Be Thin, LLC, a New York Limited Liability Corporation, Plaintiff, - vs. – Baldev Sandhu, 1800 DRS Diet LLC, a New Jersey Limited Liability Corporation, Ofeck & Heinze, L.L.P., a New Jersey Limited Liability Corporation, and Mark F. Heinze, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : BERGEN COUNTY CIVIL ACTION NO. BER-l-1568-08

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

The claim for tortious interference with contract is premised on outrageous conduct, outside the bounds of normal business competition, meant to sever the contractual relationship between two parties. Frequently, courts are presented with "plain vanilla" aggressive competition and wisely refuse to involve themselves in the regulation of normal, healthy commerce. The law in this State requires only that the methodology of competition be fair, the means justifiable, the actions taken by a competitor tolerable as measured by current standards of acceptable business practice.

This, however, is one of the other times.

Here one desperate businessman – Baldev Sandhu and his company, 1800 DRS Diet LLC (collectively, "Sandhu") – seeking to induce customers of plaintiff Be-Thin, LLC ("Be-Thin"), a competing provider of medical weight loss programs to breach their contracts and switch their business to him, crossed the line. He did not merely contact these customers directly and urge them to do business with him instead. Rather, after Be-Thin's customers ignored his entreaties, Sandhu actually hired an attorney to write a letter on legal stationery claiming that Be-Thin was operating illegally, distributed that letter to Be-Thin's clients, and urged Be-Thin's customers to hire that lawyer to sue Be-Thin to get out of their contractual

obligations. All this was done with the attorney's full knowledge and cooperation.

While the acts of the defendants complained of here have no precedent in our law, their unfairness, lack of justification and departure from normal business practice easily meet the low standard required for a plaintiff to withstand a motion to dismiss for failure to state a claim. Here, too, plaintiff should be given the opportunity to redress the wrongs done to it by those, such as defendant, who substitute deception and sharp practices for competition based on offering superior service, price or other merits recognized by the market.

STATEMENT OF FACTS[1]

Plaintiff, Be-Thin, LLC, is a New York limited liability company in Tarrytown, New York ("Be-Thin"). Be-Thin offers training and guidance to board certified physicians who wish to provide medical weight loss services for the treatment of obesity and weight related illness. The physicians involved in plaintiff's medical weight loss program use the most current standards of care in bariatric medicine, along with FDA-approved weight loss prescription medications, to help patients lose weight quickly and effectively. Be-Thin also enters into agreements to provide advertising and marketing services to

[1] All the facts set forth herein are taken from the Complaint filed in this matter.

physicians who wish to utilize Be-Thin's program to treat their own patients' weight issues.

Defendant Baldev Sandhu, of Cresskill, is the principal of defendant 1800 DRS Diet LLC of Englewood Cliffs, a company that competes with Be-Thin. Defendant Ofeck & Heinze, L.L.P. is a law firm in Hackensack, one of whose partners is defendant Mark F. Heinze (collectively the "attorney defendants"). The attorney defendants act as Sandhu's attorneys and, as the facts demonstrate, partners and co-conspirators in Sandhu's efforts to undermine plaintiff's business. They do this in return, by all indications, for an anticipated flow of clients – hoped-for former customers of Be-Thin – to their law firm. It is not known what other financial or commercial arrangements there may be among the defendants.

For his part, Sandhu is a former physician with whom two principals of plaintiff contemplated going into business in 2005 with the intention of promoting medical weight loss programs to the public. Ultimately the parties could not come to terms, however, and broke off negotiations in August 2005. In January 2006 Be-Thin was formed without Sandhu. Evidently, as subsequent events demonstrate, Sandhu never forgave them for this, as their business began to prosper without Sandhu.

Sandhu established his own diet center business, marketed in part at an Internet website found at http://www.1800drsdiet.com,

which advertises "turnkey marketing and weight management" to physicians in return for a $7,995 initial set up fee, plus monthly fees for website and Internet advertising of $200 and $1,000 respectively. The site also demonstrates to physicians the additional profits to be made at each juncture of treatment.

