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FOR IMMEDIATE RELEASE
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NEWS RELEASE

FITZGERALD KNAIER LLP SECURES TRIAL VICTORY IN LONG-RUNNING PAT & OSCAR'S LITIGATION

The Honorable Judge Kevin Enright of the San Diego Superior Court yesterday issued a final Statement of Decision in the case of *Pat & Oscar's Concepts, Inc. v. Casual Food Group, et al.*, a lawsuit brought by the owner of the Pat & Oscar's restaurant brand against a group of former Pat & Oscar's franchisees, who converted their restaurants to O's American Kitchen following the bankruptcy of Pat & Oscar's. Although the plaintiff sought nearly $23 million in damages against the former franchisees, the court declined to award any actual damages to the plaintiff, and instead awarded a total of $100 in nominal damages.

The decision is a significant victory for the defendants, the owners of O's American Kitchen restaurants, represented by Fitzgerald Knaier LLP. After a trial lasting over a month, the jury refused to find the defendants liable, and awarded no damages to either side on any of the claims or counterclaims. The jury deadlocked on the plaintiff's claim for breach of contract, and the parties chose to have Judge Enright decide this remaining claim, rather than going through a second trial. In his final decision, the judge rejected the plaintiff's contention that it had suffered nearly $23 million in lost profits, and he ruled in favor of the O's American Kitchen owners on the plaintiff's claim that they violated California's Unfair Competition Law.

A representative of the O's American Kitchen owners stated: "We are very pleased with the result, which ends years of litigation over our right to sell breadsticks, lemon and barbecue chicken, ribs, and other popular menu offerings. Following the bankruptcy of Pat & Oscar's and the loss of our franchises, we worked very hard to improve our recipes, change our décor, add new menu items, and forge a new identity as O's American Kitchen. With the judge's decision, we are again able to focus on providing high quality hand-crafted menu items in a fast-casual format."

Pat & Oscar's was originally founded as "Oscar's" in San Diego, by Pat & Oscar Sarkisian and their children John Sarkisian and Tammy Moore. Known for its popular breadsticks, the restaurant chain was sold by the Sarkisians to Sizzler in 2000, for roughly $22 million. Shortly after the sale, the chain was renamed from “Oscar’s” to “Pat & Oscar’s,” due to another restaurant’s ownership of the trademark “Oscar’s.” The chain then suffered an e. Coli outbreak, followed by a failed expansion and franchising effort by Sizzler and subsequent owners. In 2011, the chain went into Chapter 7 bankruptcy, and the Sarkisian family repurchased the brand from the company’s largest creditor for $370,000. The Sarkisians also took over the lone non-franchised Pat & Oscar’s restaurant still operating, on Sarkisian-owned land in Temecula. After the existing Pat & Oscar’s franchise owners failed to come to terms with the Sarkisians over how to revitalize the brand, the franchisees converted their restaurants to become O’s American Kitchens. The Sarkisian family then sued the franchisees, contending that they breached their Pat & Oscar’s franchise agreements by continuing to use the Pat & Oscar’s recipes and restaurant system, along with a similar looking logo. In the trial, the Sarkisian family claimed lost profits damages of $22,958,757. After the jury rejected most of the claims, the judge in the case awarded a total of $100, and declined the Sarkisians’ request to enjoin the defendants from using their current name, logo, recipes, and restaurant system.

Lead attorney for Defendants, Ken Fitzgerald, stated: “This was a hard fought case in which the Plaintiff was represented by very skilled trial lawyers. The Sarkisians were claiming that assets they had paid $370,000 to acquire out of bankruptcy were essentially worth about $23 million, and they supported that claim with the opinion of a well-credentialed damages expert witness. We are grateful that the court rejected this claim, and we are pleased that our clients are now free from the burden of this overreaching litigation effort.”

A copy of Judge Enright’s decision is attached.

Fitzgerald Knaier LLP is a law firm of highly experienced trial attorneys committed to aggressive, honest advocacy. It is a San Diego boutique litigation firm, focused exclusively on trying cases and handling controversies for its clients.

