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JOHN DOE, Plaintiff, v. RICHARD ROE, BRAND X DISTRIBUTOR LLC, PETER ROE, JOHN AND JANE DOES 1-10 and XYZ CORP. 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION [COUNTY] COUNTY Docket No.: XXX-L-000000-24 Civil Action **BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR INVOLUNTARY DISMISSAL OF COUNT I (CONSUMER FRAUD ACT) AT THE CLOSE OF PLAINTIFF'S CASE**

PRELIMINARY STATEMENT

Plaintiff has rested, and his Consumer Fraud Act count fails as a matter of law. The Act reaches unconscionable practices and misrepresentations only "in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. 56:8-2. Plaintiff bought neither. There was no existing business for anyone to sell him. The evidence is that Plaintiff himself found the location, a commercial storefront at 100 Main Street whose lease was about to expire, and that he and Defendant Richard Roe then formed a new business together. Under a written Members Agreement, Plaintiff's company and Mr. Roe's company became the two 50/50 members of a newly created company, Brand X Anytown LLC: Plaintiff's side put up the construction money, and Mr. Roe's side contributed the Brand X name and operations. Years later, Plaintiff bought out his partner's half.

However Plaintiff labels that arrangement, it falls outside the Act on one of two independent grounds. Either it was what the documents say it was, the formation of a business by two partners followed by one partner's buyout of the other, which is a transaction in an interest in a business and not the sale of "merchandise" or "real estate"; or, if it was a franchise as Plaintiff claims, it was a franchise of the kind the Franchise Practices Act governs, and the Consumer Fraud Act does not reach it. On the first ground, the Appellate Division has refused to extend the Act to "transactions that, at their core, involve the sale of an ongoing business from one group of proprietors to another." *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009). An investment by two proprietors in a business of their own is further still from a consumer purchase. A business, new or established, is not a consumer good: businesses "are not covered by the Consumer Fraud Act because they are businesses, not consumer goods or services. They never are purchased for consumption." *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994). And a share of ownership in a company is an investment of the kind the Legislature deliberately left outside the Act. *Lee v. First Union National Bank*, 199 N.J. 251 (2009).

On the second ground, Plaintiff's label for the deal does not change the answer. He calls what he bought a "franchise," but a franchise is merchandise under the Act only in narrow circumstances that are absent here. The only New Jersey appellate decision to bring a franchise within the Act did so only for franchises "not covered by the Franchise Practices Act" that are "offered to the general public." *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003).

Both conditions must be met, and Plaintiff's alleged franchise meets neither. The Franchise Practices Act, N.J.S.A. 56:10-1 et seq., governs the substantial, ongoing franchise relationship: a

written license to use a trademark, a community of interest in marketing the franchisor's goods, a place of business in New Jersey, more than $35,000 a year in sales between franchisor and franchisee, and more than 20% of the franchisee's sales derived from the franchise. N.J.S.A. 56:10-3; N.J.S.A. 56:10-4. That is exactly the relationship Plaintiff pleads: a Brand X restaurant in Anytown, built with his capital, operated under the Brand X name, and required to buy all of its food from Defendant Brand X Distributor LLC. If that was a franchise at all, it was one the Franchise Practices Act covers, and *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) leaves it outside the Consumer Fraud Act. And nothing was ever offered to the general public: Plaintiff's own Complaint describes a private introduction through an acquaintance, an arranged meeting, and a negotiated 50/50 partnership.

Accepting all of Plaintiff's evidence as true, as *Dolson v. Anastasia*, 55 N.J. 2 (1969) requires, no rational jury could find a sale of merchandise or real estate. Count I should be dismissed under R. 4:37-2(b), and the Act's treble-damages and fee-shifting remedies should be kept from the jury.

STATEMENT OF FACTS

The facts below come from Plaintiff's own Complaint, the trial exhibits in evidence and Plaintiff's testimony at trial.

