and deceptive trade practice statute) began to run on the date of closing and the alleged charging of illegal fees was "but one action which occurred at closing rather than a series of wrongs perpetrated continually." Id. at 553-54.

Tellingly, Appellants do not cite a single case in their Opening Brief which holds that a plaintiff must suffer actual monetary damages to meet the "actual injury" element of an unfair and deceptive trade practice claim. Nor have they cited to any

cases analogous to *Hinson* or the facts of this case and holding that enforcement of an alleged wrongfully procured contract term constitutes a "continuing wrong." Instead, Appellants cite only to cases which generally discuss whether or not a plaintiff has asserted sufficient injury to sustain a cause of action for unfair and deceptive trade practices. (See cases cited at pp. 15 – 17 of Appellants' Opening Brief). Those cases are inapplicable and not instructive in the context of this action.

Appellants actually suffered injury on December 19, 2013. According to the allegations in the Complaint, it was on that date that Ms. Sanghrajka knowingly signed the First Amendment obligating her to pay a 50% transfer fee on the sale of the franchise locations. As of that date, the value of Appellants' franchises were immediately reduced by 40% - the difference between the alleged unconscionable and unfair 50% transfer fee and the 10% transfer fee admittedly known by Ms. Sanghrajka to be the standard Family Fare transfer fee as set forth in the previously disclosed Family Fare FDD. Appellants could have brought an action against Appellees at that time for unfair and deceptive trade practices or any of the other claims asserted in the Complaint alleging that they had been deceived into obtaining a franchise location worth 40% less than disclosed and promised. If she had prevailed on that unfair and deceptive claim at that time the court could have rescinded the First Amendment and declared the 10% transfer fee was applicable. Appellants did not do that, but sat on their rights for three and a half years.

In light of the foregoing, all of Appellants' claims, even their unfair and deceptive trade practice claim based on the new theories not actually asserted in their

Complaint, were untimely and cannot be saved by the continuing wrong doctrine. The trial court property dismissed all of Appellants claims.

CONCLUSION

For the reasons shown above, all of Appellants' claims for relief in this lawsuit were properly dismissed with prejudice by the Superior Court since they were filed after the expiration of the contractual one-year limitation period contained in the Franchise Agreement. Appellees' respectfully pray this Court affirm the Superior Court's order.

This the 23rd day of April, 2018.

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CERTIFICATE OF COMPLIANCE

This brief was prepared using Century Schoolbook 12-point proportional type. Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Appellee certifies that the foregoing brief contains no more than 8,750 words (excluding cover, indexes, tables of authorities, this certificates of service, signature blocks and appendixes) as reported by the word-processing software.

This the 23rd day of April, 2018.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the ***Brief of Defendants - Appellees*** was duly served this date on counsel for all parties by forwarding a copy thereof via U.S. Mail and email, addressed as follows:

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