FILED
Clerk of the Superior Court

AUG 17 2015

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

PAT & OSCAR'S CONCEPTS, INC., Plaintiff, v. Casual Food Group, a California corporation; Dough Raisers, a California corporation; Ronald James Mehrens, an individual; M&M Restaurant Holding LLC, a California limited liability company; Chad Bertagnoli, an individual; Maria Bertagnoli, an individual; Mira Mesa LP, a California limited partnership, Mission Valley LP, a California limited partnership; Plaza Bonita P&O LP, a California limited partnership; P&O Parkway Plaza LP, a California limited partnership, Carlyle MacHarg, an individual; RK&R United LP, a California limited partnership; Tricam, a California corporation; Ron Camera, an individual; Gilroy Group, a California corporation; Frank Jiminez, an individual; Orion Holdings, a California corporation; and DOES 1-50, inclusive, Defendants. AND RELATED CROSS ACTIONS.	CASE NO. 37-2012-00100956-CU-BC-CTL Consolidated with CASE NO. 37-2013-704703-CU-BT-CTL **STATEMENT OF DECISION** Dept: 74 Judge: Hon. Kevin A. Enright

I. INTRODUCTION

This matter came for trial on February 2, 2015. Plaintiff and Cross-Defendants were represented by Vincent J. Bartolotta, Jr., Karen R. Frostrom and Rebecca Blain of Thorsnes Bartolotta McGuire LLP. Defendants and Cross-Complainants were represented by Kenneth Fitzgerald, Robert Knaier and Adam Gordon of Chapin Fitzgerald Knaier LLP. A jury was empaneled. The Court heard testimony and took evidence. The matter was submitted to the jury on February 17, 2015. The jury deliberated for 9 days from February 17 until March 3, 2015, when it reported that it believed it would be unable to reach a verdict. The Court gave the charging instruction and returned the jury to deliberations. On March 5, 2015, the jury reported that it was hopelessly deadlocked on the breach of contract cause of action, but that it had reached a verdict on all other causes of action. The Court took the verdicts on the complaint regarding the intentional interference with prospective business advantage cause of action in favor of the Defendants and on the cross-complaint in favor of the Cross-Defendants and then discharged the jury. As of this time, an unresolved dispute remains between the parties as to whether the jury reached a verdict in favor of Defendant P&O Parkway Plaza LP on the breach of contract cause of action. Other than Defendant P&O Parkway Plaza LP, the parties thereafter stipulated to waive jury on the breach of contract cause of action, submitting it to the bench as the trier of fact. The Court also at this time decides the equitable Unfair Competition Law cause of action. Pursuant to the Court's pretrial rulings, the parties had the opportunity to submit additional evidence to the Court in support or in defense of Plaintiff's UCL claim, before adjudication of that claim by the Court.

The following Defendants – all of whom operate restaurants known as O's American Kitchen – are breach of contract Defendants: Casual Food Group, Dough Raisers, Ronald James Mehrens, M&M Restaurant Holdings LLC, Mira Mesa LP, Mission Valley LP, Plaza Bonita P&O LP, P&O Parkway Plaza LP, RK&R United LP, Tricam, Ron Camera, Gilroy Group, and Frank Jiminez. All Defendants are UCL Defendants.

Having considered the pleadings, evidence presented and arguments of counsel, as well as the additional evidence submitted by Plaintiff following the jury's verdict, and assessing credibility of the witnesses, the Court filed the Proposed Statement of Decision in this case. Having also considered the Plaintiff's Objections to Proposed Statement of Decision and Defendants' and Cross-Complainants' Objection to Court's Proposed Statement of Decision, the Court now files this Statement of Decision.

II. SUMMARY OF DECISION

On Plaintiff's Second Cause of Action of the Second Amended Complaint for breach of contract, judgment is to be entered for Plaintiff. Nominal damages are awarded.

On Plaintiff's Fifth Cause of Action of the Second Amended Complaint for violation of the Unfair Competition Law, judgment is to be entered for Defendants.