Plaintiff alleges that an acquaintance asked whether he was familiar with the Brand X franchise and told him that Defendant Richard Roe "was offering Brand X franchises for sale." (Compl. ¶¶ 10-11.) Plaintiff hoped the business could be an opportunity for a family member. (Compl. ¶ 13.) "A meeting was arranged" for Plaintiff to meet Mr. Roe, who introduced himself as the owner of the Brand X brand and said that his company, Brand X Distributor LLC ("BXD"), "would supply all necessary ingredients, recipes, materials, and support for the operation of the

Brand X franchise." (Compl. ¶¶ 14-16.) At that meeting, Plaintiff alleges, Mr. Roe represented "that for a $40,000 investment, Plaintiff and Roe would be 50/50 partners in a new Brand X location." (Compl. ¶ 17.)

There was no existing restaurant to buy. After Plaintiff paid his deposit, Mr. Roe "told him to look for a store location." (Compl. ¶ 19.) Plaintiff found the location himself, a commercial storefront at 100 Main Street, Anytown, New Jersey, "where the lease was about to expire," and he testified at trial that he was the one who found it. (Compl. ¶¶ 19-21.) The store then had to be built. Plaintiff alleges that Mr. Roe told him "he would need to make improvements to the store so that it could function as a Brand X," that Plaintiff was to pay for the construction and equipment "because Defendant Richard Roe was providing the Brand X franchise as his investment in the business," and that Plaintiff spent approximately $300,000 of his own capital so that the store "could function as a Brand X store." (Compl. ¶¶ 22-24.) The business began only after "the location was operational." (Compl. ¶ 26.) Thereafter, Plaintiff alleges, Defendants "required Plaintiff to purchase all foodstuff and ingredients" from BXD, refused to let him use other suppliers "because it was a Brand X franchise store and Plaintiff was required to honor the brand's supply chain," and collected monthly "franchising fees." (Compl. ¶¶ 28-30, 32.)

The trial exhibits show how the parties structured the new business. The Members Agreement between RR Trading Group, LLC and JD Investments, LLC states its object as "The creation and registration of a legal Company according to the requirements of the state of New Jersey, to do business legally." (P-2.) The company it created, Brand X Anytown LLC, lists those two companies as its members. (P-1.) The Members Agreement gives each member 50% of the company; RRT contributes the rights to use the Brand X mark, logo, colors and operations, and JD contributes $125,000 for construction; and it provides for the sharing of operating charges "Once

we have opened the business." (P-2.) Plaintiff and Mr. Roe were thus, through their companies, 50/50 partners in a business they created together, as Plaintiff alleges he was promised: "50/50 partners in a new Brand X location." (Compl. ¶ 17; P-1; P-2.)

Later, Plaintiff bought out his partner. The Sales Agreement and General Release, between "BUYER, John Doe, (JD, LLC)" and Richard Roe as seller, transfers the "restaurant rights" at 100 Main Street for $210,000, passes the restaurant's administration, employees, insurance and taxes to the new owner, and provides that the new owner "will have the rights to apply for any type of franchise once he meets the requested requirements." (P-17.) Plaintiff's Complaint describes the same event as an agreement "to buy-out any remaining interests or obligations" Mr. Roe claimed in the location, after which Plaintiff would have "sole ownership of that Brand X store." (Compl. ¶¶ 36-37.) No real property was sold; the restaurant occupied a leased storefront. (Compl. ¶ 20.)

Count I alleges unconscionable commercial practices or fraud "in connection with the sale of a Brand X franchise to Plaintiff," the imposition of an exclusive distributorship, markups on food, and the sale of trademark rights. (Compl. ¶¶ 54-57.) The Complaint pleads no claim under the Franchise Practices Act. Plaintiff offered no evidence that the location, the partnership interest, the business or any franchise was advertised or offered to the general public.

LEGAL ARGUMENT

POINT I

WHETHER THE CONSUMER FRAUD ACT REACHES THE TRANSACTION IS A QUESTION OF LAW THAT THE COURT SHOULD DECIDE NOW, AT THE CLOSE OF PLAINTIFF'S CASE.

