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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

FLORIDA HOME CARE GIVERS, LLC, HEART BODY AND MIND, LLC, RALPH LAUGHTON and PEARL LAUGHTON,	)	
Plaintiffs/Counter-Defendants,	)	
VS.	)	**NO. 16-449-BC**
SITTERS ETC. FRANCHISING, LLC, and BEAU BROTHERS,	)	
Defendants/Counter-Plaintiffs,	)	
AND	)	
RICHARD DESIMONE, and CARPEVITA HOLDINGS, INC.,	)	
Defendants/Cross-Plaintiffs.	)	

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Stated below are the analysis, authorities and rulings that the Plaintiffs' Partial Motion for Summary Judgment is granted in part

— dismissing Defendants' Tenth Affirmative Defense of Beau Brothers' immunity from suit;

— dismissing the claims of the Amended Counterclaim that Florida Home and Richard Laughton were in first breach of the March 2015

ADA deadline, and entering judgment on the Plaintiffs/ Counterdefendants' Tenth Affirmative Defense of waiver; and

— dismissing the Count II claim of the Amended Counterclaim of breach by Heart of the September 1, 2015 deadline to open the Fort Myers unit, and entering judgment on the Plaintiffs/ Counterdefendants' Tenth Affirmative Defense.

The Plaintiffs' Motion for Partial Summary Judgment is denied in part as to

— Sitters alleged material breach of the parties' contracts by failing to update its disclosures on change in franchise ownership;

— the alleged precondition to Sitters filing a counterclaim that Sitters must give contractual notices of default.

Background

This lawsuit arises out of franchises sold by Defendant Sitters Etc. Franchising, LLC ("Sitters"). Defendant Beau Brothers served as the CEO of Sitters from December 1, 2013, to December 22, 2015, and was the majority shareholder of this closely held business. The nature of the franchises is provision of non-medical in-home personal care, offering assisted living/residential care placement services.

Explained in Defendants' counterclaim is their Franchisor's "area representation" model in which the "area representative" contracts with the Franchisor for the right to solicit prospective franchisees and to provide certain services to existing franchisees in a given (usually exclusive) territory. The Franchisor offers three different business opportunities: (a) to establish and operate a Sitters franchise business; (b) to enter into a

Fast Start Agreement for the development of a Franchised Business in a designated geographical area ("Development Area"); and (c) to enter into an Area Developer Agreement for the development of Franchised Businesses in a designated geographical area that is usually statewide or covers a large population in a major television market.

At issue in this lawsuit are two franchise development agreements between Plaintiffs Ralph and Pearl Laughton's two companies, Plaintiff Florida Home Care Givers, LLC, ("Florida Home"), and Plaintiff Heart Body & Mind Healthcare, LLC ("Heart"), and Defendant Sitters, the Franchisor. Florida Home purchased a Sitters area development franchise for a large portion of southwest Florida on March 3, 2014. Included in that agreement is a development schedule requiring Florida Home to have specific numbers of Fast Start developer agreements and individual unit franchise agreements signed and franchise units open for business on the first anniversary of the area development agreement's effective date. It is undisputed that Plaintiffs had no individual or Fast Start developer agreements signed and no units opened by that deadline. Three months after the deadline had passed, on May 29, 2015, Florida Home sold a Sitters Fast Start Agreement to Heart, its affiliated company, covering six individual Sitters units in certain cities within Florida Home's territory. This was done with Sitters' knowledge and assistance, and Sitters signed Heart's Fast Start agreement as its Franchisor.

Heart's Fast Start agreement required it to open its first unit, in Fort Myers, Florida, by September 1, 2015. The unit, however, did not open. Heart had not received its Florida home health agency license by the opening deadline. That license was not received until mid-November 2015.

