IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

BONANZA RESTAURANT CO.,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. S10C-10-018 RFS
	)	
ROBERT E. WINK,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

Upon Plaintiff's Motion for Summary Judgment. Denied.
Upon Defendant's Motion for Summary Judgment. Granted.

Submitted Date: March 12, 2012
Decided Date: April 17, 2012

Jennifer M. Becnel-Guzzo, Esquire, Saul Ewing LLP, Wilmington, Delaware, and Julie Crocker, Esquire, Taft Stettinius & Hollister LLP, Cleveland, Ohio, attorneys for Plaintiff.

Edward M. McNally, Esquire and Patricia A. Winston, Esquire, Morris James LLP, Wilmington, Delaware, attorneys for Defendant.

STOKES, J.

Plaintiff Bonanza Restaurant Company ("Bonanza") and Defendant Robert E. Wink ("Wink") have filed cross motions for summary judgment on damages in this breach of contract action. Bonanza seeks damages consisting largely of lost future royalty fees on franchise agreements. Bonanza's motion for summary judgment is denied, and Wink's motion is granted.

On November 6, 2006, Bonanza entered into two sets of agreements. The first set consisted of four Franchise Agreements with New Franchisees[1] for four Bonanza restaurants. Wink, who had previously operated the restaurants, had assigned his interest in the four restaurants to the New Franchisees. The second set of agreements consisted of four Consent to Assignment Agreements with Wink.

Because the Consent to Assignment Agreements are significant here for Wink's personal guaranty contained in each one, they are referred to individually as "the Guaranty" or collectively as "the Guaranties." In each Guaranty, Wink agreed to pay Bonanza all monies due under the Franchise Agreements in the event of default by New Franchisees. Wink's obligations were limited to a period of one year from the effective date of the Franchise Agreements, that is, November 6, 2007.

One of the Bonanza restaurants ceased operating and closed for business October 17, 2007, while the other three restaurants ceased operating and closed October 21, 2007. Bonanza terminated all four Franchise Agreements on October 21, 2007. Bonanza sent

[1]The names of the New Franchisees are not relevant to this action.

four demand letters to Wink between October 25, 2007 and August 12, 2009, seeking payment and performance under the Guaranties. Wink paid Bonanza nothing under the Guaranties. The Complaint was filed on October 15, 2010, seeking judgment on Wink's Guaranties in the amount of $1,319,899.83, primarily for lost future royalty fees under the Franchise Agreements.

Statute of limitations. Wink argues that the Complaint is barred because it was not filed within the two-year time frame set forth in the Franchise Agreements. Bonanza argues that the contract language leads to a different result.

Paragraph 20.I of each Franchise Agreement provides that all claims arising out of the agreement must be filed within two years from the date the triggering event occurred. An exception is created for "CLAIMS BROUGHT BY FRANCHISOR WITH REGARD TO FRANCHISEE'S OBLIGATIONS TO MAKE PAYMENTS TO FRANCHISOR AND TO INDEMNIFY FRANCHISOR PURSUANT TO THIS AGREEMENT." This action falls within the exception, which does not establish a limitations period.

Delaware courts generally enforce contractual limitations periods that are reasonable.[2] A contractual provision that reasonably abbreviates the time for filing a claim is enforceable because it enhances public policy in favor of resolving claims.[3] A contractual provision that extends a statutory limitations violates public policy and is not

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[2] *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386 (Del.Super. 1978).

[3] *Id.*

enforceable.[4]

This case is governed by the three-year limitations period set forth in 10 *Del.C.* § 8106. The Court finds that the two-year provision in Paragraph 20.I is reasonable because it expedites litigation without infringing on the parties' rights. However, the exception is silent as to the appropriate limitations period. This silence is not reasonable because it opens the door to lengthy and costly delays in litigation. In light of the drafter's silence, the exception must fall within the three-year statute of limitations stated in § 8106.

The event giving rise to Bonanza's damages claim was the closing of the four restaurants,[5] as discussed *infra*. One restaurant closed October 17, the other three October 21, 2007. The Complaint was filed October 15, 2010, within the three-year statute of limitations. Defendant's motion for summary judgment on the statute of limitations is **DENIED.**

Waiver. The purpose of the Guaranties was to protect Bonanza from New Franchisees' potential failure to perform in the event of default:

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[4]*Id.* at 386-387; *GRT, Inc. v. Marathon GFT Technology, Ltd.* 2011 WL 2682898, at *15 (Del.Ch.); 15 Corbin on Contracts § 83.8 at 289-90.

[5]As explored in a 2012 article in the Franchise Law Journal, courts generally agree that a franchisor may recover lost future royalties when a franchisee terminates the franchise relationship. Douglas R. Hafer & Logan W. Simmons, *Lost Future Royalties: Lessons from Recent Decisions*, 31 Franchise L.J. 150 (2012). The same sources show that courts stand in contention where the franchisor terminates the relationship. This unresolved issue need not be addressed here because the New Franchisees' permanent closing of the restaurants constituted a default.