Sandhu's website is amateurish, of poor quality, and reveals no information about the people or the business behind it. There is no indication from the website that Sandhu's company has any customers at all. Not surprisingly, Sandhu's business was and is not as successful as Be-Thin's. The frustrated Sandhu began to plot a way to undermine Be-Thin's business, but one that would not require him to make the level of investment or achieve the level of quality and customer satisfaction that Be-Thin has. Instead, he decided to take the customer base built up by Be-Thin and, by bombarding them with what he believed was damaging information about the company, scare them into breaking their contracts with Be-Thin. He also presented himself, of course, as an attractive alternative, notwithstanding the generally low level of success of his own company on its merits.

In 2007, Sandhu mailed a written solicitation to physicians participating in Be-Thin programs, commonly referred to as "members," saying that "he has received complaints from Be-Thin members, that our phone number is not a "marketable number" and

that the Be-Thin business model would "never be successful." He did not identify those "members" who had complained. In November 2007, attorneys for Be-Thin wrote to Sandhu and demanded that Sandhu cease and desist interfering with the Center's contractual relationship with its members. Indeed, that same month, one member doctor, Tabitha Fortt, MD, sent a termination letter to Be-Thin in a format – evidently suggested, or drafted, by the attorney defendants. Naturally, Dr. Fortt's withdrawal caused a financial loss to Be-Thin.

In January, 2008 Sandhu transmitted another letter to all Be-Thin members, this time claiming that the Center's arrangements with them were a violation of New York franchise regulations.[2] Enclosed in each transmission by Sandhu was a copy of a letter from the attorney defendants in which they, as attorneys for particular Be-Thin member physicians, purported to terminate their contracts with Be-Thin. The last paragraph of Sandhu's letter says:

> If you wish to obtain ANY restitution from CMWL [Be-Thin] it is important that you have the assistance of an aggressive attorney that [*sic*] is thoroughly familiar with the intricacies involved in this matter who can represent you diligently in New York Courts. Several former CMWL clients have already initiated the process, see enclosure. Should you require assistance with your medically supervised medical weight loss program we stand ready to help you. Please

[2] Be-Thin, LLC denies the existence of a franchise, and is defending against that allegation in the New York litigation.

> feel free to call me should you require any assistance.

Exhibit C to the Certification of Mark F. Heinze, submitted by defendants. The "enclosure" – the letter from the attorney defendants, also attached as Exhibit C to defendants' submission – was in turn calculated by defendants to leave the member recipients with the false impression – without exactly stating so – that an unbiased legal determination had been made by someone with expertise, authority or an official capacity as to the legality of the Be-Thin program. No such determination has ever been made, however. Nor has any official body taken any sort of action or otherwise cited, disciplined or penalized Be-Thin for its activities in any jurisdiction.

In fact, the letters from the attorney defendants themselves probably violated numerous provisions of the Rules of Professional Conduct (RPC) governing attorneys in this State, including the Rules governing attorney advertising, the prohibition of direct contact with prospective clients, the prohibition of the publication or transmission of misleading communications by attorneys, and other provisions of the RPC. The defendant attorneys' use of Sandhu's mass mailing as a pretext for distributing their barely-masked client solicitations was not only a thin cover for their unethical conduct, but a uniquely unprofessional and unseemly involvement by an attorney in a client's campaign to undermine another's

business – Be-Thin – by the spreading of innuendo and the encouragement of litigation.