In early September 2015, Sitters and Mr. Brothers notified Mr. Laughton that Mr. Brothers and his wife had contracted to sell all of the equity interest in Sitters to CarpeVita Holdings, Inc., a third-party whose chief executive officer is Richard DeSimone. Plaintiffs assert that between then and early December 2015, Sitters and CarpeVita proposed that Mr. Laughton voluntarily terminate Florida Home's and Heart's franchises; cease being Sitters developers and franchisees; and enter into new, non-franchised relationships with CarpeVita. During the same time period, in a November 10, 2015 letter to *"all Franchising LLC franchisees and affiliates"* Sitters also announced its plan to "discontinue the sale of franchised home care business network and focus [its] effort on building a national home care network under the CarpeVITA corporate and partnership models."

The Laughtons declined the offered relationship terminations and conversions in early December 2015, and Florida Home and Heart gave written notice to Sitters of the rescission of their respective agreements in late December 2015. The Defendants dispute that the rescission was effective or proper. Each of the Laughtons' companies then

disassociated themselves from Sitters and its brands and system. Plaintiffs filed this lawsuit in February 2016 seeking rescission of the agreements and damages.

The Plaintiffs' complaint initially involved three deceptive practices claims under Tennessee and Florida statutes, and common-law claims for fraudulent and negligent misrepresentation and rescission. Those claims all related to the sale of Sitters franchise agreements to Florida Home and Heart in 2014 and 2015, respectively. In July 2017, CarpeVita and Mr. DeSimone were added as parties to this action. They, along with Mr. Brothers, are defendants in Count VII of the Second Amended Complaint, claiming they engaged in tortious interference with Plaintiffs' contracts. Sitters has counterclaimed against Florida Home and Heart for breaches of contract, attorneys' fees, and unjust enrichment/quantum meruit; and against Ralph Laughton as the franchise agreements' guarantor. Each side has asserted numerous affirmative defenses to the other side's claims.

Some of the factual allegations in Plaintiffs' pleadings are that the Defendants have failed to comply with federal law on the requisites for a Franchise Disclosure Document. Plaintiffs' allegations further include failure of the Defendants to provide promised training, sales leads, and special programs and assistance, and that, at the time the Plaintiffs entered into the agreements, the Defendants intended to re-brand the entire franchise system using new trademarks and terminate the franchise business model, and sell the franchise to CarpeVita, Inc.

The Defendants deny the Plaintiffs' allegations and causes of action and assert that the Plaintiffs defaulted on the parties' agreements, committed first breach, and that personal liability should not be imposed upon Defendant Brothers.

Pending Motion

This case is presently before the Court on the Plaintiffs' Motion for Partial Summary Judgment against the Defendant LLC and Defendant Beau Brothers, individually. The motion does not address CarpeVita and Mr. DeSimone. The motion for partial summary judgment seeks the following rulings as a matter of law:

1. Dismissal of Defendants' Amended Tenth Affirmative Defense asserting that Defendant Brothers is contractually immune from this lawsuit;

2. Dismissal of breach of contract claims contained in Counts I and II of the Amended Counterclaim, and entry of judgment on Counterdefendant's Second, Third, Eighth, Tenth and Eleventh Affirmative Defenses to the Amended Counterclaim, due to Defendants' waiver and additional subsequent deadline extension, and Defendant Sitters' subsequent material breach of the contract;

3. Dismissal of Count II of the Amended Counterclaim and entry of judgment on Counterdefendants' Fourth Affirmative Defense on the grounds that Plaintiff Heart's failure to open the Fort Myers unit on September 1, 2015, is excused as a matter of law because Sitters' contractually required pre-conditions for opening had not yet occurred by that deadline; and

4. Dismissal of Counts I, II, III and IV of the Amended Counterclaim and entry of judgment on Counterdefendants' Sixth and Seventh Affirmative Defenses because Sitters cannot prove that, prior to

> filing these counterclaims, Sitters gave the contractually required written notices of default.[1]

Summary Judgment Standard

In *Rye v. Women's Care Ctr. of Memphis, MPLLC*, the Tennessee Supreme Court provided the standard to apply when ruling on motions for summary judgment.

> Our overruling of *Hannan* means that in Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a

[1] Plaintiffs in their *Reply* at 7 withdrew their statute of limitations affirmative defense to the Amended Counterclaim.

> rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

477 S.W.3d 235, 264–65 (Tenn. 2015), *cert. denied*, 136 S. Ct. 2452, 195 L. Ed. 2d 265 (2016). This is the standard the Court has applied in deciding Plaintiffs' pending motion.

Analysis, Authorities and Rulings

1. Defendants' Tenth Affirmative Defense

Exhibit C and E to the Second Amended Complaint are, respectively, two of the three contracts the parties entered into that are in dispute in this case: the Area Development Agreement ("ADA") and the Fast Start Developer Agreement. These contracts contain, respectively, at paragraphs 15(B)(2) and 14(B)(2), the following provision that the Franchisor's representatives are immune from legal proceedings:

> (2) Developer's Principals and Guarantors represent and agree that the sole entity against which Developer's Principals and Guarantors may seek losses and/or damages or any remedy under law or equity for any claim arising out of or relating to this Agreement, if any, is Franchisor or its successor or assignee. Developer represents and agrees that Franchisor's Representatives (other than the Franchisor itself) shall not be liable or named as a party in any legal proceeding commenced by Developer's Principals or Guarantors. Developer's Principals and Guarantors

> acknowledge that Franchisor's Representatives have relied upon this representation, are intended beneficiaries of this representation and where they are not Franchisor, may take legal proceedings in their own names and independently of Franchisor in order to enforce any rights arising therefrom.

Based upon the foregoing provision, the Defendants have asserted in their Tenth Affirmative Defense to the Second Amended Complaint that Defendant Brothers is immune from this lawsuit. The Plaintiffs' position on summary judgment is that the Tenth Affirmative Defense should be dismissed as contrary to public policy derived from the Tennessee Consumer Protection Act, Florida law, and interpretations of the Federal Trade Commission Act. The Plaintiffs have also cited Tennessee law to the Court concerning the liability of an agent, individually, for torts even though the torts were committed within the agency capacity for the principal. Plaintiffs' advocacy applying these legal theories to the circumstances of this case are that the Defendant LLC is now defunct; therefore if Defendant Brothers is provided immunity the Plaintiffs are without legal redress.

> If these particular contractual immunity provisions are given legal effect, the result will allow Mr. Brothers to "hide behind" his now defunct company, completely frustrating the legislative purposes of the FTC Act, the Franchise Rule, TCPA, FDUTPA and the Florida Franchise Act-all of which seek to prohibit deception and hold responsible those individuals who personally participated in or had the power to control the deceptive acts. Defendants' tenth affirmative defense is contrary to public policy. It must be stricken as being unenforceable as a matter of law.

Memorandum of Law In Support Of Plaintiffs' Motion for Partial Summary Judgment Against Sitters, Etc. Franchising, LLC and Beau Brothers Only, October 27, 2017, at 18.

With respect to Plaintiffs' pending motion, it is the Defendants' position that based upon the contractual immunity provision quoted above, the Defendants are entitled to partial summary judgment dismissing Defendant Beau Brothers from the lawsuit.

Upon studying the law cited by Counsel for both sides, the Court concludes that it is not necessary to use the legal construct of a violation of public policy in analyzing the viability of Defendants' Tenth Affirmative Defense. It is sufficient, the Court concludes, to determine the viability of the Tenth Affirmative Defense based upon the agency law cited in the Plaintiffs' *Reply* filed January 30, 2018.

The Court concludes as a matter of law that the contractual immunity provision in issue might be a defense to a contract claim. The Plaintiffs, however, have not alleged breach of contract. Their allegations all sound in common law or statutory torts, and the remedy sought is one for such torts—rescission and damages.

As cited in Plaintiffs' *Reply*, an agent cannot escape liability for tortious acts under the justification that the agent was acting within scope and course of the agency or at the direction of the principal.