III. FACTS

The Sarkisian family founded the Oscar's restaurant chain (later renamed Pat & Oscar's) in the early 1990s. Their ownership interest was held through the corporate entity FFPE, LLC ("FFPE"). In 2000, the Sarkisian family sold the restaurant chain to Worldwide Restaurant Concepts, Inc. (which owned and operated the Sizzler Restaurant chain). From 2000 through 2008, two different owners expanded the chain and incurred significant debt, while declining food quality and cleanliness issues—along with a widely publicized E. coli outbreak—damaged the Pat & Oscar's brand. Softening demand for Pat & Oscar's food coincided with significantly increased competition in the fast casual restaurant market. The overall result was steadily declining sales and profits for Pat & Oscar's.

In December 2008, Tim Foley and John Kaufman purchased FFPE for $1, and the assumption of roughly $6 million in debt. At the time, Pat & Oscar's consisted of 19 operating restaurants. In an effort to save the restaurant chain and raise much needed cash, Kaufman and Foley sold eleven corporate-owned locations and through a wholly-owned subsidiary registered with the California Department of Corporations, Pat & Oscar's Development, LLC ("Development"), entered into franchise agreements with the buyers. These restaurants were sold to Defendants: Casual Food Group, Gilroy Group, Dough Raisers, RK&R United LP, M&M Restaurant Holdings LLC, Mission Valley LP, Plaza Bonita P&O LP, Mira Mesa LP, and Tricam. FFPE, Development and the purchasing entities executed asset purchase agreements; while Development and the purchasers executed franchise agreements, and amendments to the franchise agreements as part of many of the sale transactions.[1]

M&M Restaurant Holdings LLC ("M&M"), owned by Maria Bertagnoli and her family members, had previously loaned $500,000 to FFPE, $375,000 of which remained unpaid at the time M&M purchased its franchise. 2/3/15 a.m. Transcript at 41:4-27. As a result, Development agreed that M&M would owe no franchise royalty payments until royalty payments that would be owed totaled the amount of FFPE's debt, *i.e.*, $375,000. Mission Valley LP, Plaza Bonita P&O LP, and Mira Mesa LP were all controlled by their general partner, Orion Holdings, which was in turn owned by Carlyle and Kimiko MacHarg. On August 10, 2010, a MacHarg-controlled entity paid $500,000 to FFPE, in exchange for the right to all franchise royalties that would be owed for the life of the restaurants. Trial Exhs. 2753, 2637, 2636. As a result, Development and FFPE had no further rights to franchise royalties from the MacHarg-affiliated franchises. In other words, through this transaction, these partnerships effectively paid all franchise royalties in advance to Development. Personal guarantees were signed by the following individuals, for the following franchisees: Ron Mehrens Sr. (RK&R United LP – Palm Desert; Dough Raisers, Inc. – Buena Park and San Bernardino), Ron Camera Sr. (Tricam, Inc. – Santa Ana), and Frank Jiminez (Gilroy Group – San Marcos).

FFPE's financial situation further deteriorated from 2009 through 2011. As a result, FFPE laid off corporate employees, and Development faltered in providing the franchise support services required by the franchise agreements. In particular, Development curtailed its marketing, culinary, and operational support for the franchisees, failed to reimburse Defendants for accepting corporate-issued gift cards, failed to reimburse three of the franchisees for monies expended on behalf of the franchisor, and failed to make rent payments owed to certain franchisees' landlords, which payments had been made to FFPE by the franchisees.

On September 21, 2011, FFPE filed a Chapter 7 bankruptcy petition. The bankruptcy trustee immediately shut down the three remaining company owned Pat & Oscar's restaurants, including the

[1] Defendant P&O Parkway Plaza LP was never a franchisee of Development.

Temecula location, which was located on real property owned by the Sarkisians. Development stopped performing all of its obligations to the franchisees. The franchisees, in turn, stopped paying franchise royalties to Development, although they continued using the Pat & Oscar's trademarks and franchised restaurants system. FFPE's bankruptcy filings further revealed that the Marketing and Production Funds that Development was supposed to maintain for the franchisees had been used up to pay FPPE's bills.