It hardly seemed possible that an attorney, when accused of such a use of his correspondence, would not put a stop to it, explain it, or defend it. So on February 7, 2007, attorneys for Be-Thin wrote to defendant Heinze, as follows:

> This office represents Be Thin, LLC ("Be Thin"), to which you have addressed two recent letters on behalf of clients of yours, Physicians Medical Group and Shailaija Menon. In addition, another person whom we have reason to believe is a client of yours – Dr. Baldev Sandhu, a non-practicing MD who is a competitor of Be Thin – has recently transmitted an unknown number of "attack letters" regarding Be Thin, making use of correspondence from your office.
>
> Dr. Sandhu's letters are a misguided and unlawful attempt by him to interfere with the contractual relationships between Be Thin and its clients and otherwise to compete unfairly with Be Thin. Our client is currently considering its options in terms of responding to Dr. Sandhu's actions, including bringing an action for an injunction and damages for wrongful interference with contract under New Jersey law. It also appears that your firm may be disseminating misleading information regarding putative legal questions regarding franchise law as it relates to the Be Thin program in concert with Dr. Sandhu's letter campaign. We note that Dr. Sandhu has included letters from your office in mailings he has sent to clients of Be Thin.
>
> We write now to demand that you either (1) disclose any action or program to discredit Be Thin being undertaken by your office in cooperation with Dr. Sandhu, or

> (2) explicitly represent that you are not representing Dr. Sandhu, that he is not authorized to use your stationery or your correspondence in connection with his present efforts, and that your firm has instructed him or will immediately instruct him to cease his use of correspondence from your office in his communications with third parties and to take appropriate corrective action regarding those persons with whom he has already been in contact utilizing your firm's letters.

Exhibit C to the Certification of Mark F. Heinze.

Heinze, however, did not respond. He did not deny these claims in any way, acknowledging by his silence the accusations in the February 7th letter that his own correspondence was misleading, and that he was aware that Sandhu was using that misleading correspondence as part of his deceptive "attack-marketing" campaign. Regrettably, plaintiff was left with no choice but to bring this action and seek relief from this Court from this creative new "approach" to destroying another's business by "leveraging" a cooked-up attorney's "opinion letter" claiming that that business is "illegal," distributing it to all that business's customers, picking up those that are intimidated by the ponderous-sounding legal opinion – or who seek an excuse to get out of the contract for their own reasons – while delivering a stream of fee-paying clients to the attorney.

LEGAL ARGUMENT

I. PLAINTIFF HAS STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Legal standard

The test for determining the adequacy of a pleading under R. 4:6-2(e) is whether a cause of action is "suggested" by the facts. *Velantzas v. Colgate-Palmolive Co.*, 109 *N.J.* 189, 192 (1988). Notwithstanding defendants' fulsome but irrelevant submissions, the Court's inquiry on this motion is limited to examining the legal sufficiency of the facts alleged on the face of the complaint.[3] In making such an examination, a court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary," and plaintiffs are entitled to every reasonable inference of fact. "Thus the examination of a complaint's allegations of fact should be one that is at once painstaking and undertaken with a generous and hospitable approach." *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739 (N.J. 1989), *quoting*, *Di Cristofaro v. Laurel Grove Memorial Park*, 43 *N.J. Super.* 244, 252 (App.Div.1957).

[3] Thus the entire set of New York litigation papers submitted by defendants as Exhibit D to the Heinze Certification are irrelevant to this motion, and clearly were filed only to further defendants' goal of smearing plaintiff. The Court should not consider them for any purpose.

Considering this high standard, and the outrageous nature of the conduct alleged in this case including the mass-mailing to plaintiff's customers of an attorney's opinion letter alleging that plaintiff's business was illegal, the Court should have no difficulty ruling that defendants' motion be denied.

B. Plaintiff has pleaded an actionable claim for tortious interference with contract.

As the complaint in this action makes clear, what makes defendants' actions tortious and not mere market competition is that defendant Sandhu hired an attorney to write a letter on legal stationery, claiming that Be-Thin was operating illegally, and then sent that letter to Be-Thin's clients. And on this motion to dismiss, his approach is of a kind: Ignore the actual issues and smear plaintiff with recitations of wrongdoing that have nothing to do with the case at bar. That defendant Sandhu has recruited the aid of an attorney, a defendant in this lawsuit, to dress up his efforts at alienating plaintiff from its clients in the veneer of "public interest" and – ironically – a heightened and offended sense of legality, only makes defendants' efforts more transparent. This Court should not allow itself to be so distracted.