> 6. Assignor's Continuing Limited Personal Guaranty. Assignor agrees to unconditionally and personally guarantee to [Bonanza] the performance of all the Assignee's obligations (monetary and other) under the New Franchise Agreement, as the New Franchise Agreement may be amended from time to time hereafter. **If any default should be made by Assignee, Assignor individually promises and agrees to comply with the terms and conditions of the New Franchise Agreement for and on behalf of Assignee and further agree[s] to pay [Bonanza] under the terms and conditions of the New Franchise Agreement. . .** . [Bonanza] agrees that Assignor's obligations under the Personal Guaranty shall be limited to a period of one (1) year from the effective date of the New Franchise Agreement (the "Guaranty Period"). If the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, Assignor's Personal Guaranty will survive such expiration or termination and will be subject to the Assignee's post-termination obligations. The Personal Guaranty, as amended by this Agreement, is affirmed in all respects.[6] (Emphasis added.).

Closing the restaurants was a default. Under Section 17 of each Franchise Agreement, a "Franchisee [who] fails to actively operate the Restaurant" is subject to termination at the discretion of the Franchisor. Thus, the closing of the restaurants was the triggering event which called the Guaranties into play.

Wink acknowledges that the Guaranties obligate him to payment of Bonanza's actual damages and that he has not paid Bonanza any amount requested.[7] He argues that the damages sought are future lost profits which constitute consequential damages. He contends that Bonanza and the New Franchisees waived consequential damages in Paragraph 20.J of each Franchise Agreement. For these reasons, he argues that he is

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[6]Pl. S.J., Ex. A , at 2-3.

[7]Wink Deposition, 91:12-19; 94:7-10.

entitled to summary judgment.

Bonanza responds first by arguing that the issue of damages should be decided under Texas law, as specified in the Franchise Agreements. Bonanza notes that neither Texas nor Delaware has determined whether a franchisor is entitled to lost future royalties following a breach. The Guaranties are silent as to choice of law. Bonanza reasons that the Guaranties pertain to performance of the Franchise Agreements and therefore Texas law should govern both sets of contracts.

At oral argument, the parties stated that the result would be the same under either Texas law or Delaware law, that is, neither state has resolved the issue. Thus, nothing in Texas law conflicts with any fundamental Delaware law or policy on this issue.[8] No reason exists to apply Delaware law where the parties to the Franchise Agreements made a clear choice of law in favor of Texas law, which does not offend Delaware law or policy.[9]

Thus, the question before the Court is whether, under Texas law, the waiver of consequential and speculative damages precludes Bonanza's recovery of future lost royalties.

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[8] *J.S. Alberici Const. Co. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000).

[9] *TR Investors, LLC v. Genger*, 2010 WL 2901704, n. 142 (Del.Ch.).

Paragraph 20.J of each Franchise Agreement provides:

20.J. WAIVER OF PUNITIVE DAMAGES.

FRANCHISOR AND FRANCHISEE HEREBY WAIVE TO THE FULLEST EXTENT PERMITTED BY LAW, ANY PUNITIVE, EXEMPLARY, CONSEQUENTIAL OR SPECULATIVE DAMAGES AGAINST THE OTHER AND AGREE THAT IN THE EVENT OF A DISPUTE BETWEEN THEM, EXCEPT AS OTHERWISE PROVIDED HEREIN, EACH SHALL BE LIMITED TO THE RECOVERY OF ACTUAL DAMAGES SUSTAINED BY IT.

Because the Franchise Agreements and the Guaranties do not define the terms "actual damages" or "consequential damages," the Court presumes the parties intended their ordinary meaning.[10] The term "actual damages" encompasses both "direct" and "consequential" damages.[11] Direct damages are those inherent in the breach,[12] which in this case is the closing of the restaurants by New Franchisees. Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong.[13] Direct damages compensate the plaintiff for the loss that is

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[10] *Cherokee Cnty. Cogeneration Partners, L.P. v. Dynegy Mktg. & Trade*, 305 S.W.3d 309, 314 (Tex.App-Houston 14th Dist. 2009). *See also Relax, Ltd. V. ANIP Acquisition Co.*, 2011 WL 2111162915 (Del.Super.).

[11] *Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex.1997); *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 163 (Tex.1992). *See also Gebhart v. Martin*, (Super. Ct.1992); *Isti Delaware Inc. v. Townsend*, 1992 WL 189467, *4 (Del. Super.).

[12] *Id.* at 816; *Cherokee* at 314. See also *Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 2929552 (Del.Ch.)(observing that direct damages follow immediately from the breach).