Rule 4:37-2(b) permits a defendant, after the plaintiff has rested, to move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The New Jersey Supreme Court framed the test in *Dolson v. Anastasia*, 55 N.J. 2 (1969): the motion must be denied

only "if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ." The same standard governs a motion for judgment under R. 4:40-1. *Dolson v. Anastasia*, 55 N.J. 2 (1969). Defendants accept Plaintiff's evidence as true for purposes of this motion; the motion turns on whether that evidence describes a transaction the statute covers.

That is a legal question.

The Act declares unlawful certain practices "in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. 56:8-2. The Legislature defined "merchandise" to include "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1. In *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009), the Appellate Division reviewed a judgment entered after trial on a Consumer Fraud Act claim arising from the sale of a motel business, and it decided coverage itself: it concluded "as a matter of law, that the CFA does not apply to the parties' transaction in this case," and reversed the Consumer Fraud Act judgment. The New Jersey Supreme Court likewise treated the question of what counts as "merchandise" as one for the courts, adopting considerations "for use by the courts" in deciding it. *All the Way Towing, LLC v. Bucks Cnty. Int'l, Inc.*, 236 N.J. 431 (2019). When, as here, the documents in evidence and Plaintiff's own pleading establish what was bought and sold, nothing about coverage is left for the jury.

POINT II

WHETHER PLAINTIFF INVESTED IN A NEW BUSINESS AS A 50/50 PARTNER OR LATER BOUGHT OUT HIS PARTNER'S HALF, WHAT HE ACQUIRED WAS AN INTEREST IN A BUSINESS, WHICH IS NEITHER "MERCHANDISE" NOR "REAL ESTATE."

A. A Business, and an Interest in One, Is Not Merchandise.

The Act's reach is fixed by its text. It applies only to practices "in connection with the sale or advertisement of any merchandise or real estate," N.J.S.A. 56:8-2, and merchandise consists of "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1. In a transaction between businesses, the New Jersey Supreme Court has held, it is the nature of the transaction that determines whether it fits within that definition, and the Court has cautioned: "We do not suggest that all business-to-business transactions automatically fit the intendment of a sale offered to the public." *All the Way Towing, LLC v. Bucks Cnty. Int'l, Inc.*, 236 N.J. 431 (2019).

A business is not merchandise. In *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009), the buyers purchased an operating motel, together with the land beneath it, and recovered a Consumer Fraud Act judgment based on the sellers' misrepresentations about the motel's past income. The Appellate Division reversed. It explained: "Defendants sold plaintiffs a motel business, not 'objects, wares, goods, commodities, services,' or 'anything offered, directly or indirectly, to the public for sale.'" *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009). It held: "We discern no textual basis in the statute or other reason to expand the scope of the CFA to transactions that, at their core, involve the sale of an ongoing business from one group of proprietors to another." *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009). Because "[t]he real estate was incidental to the motel business that was the gravamen of plaintiffs' claims of

fraud," and although the court found the sellers' conduct troubling, it concluded that "the statute simply does not cover this situation." *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009).

Federal courts applying New Jersey law reach the same result for the same reason. The Third Circuit held that franchises and distributorships, even when available to the public at large, "are not covered by the Consumer Fraud Act because they are businesses, not consumer goods or services. They never are purchased for consumption." *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994). "Instead, they are purchased for the present value of the cash flows they are expected to produce in the future" and bear no resemblance to the goods and services the Act lists. *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994). The court emphasized that "it is the character of the transaction rather than the identity of the purchaser which determines if the Consumer Fraud Act is applicable." *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994). Applying *All the Way Towing, LLC v. Bucks Cnty. Int'l, Inc.*, 236 N.J. 431 (2019) and *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994), the District Court recently concluded that alleged misrepresentations in the negotiated sale of an online business were not actionable under the Act, because a business, even if available to the public at large, is not a consumer good or service, and the transaction there was "the sale of a business resulting from arms-length negotiation between parties concerning the terms of the sale, including the purchase price, payment structure, and financing." *Gebhardt v. Beri*, 2024 WL 3279531 (D.N.J. 2024).