Defendants properly set out the elements of a claim for tortious interference with contract in New Jersey, but, not surprisingly, devote their analysis and defense to what the

claim here is **not** about: The mere transmission of "truthful information" to plaintiff's customers, which they suggest is the broad, unqualified permit of *East Penn Sanitation, Inc. v. Grinnell Haulers, Inc.*, 294 N.J. Super. 158 (App. Div. 1996).[4] Defendants restate this rule relentlessly and redundantly, testing individual sentences in their letters for literal truth – quite often, unsuccessfully in fact[5] – and repeating their cynical pretense that they are merely in the business of "information distribution."

As set out below, what is appropriate here if for the Court to look at the entire fact pattern and the context of defendants' communications, and to consider the actual holdings of the cases cited by defendants in their desperate attempt to overcome the high burden for dismissal of a complaint of R. 4:6-

[4] Defendants' brief is actually rich with irrelevant defenses made to claims that are not part of this action, such as the fact that violations of the Rules of Professional Conduct (RPC) cannot themselves form the basis of a cause of action (Defendants' Brief at 18). Of course, plaintiff's claim here is not based on the attorney defendants' gross violations of the RPC, but rather the manner in which their unethical conduct constituted, along with the actions of defendant Sandhu, tortious interference. This journey into irrelevancy reaches a high point at page 26 of Defendants' Brief, in which they analyze statements that they acknowledge "[t]he Complaint does not suggest is distorted or misleading," but which are obviously included for purposes of swaying the Court with (unjustified) allegations of generalized wrongdoing on the part of plaintiff.

[5] For example, regarding the sentence in their February 4th letter, "If you did not receive, and sign for, a franchise registration agreement with Centers for Medical Weight Loss (CMWL) you may be entitled to rescission of the agreement as well as restitution of ALL funds you have paid CMWL," defendants in their Brief inexplicably claim, "Nor … does this statement call for the recipient of the letter to breach their agreement with plaintiff…" This is outrageous enough, but placed in the context of other statements in the letter – including the suggestion that recipients hire an "aggressive attorney" and that "Should you require any assistance with your medical weight loss program we stand ready to help you" – it is completely contrary to what the letter says. Defendants' Brief at 27-28.

2(e), and apply them to the actual, rather shocking facts alleged in the complaint. Such analysis indicates that dismissal is patently inappropriate here, and that this case cries out for further development of the factual record and an opportunity for plaintiff to have its day in court in response to defendants' outrageous, underhanded and shocking conduct.

1. The "public interest" privilege for interference with contract does not apply here.

To camouflage the indefensibility of their ugly campaign against plaintiff's business, defendants cite broad, general and undisputed rules of law extolling the virtues of competition and promotion of the public interest. They rely largely on the language in *Middlesex Concrete Products and Excavating Corp. v. Carteret Industrial Association,* 37 N.J. 507, 518 (1962) for the unremarkable proposition that a defendant's interference with a contract may be privileged by a showing of a "public interest" motivation. They then go painstakingly, a line at a time, through the communications made in the correspondence they mailed to Be-Thin's clients and argue – quite unpersuasively – that these meet this standard, or are otherwise defensible. In doing so they ignore the "big picture": sending a deceptive mass-mailing, including a dubious "opinion" on legal letterhead, explicitly urging plaintiff's clients to breach their contracts.

This is utterly unlike the case of *Middlesex Concrete Products*, where the defendants were trying to influence

municipal negotiations regarding a contractual dispute of obvious public interest. That is the essence of participatory democracy, and those defendants' entitlement to the public interest privilege was not only axiomatic but of constitutional dimensions. In contrast, here the defendants are (1) a direct competitor crassly interested only in grabbing business from a successful adversary, and (2) a law firm that hired out its letterhead to that competitor to aid in those anti-competitive efforts and generate legal fees for itself. Together these defendants orchestrated a campaign of mass mailings to individual customers of plaintiff – customers defendant Sandhu hoped to intimidate into signing onto his failing business and whom the defendant attorneys sought to turn into paying clients.