> An agent cannot escape liability for tortious acts, including fraud or misrepresentation, against third persons simply because the agent was acting within the scope of the agency or at the direction of the employer. An officer or director of a corporation who commits or participates in the commission of a tort is likewise liable to third parties regardless of the liability of a corporation. *See Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590-91 (Tenn. Ct. App. 1980). *See also, Jurgensmeyer v. Prater*, No. M2000-02986-COA-R3-CV, 2003 Tenn. App. LEXIS 304, at *19 (Tenn. Ct. App. Apr. 24, 2003); *The Judds v. Pritchard*, CA. No. 01A01-9701-CV-00030., 1997 Tenn. App. LEXIS 647, at *9 (Tenn. Ct.

> App. Sep. 24, 1997). *See also, Cummings v. HPG Int'l, Inc.,* 244 F.3d 16, 21 (1st Cir. 2001) (a party cannot induce a contract by fraudulent misrepresentations and then use contractual devices to escape liability). The Defendants have admitted on the record that Mr. Brothers served as the chief executive officer and had the authority to control Sitters' acts and practices. Ex. PSJ-6 *Def. Sitters' Resp. to Pls.' Req. for Admis. No. 11;* Ex. PSJ-7 *Def. Brothers' Resp. to Pls.' 1st Req. for Admis. No. 4.* Sitters also admitted on the record that each of the documents attached as Exhibit G were prepared by or at the direction of Mr. Brothers. Ex. PSJ-27 *Excerpt of Def. Sitters' Resp. to Pls.' First Req. for Admis. No. 9*. Plaintiffs' claims fall within the class of representations prohibited by TCPA, §§ 104(b)(5) and (12). Section § 104(b)(5) prohibits "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship approval, status, affiliation or connection that such person does not have." *See* TENN. CODE ANN. § 47-18-104(b)(5). Section § 104(b)(12) prohibits "[r]epresenting that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law." *See* TENN. CODE ANN. § 47-18-104(b)(12). "Goods" is defined to include ". . . a franchise, distributorship agreement or similar business opportunity." *See* TENN. CODE ANN. § 47-18-103(7).

Plaintiffs' Reply to Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, January 30, 2018, at pp. 3-5.

From the cases cited above in the quotation of Plaintiffs' *Reply* and the undisputed facts of Mr. Brothers' authoritative role of CEO, the Court concludes that the scope of the contract immunity provision cannot, as a matter of Tennessee law, preclude Defendant Beau Brothers' liability for the common law and statutory torts and negligence alleged in this case. That is because the effect of the contractual immunity provision, if applied as a defense to the Second Amended Complaint, would in this case allow the agent, Beau

Brothers, to escape individual liability for alleged tortious acts. This immunity from tort liability is not allowed under Tennessee law.

It is therefore ORDERED that the Plaintiffs' motion for partial summary judgment is granted, dismissing with prejudice Defendants' Tenth Affirmative Defense.

2. Counts I and II of Counterclaims, and Plaintiffs/Counterdefendants' Second, Tenth and Eleventh Affirmative Defenses

A. Waiver

In paragraph 44(a) and (b) of the Amended Counterclaim, the Defendant asserts the Plaintiffs/Counterdefendants breached the ADA by not performing under that contract:

> 44. Following the effective date of the Area Developer Agreement in March 2014, Plaintiffs FHC and Mr. Laughton breached the ADA in numerous respects, including without limitation:
>
> a. Failing to satisfy all monetary obligations owed to Franchisor under the ADA;
>
> b. Failing to secure the execution and/or opening of the franchise business required by the ADA . . . .

Plaintiffs assert summary judgment should be granted dismissing Defendants' counterclaims that in March 2015 Florida Home and Mr. Laughton were in default of the ADA based upon Plaintiffs' affirmative defense of waiver. In support, the Plaintiffs rely upon the following undisputed material facts.

— Sitters gave no written notice to Florida Home in February, March or April of 2015 that Sitters deemed it to be in default of the ADA.

— Sitters allowed Florida Home to sell the Fast Start agreement and the individual unit franchise agreement covering Fort Myers, Florida to Heart in May 2015.

— Mr. Brothers knowingly countersigned the Fast Start agreement to Heart as Sitters' C.E.O.

— Sitters knowingly accepted the payment of over $70,000.00 as Sitters' share of the initial franchise fees generated by the Heart sale transaction—almost 90 days after Florida Home's first anniversary deadline had passed.