B. The Rule Does Not Depend on Whether the Business Was Already Operating.

Plaintiff will say that *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009) spoke of "the sale of an ongoing business," and that no restaurant

was operating when he made his investment. The distinction does not help him. The reason the Appellate Division gave for excluding the motel sale was not the age of the business; it was that a business is not among the things the Act covers. A business that has yet to open its doors is no more an object, ware, good, commodity or service than one that has been operating for years. A share in a new venture is acquired, as the Third Circuit put it, "for the present value of the cash flows they are expected to produce in the future"; it is not consumed. *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994). Indeed, the franchise in *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994) was itself a new business: the franchisees paid a $25,000 franchise fee and signed a franchise agreement and a sublease to operate a new restaurant in the food court of a shopping mall, which they opened months later, and the Third Circuit held the transaction outside the Act. *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994).

Nor can Plaintiff find support in the passage of *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009) describing *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). There the Appellate Division recalled that, in Kavky,

> "We held in Kavky that franchises and distributorships may come within the Act‘s definition of merchandise when they are not otherwise covered by the Franchise Practices Act and when they are offered to the general public. Id. at 501, 820 A.2d 677. In contrast to the case at bar, we found that the investment in a franchise was “not really the acquisition of a business” and was “certainly not an investment in a going concern.” Id. at 507, 820 A.2d 677..'" *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009).

That description concerned an $85 distributorship that Herbalife solicited from the public through general advertising over the Internet, which was, in the court's words, "too small" to come within

the Franchise Practices Act. *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003).

Nothing in either decision suggests that two proprietors who form a company together, each contributing money or rights and each taking half of the company, are buying "merchandise" from one another. The narrow rule of *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) reaches only franchises that are outside the Franchise Practices Act and offered to the general public, and, as Point III shows, Plaintiff's investment was neither.

C. A Half Interest in a Company Is an Investment the Legislature Left Outside the Act.

What Plaintiff's company received for its construction contribution was a 50% membership interest in Brand X Anytown LLC. (P-1; P-2.) That is an ownership interest in a business, an investment, and the New Jersey Supreme Court has recognized that the Legislature deliberately kept investments in ownership interests outside the Act. Construing the definition of merchandise, the Court held: "We therefore hold that securities are not meant to be included in the definition of merchandise." *Lee v. First Union National Bank*, 199 N.J. 251 (2009). It explained that "we discern a clear legislative plan to leave the securities marketplace beyond the penumbra of the CFA's proscriptions." *Lee v. First Union National Bank*, 199 N.J. 251 (2009). The Appellate Division had reached the same conclusion, holding that "a fraud in the sale of shares of stock or other securities is not within the compass of that statute." *Stella v. Dean Witter Reynolds, Inc.*, 241 N.J. Super. 55 (App. Div. 1990).

Defendants do not ask the Court to decide whether Plaintiff's membership interest was a "security" under the securities laws. The point is simpler. A share of ownership in a company, whether a share of corporate stock or a 50% membership interest in a limited liability company, is not an object, ware, good, commodity or service offered to the public for sale, and the Legislature

has never brought such interests within the Act. N.J.S.A. 56:8-1. Plaintiff did not walk into a store and buy something to consume; through his company, he became a co-owner of a business.

D. Applied Here: Two Partners Formed a Business, and One Later Bought Out the Other.

By Plaintiff's own account and the exhibits in evidence, nobody sold Plaintiff an existing restaurant. Plaintiff found the location. (Compl. ¶¶ 19-21.) The parties' companies then signed a Members Agreement whose object was "The creation and registration of a legal Company according to the requirements of the state of New Jersey, to do business legally," each taking 50% of the new company, JD contributing the construction money and RRT contributing the Brand X name and operations, and both agreeing to share the operating charges "Once we have opened the business." (P-1; P-2; Compl. ¶¶ 17-24.) That is the formation of a business venture by two proprietors, the opposite of a consumer's purchase of goods or services. It falls outside the Act for every reason given in *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009), *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994) and *Lee v. First Union National Bank*, 199 N.J. 251 (2009).