This was no "public service"; indeed, as a transparent ploy for an attorney to drum up legal fees, it was quite the opposite. Indeed, these actions were taken only after the failure of an earlier letter-writing campaign by defendant Sandhu – the November 7th Memo and the February 4th Letter – attempting to convince customers of plaintiff to breach their contracts and do business with defendants. No "public interest" was suggested then.

Not only are the facts of *Middlesex Concrete* and *East Penn Sanitation* obviously distinguishable from those here, but defendants deceptively suggest that the breadth of the

"competitors' privilege" permits more or less any conduct by a competitor short of bank robbery or arson in order to "compete." That is not the law in this State. As our Supreme Court has taught:

> [Defendant]'s conduct, if proven, could not be justified merely because he was a competitor motivated by profit. See, e.g., *Harris v. Perl*, supra, 41 N.J. at 461 ("[O]thers too may further their equal interest, and if the means are fair, the advantage should remain where success has put it.") However, "[t]he justification must be as broad as the act, and must cover not only the motive and the purpose, or, in other words, the object sought, but also the means used." . . . So here, although [defendant] surely sought to bring profit to [his company] from the [interference with plaintiff's contract with its customer], the fact-finder could conclude that **the means he is alleged to have employed were intolerable, as measured by current standards of acceptable business practice**.

Printing Mart-Morristown, 116 N.J. 739, 758-759 (emphasis added; some internal citations omitted). Seeking to generate profit for a competitive business, says the Supreme Court, is one thing. Using "intolerable" means to do so, "as measured by current standards of acceptable business practice," is something altogether different; something forbidden by New Jersey law; and something appropriately weighed by a finder of fact.

It cannot be said that the allegations here do not make out an intolerably unethical business practice – that the use of an attorneys' letter, including subjective (and unadjudicated)

claims of illegality by plaintiff slyly suggesting that plaintiff's customers themselves could be involved in something illegal; done as part of a mass-mail solicitation campaign to plaintiff's clients; urging them to contact that same attorney and to breach their contracts and switch their business over to defendant Sandhu – to the degree of judicial certitude required under R. 4:6-2(e), to fall within the "current standards of acceptable business practice."

Defendants would have this Court endorse, on a motion to dismiss and without discovery or testimony, a competitors' use of menacing, misleading, bought-and-paid-for litigation correspondence from a law office as a marketing-and-intimidation piece in client solicitations meant to both suck in clients and induce breaches of contract. Instead they pretend that the complaint is about "truthful communications," and then tortuously wend their way word-by-word through the purported "literal truth" of their series of communications, missing the forest of tortious interference for the trees. This Court should not be fooled into closing its eyes to the whole of what is being alleged here, and the plain conclusion that dismissal is completely inappropriate.

2. The "truthful communication" rule regarding interference with contract does not apply here.

The rule of *East Penn Sanitation* is that the "mere" provision of truthful information to one contracting party

regarding the other is not a wrongful interference with contract. *Id*. at 35. Defendants rely on no case so much as they do *East Penn Sanitation*, but, again, do not actually discuss the facts of that case, for to do so would demonstrate just on just how thin, and inappropriate, a reed they base their motion to dismiss.

The truthful information in *East Penn Sanitation* found to be privileged was the simple, objective fact that the plaintiff did not have the license required to do the work that was the subject of the contract. This was a "true or false" proposition: There was no license, period. This datum was not a biased legal opinion, a purported analysis or a suggestion of a legal conclusion.