During the bankruptcy, FFPE's secured creditor, Sysco Corporation – which was owed approximately $700,000 by FFPE – asserted its first position lien claim which included a perfected security interest in all FFPE assets, including FFPE's ownership interest in Development. As a result of the bankruptcy and the trustee's failure to assume FFPE's leases, those leases were terminated, leaving those former franchisees without subleases for their locations.[2] The restaurant owners thereafter entered new leases with the landlords, or became month-to-month tenants.

In October of 2011, Tammy Moore, the daughter of Pat and Oscar Sarkisian, together with her parents and her husband, re-opened the Temecula restaurant as a Pat & Oscar's. During the same time period, the franchisees attempted to negotiate the purchase of Sysco's lien and believed that they had reached a handshake agreement with Sysco's San Diego President for a purchase price of $350,000. Shortly thereafter, however, the Sarkisian family, through Pat & Oscar's Concepts, Inc. ("Concepts"), purchased Sysco's lien for $370,000. On November 7, 2011, the franchisees were informed of the sale. When it foreclosed on the Sysco lien, Concepts had no employees, no marketing personnel, no human resource personnel, no accounting personnel, and no purchasing personnel. Concepts did not register as a franchisor with the California Department of Corporations, and made no effort to comply with California's Franchise Investment Law.

On December 9, 2011, a meeting occurred between John Sarkisian, Moore, Carlyle MacHarg and Kimiko MacHarg. During this meeting, John Sarkisian and Moore stated that the franchisees would need to pay new franchise fees, plus three to five percent franchise royalties to finance a Sarkisian-owed franchisor. 2/9/15 a.m. Transcript at 33:18-34:2 and 34:21-35:15. John Sarkisian

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[2] Ron Mehrens' restaurant located in Buena Park controlled by the entity Dough Raisers, Inc. was forced to close because it could not obtain a new lease from the landlord. 2/2/15 a.m. Transcript at 16:26-18:20.

stated that he would produce a business plan in time for a subsequent meeting. On December 17, 2011, the Sarkisian family met with a majority of the franchisees. At this meeting, the Sarkisians did not produce a business plan. John Sarkisian, in contrast to the December 9, 2011 meeting, also refused to say whether or not the franchisees would have to pay new franchise fees, but he indicated that royalties would "start[ ] off maybe in around 2 percent and building up to 4 percent, not to exceed 5 percent." 2/9/15 a.m. Transcript 42:8-20. Pat Sarkisian, the mother of John Sarkisian and Tamara Moore, indicated that she had been busy at the Pat & Oscar's Temecula restaurant restoring the recipes to her originals, saying that Pat & Oscar's had deviated from her original recipes, and that a slight change in the recipes made a big difference in the taste of the food. 2/9/15 a.m. Transcript at 41:25-42:7. The Sarkisians informed the former franchisees that if they would become the Sarkisians' franchisees, they would benefit from having access to the original Pat & Oscar's recipes, and that the Sarkisians would market the return of the original founders to the restaurant chain in order to rebuild the Pat & Oscar's brand. 2/9/15 a.m. Transcript at 53:5-12. John Sarkisian said that he would need to see financial statements from the franchisees to determine what level of royalties to charge them. As an alternative to a franchising arrangement, he indicated a willingness to sell the Sarkisians' position, and with it the rights to Pat & Oscar's trademarks and intellectual property, for $1 million. The franchisees declined this offer.

Defendants were unwilling to agree with the Sarkisians' proposal to pay new franchise fees and industry-standard franchise royalties, because 1) all the owners had already paid their franchise fees (or had existing agreements waiving them); 2) the Bertagnoli and MacHarg-controlled entities (M&M Restaurants Holding LLC, Mira Mesa LP, Mission Valley LP and Plaza Bonita P&O) had already paid all royalties due under their existing franchise agreements; and 3) the Frank Jiminez, Ron Mehrens Sr. and Ron Camera Sr. controlled entities (Dough Raisers, Inc., Tricam, Inc., Casual Food Group, Inc., and Gilroy Group, Inc.) had sliding scale royalties under their existing franchise agreements, depending on their levels of sales. The Sarkisians' communications contemplated new franchise agreements with materially different terms.