The later buyout is outside the Act as well. Under the Sales Agreement, Plaintiff bought his partner's remaining interest in the restaurant the two had built, for $210,000, and took over its administration, employees, insurance and taxes. (P-17; Compl. ¶¶ 36-37.) That is a sale of an interest in a business from one proprietor to another, the very kind of transaction that *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009) placed outside the Act as a matter of law. And unlike the buyers in *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009), Plaintiff did not purchase land at either stage; the restaurant occupied a leased storefront. (Compl. ¶ 20.) The Act's application to sales of "real estate" therefore has nothing to attach to. N.J.S.A. 56:8-2.

POINT III

THE ONLY NEW JERSEY APPELLATE DECISION TO BRING A FRANCHISE WITHIN THE CONSUMER FRAUD ACT DID SO ONLY FOR FRANCHISES THAT ARE NOT COVERED BY THE FRANCHISE PRACTICES ACT AND ARE OFFERED TO THE GENERAL PUBLIC. PLAINTIFF'S ALLEGED FRANCHISE MEETS NEITHER CONDITION.

A. The Rule of Kavky: A Franchise Is Merchandise Only When It Is Outside the Franchise Practices Act and Offered to the General Public.

Plaintiff will argue that he bought a "franchise" and that franchises are merchandise. They are not, as a general rule. The only New Jersey appellate decision to bring a franchise within the Act did so only for franchises "not covered by the Franchise Practices Act" that are "offered to the general public." *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). The Appellate Division framed the question and answered it in two sentences:

> The novel issue, at least at the appellate level in this state, is whether the purchaser of a franchise distributorship is protected by the Act, or to put it somewhat differently, do franchises and distributorships come within the Act's definition of merchandise. Our answer is that they are included when they are not covered by the Franchise Practices Act and are offered to the general public

Kavky v. Herbalife International of America, 359 N.J. Super. 497 (App. Div. 2003). The two conditions are joined by "and." Both must be satisfied before a franchise can be treated as merchandise. A franchise that the Franchise Practices Act covers is outside the Consumer Fraud Act, however it was marketed; and a franchise that the Franchise Practices Act does not cover is still outside the Consumer Fraud Act unless it was offered to the general public. The Appellate Division restated the rule the same way six years later: "We held in Kavky that franchises and distributorships may come within the Act's definition of merchandise when they are not otherwise covered by the Franchise Practices Act and when they are offered to the general public." *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009).

The reasoning of *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) shows why the first condition matters. The court explained that "a franchise, not otherwise regulated by the Franchise Practices Act, is not merely similar in nature to the items enumerated in" the statutory definition of merchandise, "but actually consists of those items in that it involves the provision of both services and commodities." *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). It relied on *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (Law Div. 1986), where the Law Division had applied the Consumer Fraud Act to a publicly offered limousine franchise that the Franchise Practices Act did not reach, and it observed of the Herbalife distributorship before it: "As in Morgan, the subject franchise is too small to come within that statute." *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). The first condition thus reflects that the Consumer Fraud Act fills the gap for small, mass-marketed businesses that the Franchise Practices Act does not protect, such as Herbalife, Royal Prestige, and other multilevel marketing businesses. It does not reach the substantial franchise relationship that the Legislature regulated separately. That is why the court accepted the result in *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994): "However that is not to say that we disagree with the result reached in J & R, but that is only because it appears to have involved a substantial and complex commercial transaction, which likely fell within the Franchise Practices Act." *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). The franchise in *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994) was a restaurant franchise acquired for a $25,000 franchise fee, with a franchise agreement and a sublease of a food-court location. *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994). The District Court has since described *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App.

Div. 2003) as having carved "a narrow exception to the general rule that franchises are not covered by the NJCFA, based on the fact that the defendant there had engaged in mass marketing to the public." *Gebhardt v. Beri*, 2024 WL 3279531 (D.N.J. 2024).

B. The Franchise Practices Act Defined, and the Franchises It Covers.

Because the first condition of *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) turns on whether a franchise is "covered by the Franchise Practices Act," the Court must look to that statute. The Franchise Practices Act, N.J.S.A. 56:10-1 et seq., was enacted in 1971 because, as the Legislature found, "distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the State, the public interest and the public welfare." N.J.S.A. 56:10-2. The Legislature declared it necessary "to define the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements and to protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power between national and regional franchisors and small franchisees." N.J.S.A. 56:10-2. The New Jersey Supreme Court has explained that "[t]he Act, N.J.S.A. 56:10-1 et seq., regulates both the ongoing franchise relationship and its termination." *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 86 N.J. 453 (1981). Among the abuses that prompted it, the Court noted that some franchisors "have threatened franchisees with termination to coerce them to stay open at unreasonable hours, purchase supplies only from the franchisor and at excessive rates or unduly expand their facilities." *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 86 N.J. 453 (1981).