The distinction between the utterance of a simple, objective fact – the unambiguous fact of the lack of a party's possession of a license - and the sort of communication being complained of here claiming, baselessly, that plaintiff is operating illegally, is not merely a quibble. This is not a matter of reporting data or statuses, but rather a complex scheme of which the "information transmission" was merely a small part. In contrast to just "passing along information," here:

- defendant Sandhu engaged the attorney defendants;

- attorney defendants are not evidently expert or even, based on the public record, experienced in the highly specialized field of franchise law[6];
- attorney defendants nonetheless rendered "an opinion" in which they "found" that plaintiff's activities were unlawful;
- attorney defendants made that "finding" despite the absence of any adjudication or other official, objective adjudication of the same by any agency;
- which "opinion" happens to benefit his client;
- defendant Sandhu is a direct competitor of his supposedly "illegal" competitor, the plaintiff; and
- defendant Sandhu is a spurned investor in the plaintiff's company;
- defendant Sandhu had already unsuccessfully engaged in a series of letter-writing campaigns attempted to wean customers form plaintiff; and
- attorney defendants permitted this legal "finding" to be distributed to customers of plaintiff and potential clients of the attorney in violation of, or meant

[6] Despite any obvious indication of experience or expertise in the area of franchise law, defendant Sandhu's February 4th letter – which defendant Heinze never denied he was aware Sandhu was sending along with his own to Be-Thin's clients – describes Heinze as "an aggressive attorney that is thoroughly familiar with the intricacies involved in this matter who can represent you diligently in the New York Courts."

cynically to evade, legal ethics rules regarding the solicitation of clients and barratry; and

- who packaged the foregoing in a letter from defendant Sandhu urging his main competitor's clients to consider the "illegality" of plaintiff's business – **based on the enclosed attorney's letter purporting to state a legal conclusion** ("see enclosure" – the February 4th Letter) – to contact him if they require "any assistance."

This series of cynical, misleading and manipulative actions by a frustrated business competitor, in concert with an ethically challenged attorney seeking new engagements, is a far cry from the narrow set of facts to which the rule in *East Penn Sanitation* applies. Defendants suggest that their "public interest" claims be taken at face value without discovery, but given their obvious bias, they cannot say why they should be. Given the requirement that, on a motion to dismiss, a court give every benefit of the doubt to the pleading party, the complaint here clearly presents a set of allegations absolutely worthy, at the R. 4:6-2(e) stage of a case, of being afforded opportunity for further discovery and ultimately trial.

a) The alleged "illegality" component of a plaintiff's agreements with its customers does not provide a privilege to interfere with that contract where the contract is only voidable.

Just as defendants would have the recipients of its mailing believe their legal "finding" of illegality, they would have

this Court believe that the alleged illegality of plaintiff's arrangements with its customers is a magic bullet against a claim of interference. In doing so they completely misread the law regarding tortious interference with contract.

Defendants rely on the language in *East Penn Sanitation* that suggests that the "illegality" of a contract weighs against a finding of unlawful interference with it by a third party. In fact, notwithstanding that defendants' allegations of illegality are baseless – an argument not appropriately conducted in this Court, and especially on this motion – defendants are mistaken both in the scope and application of this rule.

Defendants' "illegality" argument ignores the fact that, as the Appellate Division acknowledged in *East Penn Sanitation*, "contracts which are **voidable** by reason of the statute of frauds, formal defects, lack of consideration, or even uncertainty of terms, **still afford a basis for a tort action when the defendant interferes with their performance**." 249 N.J. Super. at 180, *quoting*, *Harris v. Perl*, 41 N.J. 455, 461 (1961) (emphasis added). *Accord*, *Source Entm't Group, LLC v. Baldonado & Assocs., P.C.*, 2007 U.S. Dist. LEXIS 39209 (D.N.J. May 31, 2007) ("in New Jersey . . . a voidable contract may still afford a basis for a tortious interference claim when a defendant interferes with the performance of the contract").

That rule applies straightforwardly to this case, and demolishes defendants' attempts to hide their tortious interference behind the skirts of their meritless allegations of illegality – even assuming, *arguendo*, that they would be entitled to assert that privilege based on their own, biased, "opinion."

b) Non-compliance with the New York Franchise Practices Act does not render a purported franchise agreement illegal, only voidable.

Having established that a voidable contract may be the subject of a claim for tortious interference, and without addressing the merits, *vel non*, of defendants' claims regarding the New York Franchise Sales Act, GBL § 680 *et seq*., one legal proposition regarding that Act is clear: Non-compliance of the Act by franchisors such as those alleged by defendants render a franchise agreement thereunder, at best, voidable – not void – and do not protect defendants from the consequences of their tortious actions.