[13] *Id*. (citing *Southwind Aviation, Inc. v. Avendano*, 776 S.W.2d 734, 7336 (Tex.App–Corpus Christi 1989).

conclusively presumed to have been foreseen by the defendant from his wrongful act.[14] The measure of damages for breach of contract may include reasonably certain lost profits,[15] which are defined as damages for the loss of net income to a business.[16]

Profits lost on other contracts or relationships resulting from the breach may be classified as consequential damages.[17] That is, if the party's expectation of profit is incidental to the performance of the contract, the loss of that expectancy is consequential.[18] Consequential damages, also known as special damages, are those that result naturally but not necessarily from the wrongful act, because they require the existence of some other contract or relationship.[19] Consequential damages are not recoverable unless they are foreseeable and are traceable to the wrongful act and result from it.[20] The distinction between direct and consequential damages is the degree to

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[14]*Id.* (citing *Bynum, supra,* at 163.

[15]*Id.* (citing *Cmty. Dev. Serv., Inc. v. Replacement Parts Mfg., Inc.* 679 S.W.2d 721, 725 (Tex.App.-Houston 1984)).

[16]*Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex.2002).

[17]*Cherokee, supra*, at 314.

[18]*Id.* (citations omitted.).

[19]*Arthur Anderson*, at 816; *Mood, supra*, at 12; *Continental Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 475 (Tex.App-Eastland 2003). *See also TVM Life Science, supra*, at *7 (observing that in Delaware consequential damages are those that follow the breach "by reason of special circumstances or conditions").

[20]*Mood, supra*, at *12.

which the damages are a foreseeable and highly probable consequence of a breach.[21]

A contractual restriction on consequential damages, standing alone, does not preclude recovery of lost profits; that is, lost profits cannot mechanically be classified as consequential damages.[22] Historically, courts have had difficulty establishing a workable distinction between direct and consequential damages, and the results vary with the facts.[23]

In this case, it was not only probable but inevitable that if the restaurants closed, royalty payments would cease. Such is the nature of royalties. Each Franchise Agreement requires payment weekly royalty fees in the amount of 4 percent of gross weekly sales, sent weekly by electronic funds transfer. These fees are payable for the duration of each Franchise Agreement, one of which was due to expire in 2014 and three of which were to expire in 2011. But if there are no gross weekly sales, there are no royalty fees to pay. Loss of such royalties is inherent to the breach of Franchise Agreements and is not related to other contracts or relationships. As amounts due directly under the Franchise Agreements, these losses are direct damages, not consequential damages stemming from other contracts or relationships.

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[21] *DaimlerChrysler* at *15 (citing *Rexnord Corp. v. DeWolff Boberg & Assoc., Inc.*, 286 F.3d 1001, 1004 (7th Cir.2002)(Posner, J.)).

[22] *Id.*

[23] 11 Corbin on Contracts § 56.6 (2005).

Thus, the waiver of consequential damages in the Franchise Agreements does not preclude recovery of the claimed damages. The losses were inevitable and flowed necessarily from the closings. The royalty fees, as set forth in the Franchise Agreements, were inherent to the nature of the contracts, and the Court finds that they are actual and direct damages guarantied by Wink.

The Guaranties were limited to one year from the date of the Franchise Agreements, that is, November 6, 2006. The restaurants closed on October 17 and 21, 2007. Under the guaranties, "if the Guaranty Period does not end prior to the expiration or termination of the Franchise Agreement, Assignor's Personal Guaranty will survive beyond such expiration or termination and will be subject to the Assignee's post-termination obligations." The post-termination obligations of the New Franchisees are set forth in Section 18 of the Franchise Agreements:

> Upon expiration or termination of this Agreement, Franchisee shall immediately pay to Franchisor all royalty fees, advertising contributions, amounts owed for products purchased by Franchisee from Franchisor or from its affiliate, and interest due Franchisor or its affiliates on any of the foregoing. Franchisee must contemporaneously with payment furnish a complete accounting of all amounts owed to Franchisor and its affiliates.

This section provides for payment of obligations due at the time of termination. The language requires payment of current expenses: "Franchisee shall immediately pay Franchisor all royalty fees. . . due Franchisor." There is no mention of future royalties or any method of calculating such payments. Nothing in this section contemplates or refers to future lost royalty fees.

Section 18D sets forth the continuing obligations of both Bonanza and the New Franchisees:

> All obligations of Franchisor and Franchisee under this Agreement which expressly or by their nature are to survive or are intended to survive the termination of this Agreement or expiration of this Agreement shall continue in full force and effect subsequent to and notwithstanding its termination or expiration until they are satisfied in full or by their nature expire.

These provisions do not establish payment of future royalty fees, but rather such payments that by their nature end if a franchise closes. No sales, no fees. By definition royalty fees cease when a franchise ceases operation. Bonanza is a sophisticated business entity that could have provided for recovery of lost future royalties in the Franchise Agreements if it had desired to do so. The Court finds nothing in the parties' post-termination obligations that warrants extending Wink's Guaranties past the one year Guaranty Period. Future royalty fees are not provided for or mentioned anywhere in either the Franchise Agreements or the Guaranties. The necessary conclusion is that Bonanza is not entitled to recover lost future royalty payments.

To the extent that the Complaint seeks lost future royalties, Wink's motion for summary judge is **GRANTED** and Bonanza's motion for summary judgment is **DENIED.**

IT IS SO ORDERED.