The statute defines a franchise as "a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise." N.J.S.A. 56:10-3. A "franchisor" is

"a person who grants a franchise to another person," and a "franchisee" is "a person to whom a franchise is offered or granted." N.J.S.A. 56:10-3. The Appellate Division has explained that "[t]here are thus two definitional criteria of a franchise, both of which must be met in order for the agreement to come within the statutory orbit. The first is a grant by the alleged franchisor to the alleged franchisee of a license permitting him to use the franchisor's trade name. The second is the sharing by both parties of a community of interest in a business enterprise." *Neptune T.V. & Appliance Service, Inc. v. Litton Microwave Cooking Products Division*, 190 N.J. Super. 153 (App. Div. 1983). In that relationship, "[t]he franchisee receives the benefit of the franchisor's know-how and reputation and contributes his own capital and labor." *Neptune T.V. & Appliance Service, Inc. v. Litton Microwave Cooking Products Division*, 190 N.J. Super. 153 (App. Div. 1983). The New Jersey Supreme Court has added that "[t]he community-of-interest requirement addresses the inequality of bargaining power between the parties and is critical in distinguishing franchises from other types of business relationships." *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324 (1992).

Not every franchise is covered. The Act states which franchises it protects:

> 4. This act applies only: a. to a franchise (1) the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey, (2) where gross sales of products or services between the franchisor and franchisee covered by such franchise shall have exceeded $35,000.00 for the 12 months next preceding the institution of suit pursuant to this act, and (3) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise

N.J.S.A. 56:10-4; see *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324 (1992) (setting out the definition and the three conditions of coverage). A "place of business" is "a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services." N.J.S.A. 56:10-3. A franchise that

meets these terms carries the Act's protections: a franchisor may not "terminate, cancel or fail to renew a franchise without good cause," N.J.S.A. 56:10-5; may not engage in the prohibited practices the Act lists, including "[t]o impose unreasonable standards of performance upon a franchisee," N.J.S.A. 56:10-7; and "[a]ny franchisee may bring an action against its franchisor for violation of this act in the Superior Court of the State of New Jersey to recover damages sustained by reason of any violation of this act," with injunctive relief and attorney's fees. N.J.S.A. 56:10-10. As the Supreme Court summarized, "[t]he Franchise Practices Act (the Act) provides franchisees protection against indiscriminate terminations by prohibiting cancellation or non-renewal of franchises for other than good cause." *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 130 N.J. 324 (1992).

The line between the two statutes is therefore drawn by the size and character of the franchise relationship. In *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (Law Div. 1986), the Law Division applied the Consumer Fraud Act to a limousine franchise only after finding that "[t]he FPA does not apply to this matter inasmuch as one of the two conditions for application has not been met," namely, the gross sales between the franchisor and the franchisee did not exceed $35,000 in the twelve months before suit. *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (Law Div. 1986). And in *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003), the distributorship was an $85 Internet offer that was, like the franchise in *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (Law Div. 1986), too small to come within the Franchise Practices Act. *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). The substantial franchise, with a New Jersey storefront, a continuing supply relationship and the franchisee's business built on the franchisor's brand, is the province of the Franchise Practices Act, not the Consumer Fraud Act.

C. On Plaintiff's Own Theory, His Alleged Franchise Is One the Franchise Practices Act Covers, So the First Condition of Kavky Excludes It.

Defendants have maintained throughout that there was no franchise: the exhibits describe two limited liability companies that formed a new restaurant company together as 50/50 members, followed years later by a buyout. (P-1; P-2; P-17.) But if the Court accepts Plaintiff's characterization for purposes of this motion, the franchise he describes is precisely the kind the Franchise Practices Act covers. Every element appears in his own Complaint.