There is little question that the New York Franchise Sales Act does not render non-compliant franchise agreements a legal nullity or otherwise make them "illegal." *See*, *Sandvik AB v. Advent Int'l Corp*., 220 F.3d 99, 107 (3d Cir. 2000) ("we draw a distinction between contracts that are asserted to be 'void' or non-existent, as is contended here, and those that are merely 'voidable'"). As the court ruled in *TKO Fleet Enters. v. Elite*

Limousine Plus, Inc., 184 Misc. 2d 460, 708 N.Y.S.2d 596, *aff'd*, 286 A.D.2d 436, 729 N.Y.S.2d 193 (2d Dept. 2001), to hold otherwise would be to read into that statute a harsh result that the New York legislature never intended:

> It is significant that the Franchise Sales Act affords a statutory remedy to franchisees if the franchisor sells a franchise in violation of section 683. Pursuant to section 691 (1), a franchisee may sue for "damages and, if such violation [is found to be] willful and material, for rescission, with interest at six percent per year from the date of purchase, and reasonable attorney fees and court costs." The courts have acted to promote the public policy underlying the Franchise Sales Act by protecting franchisees' enforcement of these rights against noncomplying franchisors. It is noted that the remedy of rescission is subject to a three-year Statute of Limitations. . . . It follows that, inasmuch as the statute provides a remedy for aggrieved franchisees, and is not intended to regulate the parties' actual contractual relationship, this court does not accept defendants' contention that an additional penalty, a nullification of the contract, be read into the regulatory scheme.

Id. at 463, 708 N.Y.S.2d 596. In so ruling, the *TKO Fleet Enters.* court rejected the holding of an earlier, unreported case, *King Computer, Inc. v. Beeper Plus, Inc.*, 1993 U.S. Dist. LEXIS 2707 (S.D.N.Y. Mar. 8, 1993), to the contrary, stating:

> To the extent that this court considers the rationale of King Computer (supra), it respectfully declines to follow the same. It is apparent that King Computer has not since been adopted by any court in construing violations of section 683. As one commentator has noted, King Computer is "unprecedented" and "unique nationwide" in

> its reasoning as it is applied to franchises. (Kaufmann, Practice Commentaries, McKinney's Cons Laws of NY, Book 19, General Business Law art 33, at 381.) Moreover, the King Computer rationale is premised upon non-franchise-related cases. (Kaufmann, op. cit., at 381.) It has further been noted that King Computer troublingly suggests a rule whereby franchisors who fail to register "cannot enforce their New York franchise agreements – although their franchisees conceivably can." (Kaufmann, op. cit., at 381.)

Id. at 462, N.Y.S.2d at 595. Clearly New York courts have consistently refused to read nullification, i.e., the status of illegality on which defendants hang so much, into the New York Franchise Sales Act.

Faced with a nearly identical situation, the Third Circuit Court of Appeals acknowledged in *Fineman v. Armstrong World Indus.*, 980 F.2d 171 (3d Cir. N.J. 1992) that New Jersey law would not bar a claim for tortious interference with contract merely because the contract involved may not have complied with all aspects of the comparable Connecticut franchise law. The Circuit Court noted that the application of Connecticut's franchise law in that case only made the contract voidable, and ruled that the District Court's ruling that a tortious interference claim could not be maintained – based on an erroneous elision of the concepts of void (illegal) and voidable contracts – was error:

> New Jersey law, which we apply to the claim of tortious interference, clearly provides

> that voidable contracts may still afford a basis for a tort action when the defendant interferes with their performance. Harris v. Perl, 41 N.J. 455, 197 A.2d 359, 363 (N.J. 1964). Given this rule, TINS' tortious interference claim against Armstrong is not defeated simply because Stern withdrew and voided the letter of intent.