— The only default invoices sent by Sitters are dated January 19, 2016, and in the amount of $13,500. These, it is undisputed, are billed only to Florida Home. The description section merely states, "2015 AD Default Fees Per Agreement 3/13/1315 12/3/1215." There is no specificity on the face of the invoice as required by paragraph 15(b)(1) of the Area Developer Agreement that in the event of a default Sitters is to "specify, to the fullest extent possible, the notifying party's version of facts surrounding the dispute or claim."

— The affidavit of Sitters at paragraph 9 additionally asserts that a letter terminating Florida Home's ADA was sent on or around January 24, 2016. No such letter, however, is attached to the affidavit nor was one produced in discovery. The evidence Defendants rely upon is an email sent by Mr. Brothers to John Mortenson and Richard DeSimone, two people associated with Defendant CarpeVita and not the Plaintiffs, in which Mr. Brothers states his intention to send the letter to Mr. Laughton terminating the ADA. The affidavit makes no statement about any purported termination or cancellation by Sitters of Heart's Fast Start Agreement or Individual Unit Agreement.

— When the ADA and the Fast Start Agreement are read together the ADA's development schedule had to have been changed so as not to conflict with the newly signed Fast Start Agreement. This is because the ADA's initial development schedule required a total of six units to be opened between March 3, 2014 and March 3, 2016.

> But, the Fast Start Agreement's development schedule required its units to be opened between September 1, 2015 and March 1, 2018.

Based upon all of these undisputed facts, the Plaintiffs assert that the Defendants' explanation that there are genuine issues of material fact that instead of waiver they were attempting to resolve the Plaintiffs' default through entering into the Fast Start Agreement is not plausible.

The above undisputed facts, the Plaintiffs assert, constitute waiver under Tennessee law.

> Waiver may be proved by "a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was [the party's] intention and purpose to waive." *Baird v. Fidelity-Phenix Fire Ins. Co.*, 178 Tenn. 653, 162 S.W.2d 384, 389 (Tenn. 1942). It is well settled under Tennessee law that "by accepting benefits under a contract with knowledge of a breach, the non-breaching party waives the breach." *Madden Phillips Constr. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 815 (Tenn. Ct. App. 2009). One cannot escape the legal conclusion that Sitters waived Florida Home's breach, alleged in Counterclaim Count I, ¶44(a), and that recovery therefore under ¶44(b) is barred as a matter of law.

Plaintiffs' *Memorandum*, October 27, 2017, at 19.

The Court agrees. The record of undisputed facts and the Tennessee law of waiver establish that in this case there are no genuine issues of material fact. The Defendants waived holding Florida Home and Plaintiff Laughton to the deadlines and requirements of the ADA.

It is therefore ORDERED that Plaintiffs' Motion for Partial Summary Judgment is granted dismissing the counterclaims of first breach by Florida Home and Mr. Laughton

in March 2015 of the ADA and entering judgment on Plaintiffs' Tenth Affirmative Defense.

B. Sitters' Alleged Failure to Update Disclosures—Amended Counterclaim Count I, and Counterdefendants' Second, Third and Eighth Affirmative Defenses

In this part of the Plaintiffs' Partial Motion for Summary Judgment, they assert that the entry by Defendants Sitters and Brothers into a binding agreement to sell all of their ownership interest in Sitters to CarpeVita was change of control of the franchise and, therefore, as a matter of law constituted an obligation of Sitters to update its franchise materials and disclosures to Plaintiffs and which, in turn, triggered the obligation of the Plaintiffs to timely make additional disclosures to prospective Sitters franchisees. The failure of the Defendants to provide these updates, the Plaintiffs assert, constitutes a first breach of the parties' contracts and precludes the Plaintiffs' performance of the contracts and precludes Defendants' counterclaims against Plaintiffs for breach of contracts.

In support of their theory that change of control of a franchise is a material event triggering updated disclosures, the Plaintiffs cite to scholarly articles, FTC franchise rules, and case law and statutes of other states.