First, a license to use a trade name or trademark under a written arrangement. Plaintiff alleges that Mr. Roe held himself out as the owner of the Brand X brand, that he provided "the Brand X franchise as his investment in the business," and that Defendants sold Plaintiff "trademark rights" and charged "franchising fees" for them. (Compl. ¶¶ 15, 23, 30, 57.) The arrangement was written: the Members Agreement contributes the right to use the Brand X name to the company that operated the store. (P-2.) Second, a community of interest in the marketing of goods. Plaintiff alleges that BXD "would supply all necessary ingredients, recipes, materials, and support for the operation of the Brand X franchise," that he was "required" to buy "all foodstuff and ingredients" from BXD, and that he could not use other suppliers "because it was a Brand X franchise store and Plaintiff was required to honor the brand's supply chain." (Compl. ¶¶ 16, 28-29, 42.) He alleges that he contributed approximately $300,000 of his own capital so the store "could function as a Brand X store." (Compl. ¶ 24.) That is the relationship *Neptune T.V. & Appliance Service, Inc. v. Litton Microwave Cooking Products Division*, 190 N.J. Super. 153 (App. Div. 1983) describes, in which the franchisee receives the franchisor's know-how and reputation and contributes his own capital and labor. Third, a place of business in New Jersey: the store at 100 Main Street, Anytown, where Brand X food was sold to the public. (Compl. ¶¶ 20-24.) Fourth, sales between the alleged franchisor and franchisee: Plaintiff alleges that every ingredient the restaurant used came from

BXD, month after month, and his markup damages claim is built on the volume of those purchases. (Compl. ¶¶ 28, 51, 59.) Fifth, the franchise as the source of the franchisee's sales: the store was a Brand X restaurant, built and operated as such, so its sales were derived from the alleged franchise. (Compl. ¶¶ 22-24, 38.)

The grievances Count I pleads confirm the point. Plaintiff complains that the alleged franchisor required him to buy supplies only from its affiliate, at a markup, and to pay franchise fees. (Compl. ¶¶ 28-30, 55-57.) Those are the very abuses the New Jersey Supreme Court identified as the reason for the Franchise Practices Act: franchisors coercing franchisees to "purchase supplies only from the franchisor and at excessive rates." *Westfield Centre Service, Inc. v. Cities Service Oil Co.*, 86 N.J. 453 (1981). The Legislature gave franchisees a specific remedy for such conduct, an action against the franchisor under N.J.S.A. 56:10-10. Plaintiff did not plead it. Having described the relationship the Franchise Practices Act was written to govern, Plaintiff cannot recast it as a consumer purchase of merchandise. Under *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003), a franchise covered by the Franchise Practices Act is not merchandise under the Consumer Fraud Act, and Count I fails on the first condition alone.

D. Nothing Was Ever Offered to the General Public, So the Second Condition of Kavky Also Fails.

Even if the Court were to conclude that Plaintiff's alleged franchise falls outside the Franchise Practices Act, Count I would still fail, because the second condition of *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) is independent: the franchise must be "offered to the general public." In *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003), the Appellate Division described a distributorship that Herbalife solicited through general advertising over the Internet, offering to make anyone a distributor for $85. *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div.

2003). It emphasized that "J & R did not involve marketing to the general public; rather it concerned a substantial and complex commercial transaction." *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). In *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (Law Div. 1986), the limousine company promoted its franchise to the public, and the court found that "[t]his franchise is offered for sale to the general public as any other merchandise is. No special qualifications or experience are required except having sufficient funds for the down payment." *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (Law Div. 1986). Public offering was the reason the Act applied in both cases.

Plaintiff proved no public offering of any kind. By his own account, he learned of the opportunity from an acquaintance, "[a] meeting was arranged" for him to meet Mr. Roe, and the two negotiated a 50/50 partnership in a new company in which Plaintiff's company supplied construction capital and Mr. Roe's company supplied the brand and operations. (Compl. ¶¶ 10-24; P-1; P-2.) He later negotiated a buyout for $210,000, memorialized in a notarized agreement. (P-17.) No advertisement, brochure, solicitation or general offer was ever placed in evidence. That is the opposite of the mass-marketed distributorship in *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) and the publicly promoted franchise in *Morgan v. Air Brook Limousine, Inc.*, 211 N.J. Super. 84 (Law Div. 1986).