Id. at 189. Thus, defendants' claim that the contracts with which they interfered with here is violative of the New York Franchise Sales Act is not only meritless – as plaintiff will demonstrate in the New York litigation – it is irrelevant. Under New York law (as to the Act) and New Jersey law (as to the tort complained of here), even if the non-compliance with the Act by plaintiff alleged by defendants would not render those contracts fair game for inducing breach.

For all these reasons, defendants fall far short of their heavy burden to demonstrate that the complaint in this matter should be dismissed on based on the failure of the main claim herein, tortious interference with contract, to state a claim. Because this is the only serious ground on which defendants' motion to dismiss is based, the Court should deny that motion forthwith.

II. PLAINTIFF'S REFUSAL TO PRODUCE PROPRIETARY DOCUMENTS WITHOUT A PROTECTIVE ORDER AND IN THE ABSENCE OF A COURT ORDER TO PRODUCE THE SAME DOES NOT GIVE RISE TO GROUNDS TO DISMISS THE COMPLAINT.

Defendants make the preposterous argument that plaintiff's refusal to produce, without a protective order, a proprietary document which plaintiff by all indications already possessed – the agreement between plaintiff and Dr. Fortt, the physician induced to breach her contract with Be-Thin by defendants – provides a basis for dismissal of the complaint. They cite no case endorsing such a radical result, however, for the simple reason that the law most assuredly does not support such a result.

First and foremost, the Rule under which they are proceeding simply does not provide for sanctions upon non-compliance, even assuming that plaintiff's response here is a failure of compliance:

> Sanctions for non-compliance with a demand for a document or paper made pursuant to N.J. Ct. R. 4:18-2 are not available under N.J. Ct. R. 4:23-5 governing sanctions for failure to make discovery. Sanctions for non-compliance are available only for failure to comply with the rules governing interrogatories (N.J. Ct. R. 4:17-1 et seq.), production of documents (N.J. Ct. R. 4:18-1 et seq.), and physical and mental examinations. N.J. Ct. R. 4:19. In the event a demand under this rule evokes no response, a request for production of documents should be propounded pursuant to N.J. Ct. R. 4:18-1.

1-4:18 LexisNexis NJ Court Rules Anno. P 4:18-2.01.

Secondly, dismissal of a complaint is the harshest sanction available to a litigant, and is utilized by the courts of this State only in the most extreme circumstances – far from any offense committed by plaintiff here:

> In respect of the ultimate sanction of dismissal, this Court has struck a balance by instructing courts to impose that sanction only sparingly. The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious. Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault. Moreover, the imposition of the severe sanction of dismissal is imposed not only to penalize those whose conduct warrant it, but to deter others who might be tempted to violate the rules absent such a deterrent.
>
> The scarcity of cases ordering dismissal demonstrates that trial courts have heeded our admonition to impose sparingly the ultimate sanction of dismissal. Judges, no less than lawyers, strain to avoid the ultimate sanction of dismissal of an affirmative claim or striking of a responsive pleading for failure to answer interrogatories [and] are reluctant to invoke the sanction of dismissal where lesser measures are appropriate . . .

Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 514-515 (N.J. 1995) (internal quotations and citations omitted). Here plaintiff,

far being contumacious, made a timely disclosure of almost all of the documents requested and frankly responded further that it would require a protective order prior to producing any others. The natural response by counsel seeking the document in question would have been to meet and confer with plaintiff's counsel, i.e., pick up the phone or send a letter making a further inquiry. Yet defendants made no response or attempt to contact plaintiff before making this motion; served no demand for discovery for which sanctions are available under R. 4:23-5; and sought no order compelling discovery under R. 4:23-2(b).

It appears, rather, that defendants engaged in what they thought would be a cute game of "gotcha," and were more interesting in manufacturing a specious basis for dismissal than in actually getting the document in question. That defendants believed it necessary or worthwhile to do this sheds much light on the confidence they have in their "substantive" motion to dismiss based on R. 4:6-2(e), which, like this ground for dismissal, should be rejected by the Court.

CONCLUSION

For the foregoing reasons, plaintiff respectfully submits that this Court should deny the motion of defendants to dismiss the complaint.

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