After studying the briefs of Counsel and the parties' contracts, the Court denies Plaintiffs' motion for partial summary judgment on this issue. The Court sees that in

paragraph 15G of the Franchise Agreement, the Plaintiffs are told and agree that the Defendants may assign and transfer the Franchise ownership.

G. Transfers by the Franchisor and Licensor

> The Franchisor, Licensor and their respective Principals may assign and transfer without any restrictions the interests of the Franchisor and Licensor in this Agreement, and their respective Ownership Interests, the System and the marks. The Franchisee agrees not to interfere in or attempt to interfere with a proposed transaction by the Franchisor, Licensor or by their respective Principals. If the Franchisor assigns this Agreement, the Franchisor shall be released from all further liability under this Agreement arising after the effective time and date of the assignment. Nothing contained in this Agreement requires the Franchisor to offer any services or products, whether or not bearing the Marks, to the Franchisee if the Franchisor assigns its rights in this Agreement.

The foregoing contact provision establishes the fact that the Plaintiffs knew from the outset that the Defendants had the contractual right to change ownership "without any restrictions." This notice, then, creates a genuine issue of fact on whether the change of control in this case was a material event to the franchise system. If the Plaintiffs knew from the outset change of control was allowed without any restrictions, they would need to provide proof of other facts to show such a change was material to Plaintiffs. At this stage of the litigation, that additional proof is not in the record.

Because only a material event triggers updates by the Defendants, at this stage of the litigation it has not been established that failure to give the updates constituted first breach by the Defendants of the parties' contract. Without establishing Defendants' first

breach, Plaintiffs have not established on summary judgment their contract performance was excused.

It is therefore ORDERED that Plaintiffs' Motion for Partial Summary Judgment is denied concerning Sitters' alleged first breach in not providing updated disclosures.

3. Failure of Heart to Obtain License—Amended Counterclaim Count II and CounterDefendants' Fourth Affirmative Defense

The contractual and statutory provisions relevant to this part of the partial summary judgment motion are as follows.

— Section 8(A) of the parties' Unit Franchise Agreement, Exhibit H to Second Amended Complaint, requires a Franchisee to complete pre-opening requirements such as obtaining all required licenses.

— Defendant Sitters admits that it maintained a policy of requiring Franchisees to obtain all necessary State licenses before opening their businesses. Defendant Sitters' Response to Plaintiffs' Request for Admission No. 17.

— Florida law requires a home health agency to be issued a license by the Health Care Administrative Department before an applicant can operate a home health agency. Fla. Stat. § 400.464(1).

— The Plaintiffs' Fast Start Agreement required the Fort Myers unit to be open to the public for business on September 1, 2015.

In the context of the foregoing, Plaintiffs assert that Heart's failure to open the Fort Myers unit by September 1, 2015, is excused as a matter of law and, therefore, does not constitute breach. In so asserting, the Plaintiffs cite to the Florida addendum to the

Fast Start Agreement, Exhibit B to the Second Amended Complaint, which provides that failure to obtain an acceptable site and open a franchise business within the required time period allows the franchisor to terminate the agreement and retain all received monies: "but if we determine that you have made, and continue to make, reasonable efforts to open and have been delayed solely to forces outside your control, we may extend your opening deadline for up to six months at our option."

It is undisputed that the Plaintiff Laughtons in late October sent an email to Mr. Brothers advising him that Heart did not expect to receive its State license until at least November 6 or later. It is also undisputed that the home health care agency license issued to Heart by the State of Florida is dated November 20, 2015. Lastly, from September through December 2015, there are no facts of record to indicate that Sitters did not act consistent with the understanding that Heart was not permitted to open its Fort Myers unit until it had obtained its Florida home health agency license.