The New Jersey Supreme Court's framework confirms the point. For transactions between businesses, the Court held that the nature of the transaction determines whether it fits within the Act's definition of merchandise, and it directed courts to consider "(1) the complexity of the transaction, taking into account any negotiation, bidding, or request for proposals process; (2) the identity and sophistication of the parties, which includes whether the parties received legal or expert assistance in the development or execution of the transaction; (3) the nature of the

relationship between the parties and whether there was any relevant underlying understanding or prior transactions between the parties," together with the public availability of the subject matter. *All the Way Towing, LLC v. Bucks Cnty. Int'l, Inc.*, 236 N.J. 431 (2019).

Every consideration points away from coverage here. The transaction was individually negotiated, first as the formation of a company by two limited liability companies and then as a buyout with a $195,000 down payment and deferred terms. (P-2; P-17.) The parties had an ongoing relationship as co-owners for several years before the buyout. (Compl. ¶¶ 19-38.) And a half interest in a newly formed company, or a partner's remaining interest in it, is not something "offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1.

E. Plaintiff Is Caught Either Way.

Whatever label Plaintiff chooses, Count I fails. If, as the evidence shows, he and Mr. Roe formed a new business as 50/50 partners and he later bought out his partner, what he acquired at each stage was an interest in a business, which *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009), *J & R Ice Cream Corp. v. California Smoothie Licensing Corp.*, 31 F.3d 1259 (3d Cir. 1994) and *Lee v. First Union National Bank*, 199 N.J. 251 (2009) place outside the Act.

If, as he alleges, he bought a franchise, it was one the Franchise Practices Act covers, and *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) excludes it. And if the Court were to find the franchise outside the Franchise Practices Act, it still was never offered to the general public, and *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003) excludes it for that reason too. The remaining allegations of Count I, the supply arrangement with BXD, the fees and the use of the Brand X name, are incidents of that same business relationship; they are not separate consumer purchases.

In *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009), the Appellate Division looked to what was "the gravamen of plaintiffs' claims of fraud" and held the Act inapplicable to the whole claim. *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009). The gravamen of Count I, by its own terms, is "the sale of a Brand X franchise to Plaintiff." (Compl. ¶ 54.)

POINT IV

COUNT I SHOULD BE DISMISSED WITH PREJUDICE AND THE ACT'S REMEDIES KEPT FROM THE JURY.

Because no reasonable view of Plaintiff's evidence describes the sale or advertisement of merchandise or real estate, Count I fails as a matter of law. *Dolson v. Anastasia*, 55 N.J. 2 (1969); *539 Absecon Boulevard, L.L.C. v. Shan Enterprises Ltd. P'ship*, 406 N.J. Super. 242 (App. Div. 2009); *Kavky v. Herbalife International of America*, 359 N.J. Super. 497 (App. Div. 2003). Dismissal now will also prevent prejudice to Defendants: if Count I goes to the jury, the jury will hear about a statutory scheme that does not apply, and the verdict sheet will invite a finding on a claim the law does not recognize. Plaintiff's common-law fraud, misrepresentation, conversion and contract claims, which Defendants dispute on their own grounds, remain for the jury; the Consumer Fraud Act claim, and with it the prospect of treble damages and counsel fees under N.J.S.A. 56:8-19, should not.

CONCLUSION

For these reasons, Defendants respectfully request that the Court dismiss Count I of the Complaint with prejudice under R. 4:37-2(b), or in the alternative enter judgment on that count under R. 4:40-1, and remove the Consumer Fraud Act questions from the verdict sheet.

Respectfully submitted,

[LAW FIRM]
Attorney for Defendants

/s/ [Attorney Name]

By: _____
[Attorney Name], Esq.

Dated: [Date]

Cc: [Plaintiff's Counsel], Esq., attorneys for Plaintiff (via eCourts and email)
Client (via email)