The Plaintiffs argue that the requirement for licensure in the parties' contract in this case constituted a conditional contract where the obligation to perform is dependent on the happening some contingency which is expressly stated in the contract, citing to *Stoval v. Dattel*, 619 S.W.2d 125 at *14 (Tenn. Ct. App. 1981). Plaintiffs further assert that no liability under such a contract attaches until the condition precedent is fulfilled. *Dick Moore v. Greentree Fin. Corp.*, 1999 Tenn. App. LEXIS 777 at *7 (Tenn. Ct. App. Nov. 18, 1998). The Plaintiffs alternatively assert that Defendant Sitters is equitably

estopped from insisting upon the September 1, 2015 deadline because Sitters' disclosures affirmatively state that it would extend an individual unit opening deadline up to six months if the Franchisee used good faith but could not open due to forces beyond its control.

The Defendants' position is that although they agree that compliance with State licensure was a requirement, Defendants' theory is that it was a contractual duty and not a condition precedent to performance. The Defendants assert, "the contractual language of the Fast Start Developer Agreement likewise imposes a crystal clear contractual duty on HBM's part to comply with the development schedule: if it did not it would be in material default." Defendants' *Response*, January 23, 2013, at 34. Defendants further assert that their counterclaims are not based only on delay but on the complete failure of Heart to obtain licenses in a timely manner and to open multiple franchise locations. The Defendants assert that the failure to open one of the units on time being excused does not excuse performance of opening multiple locations under the Fast Start Developer Agreement.

With respect to these issues, the Court concludes that under Tennessee law the requirement to obtain licensure was a condition precedent. The Court further finds that it is undisputed that Plaintiffs' compliance with the September 1, 2015 opening deadline was excused of necessity and, thus, cannot be asserted as the basis of a breach.

It is therefore ORDERED that on this issue Plaintiffs' Motion for Partial Summary Judgment is granted, and that on this issue Count II of the Amended Counterclaim is dismissed and judgment is granted on the CounterDefendants' Fourth Affirmative Defense, that the failure to open the Fort Myers unit on or before September 1, 2015, was a circumstance beyond the CounterDefendants' control and does not constitute a default or breach and that Sitters is equitably estopped from claiming the Fort Myers unit had to be open before Heart had received its home health state agency license.

4. Written Notice Prior to Filing Counterclaims—Amended Counterclaim Counts I, II, III and IV, and Counterdefendants' Sixth and Seventh Affirmative Defenses

The Plaintiffs assert that Counts I, II, III and IV of the Amended Counterclaim should be dismissed and judgment should be granted on Plaintiffs/Counterdefendants' Sixth and Seventh Affirmative Defenses to the Amended Counterclaim because the Defendant Franchisor failed to fulfill the condition precedent of giving written notice of default under the ADA and Fast Start Agreement prior to filing its counterclaims for breaches of contracts.

This part of the motion for partial summary judgment relates to paragraphs 15(B)(1) and 14(B)(1) of the ADA and Fast Start Agreement previously quoted and requoted as follows, "Each party agrees to first notify the other in writing of any disputes or claim arising out of or relating to the Agreement" and "the written notification shall

specify, to the fullest extent possible, the notifying party's version of facts surrounding the dispute or claim."

The Defendants dispute that this provision requires notification before a counterclaim is brought, but, even so, assert that the provision is inapplicable as futile. The Plaintiffs were the ones who filed the suit, thereby triggering the potential for filing counterclaims including compulsory ones, and the Plaintiffs asserted the contracts had been rescinded.

After studying the undisputed facts and legal analysis of Counsel, the Court adopts the Defendants' argument that these provisions requiring notice and specificity of incidents of default, being part of a section labeled "Dispute Resolution" in the contracts, pertain to resolving disputes short of litigation, and that these provisions were rendered futile and moot upon the Plaintiffs filing their lawsuit and do not serve as a basis to dismiss the counterclaims.

It is therefore ORDERED that the Plaintiffs' Motion for Partial Summary Judgment to dismiss Counts I, II, III and IV of the Counterclaim for failure of Defendants to provide the contractual notices of default is denied, and entry of judgment on the Plaintiffs' Sixth and Seventh Affirmative Defenses is denied.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

Roland Baggott III
Stephen M. Feidelman
Joshua Burgener
Mallory Schiller
Ariel Kelly
John Floyd, Sr.
John Floyd, Jr.