On December 28, 2011, the Sarkisian family's counsel published a notice of public auction for the FFPE assets which included "Franchise Agreements between Pat & Oscar's Development

LLC and Franchisees." Trial Exh. 57. A public auction for sale of those franchise agreements and FFPE's intellectual property was scheduled for January 11, 2012. Moore and John Sarkisian, who had been leading the efforts on behalf of the Sarkisian family to decide what to do with the purchased Sysco lien, were present at the auction, along with most of the franchise owners. At a meeting that took place after the morning session, John Sarkisian reiterated a willingness to sell the Sarkisians' position to the franchisees for $1 million. Later, the Sarkisians cancelled the auction.

At the time of the cancelled auction, Defendants were still operating their restaurants as Pat & Oscar's. The bankruptcy trustee twice sought and was granted orders from the bankruptcy court granting extensions for the purpose of allowing Defendants to continue using the Pat & Oscar's intellectual property. This extension, however, expired on March 21, 2012. Unwilling to enter into new franchise agreements with the Sarkisians, the former franchisees decided to rebrand their restaurants as O's American Kitchen. They hired a chef; developed a few new recipes and menu offerings; chose a new, cheaper food supplier; and created a new name and logo. On April 18, 2012, the FFPE bankruptcy case terminated, and the bankruptcy trustee relinquished control over FFPE.

On June 2, 2012, shortly after Defendants publicly announced their rebranding to become O's American Kitchen, Tammy Moore removed the previously mentioned reference to the franchise agreements from the notice of public auction of the FFPE assets. (Exhs. 145 and 25.) That auction took place on June 19, 2012. At that time, Plaintiff foreclosed on the Sysco lien, acquiring, *inter alia,* 100% of the financial interest in FFPE, and FFPE's interest in Development, for a credit bid of $10,000. By that date, all but one of the former franchisees had rebranded their restaurants as O's American Kitchen. These O's American Kitchen restaurants varied in the amount and nature of the changes made to their menus, signs, interiors, and recipes.

At the time of the restaurants' change from Pat & Oscar's to O's American Kitchen, there were eleven O's American Kitchen restaurants. Four of those restaurant locations subsequently closed due to poor performance: Orange, San Bernardino, Santa Ana, and Eastlake. A fifth, located in Carmel Mountain Ranch, was unable to make its lease payments; it is currently operating under a month-to-month agreement until its landlord selects a new tenant. The Pat & Oscar's in Temecula, operated by Sarkis Concepts, Inc., continues to operate as the sole remaining Pat & Oscar's. In

2012, both O's American Kitchen and the sole remaining Pat & Oscar's in Temecula operated in the fast casual market by selling breadsticks, chicken, pizza, ribs and salads. Many of the cooking procedures remained the same. There was testimony from customers of both restaurants to the effect that the food tasted the same before and after the transition. A few of the ingredients for all of the most popular items changed: the breadsticks used a slightly different egg mixture and garlic topping (garlic powder instead of chopped fresh garlic); the chicken used a new marinade and a new method for marinating; the pizza used a different marina sauce and changed to higher quality ingredients for toppings; the ribs used a different BBQ sauce; and the salads used a different house dressing.

IV. ANALYSIS

A. Plaintiff's Second Cause of Action for Breach of Contract

1. Liability

This Court, in connection with rulings on *in limine* motions and contested jury instructions, determined that Plaintiff was not obligated to perform under the franchise agreements as a precondition of enforcing the termination covenants in those agreements. When Plaintiff took ownership of the FFPE assets as the successor in interest to Sysco, it took those assets as the assignee of FFPE. The assets were, at the time of the assignment, unencumbered by any debts or obligations because any such debts or obligations had been cleared by the bankruptcy, which had closed some months earlier.

That assignment included FFPE's rights as a third party beneficiary of the franchise agreements, including the benefit flowing from the goodwill earned by the operation of the Pat & Oscar's restaurants. Civil Code § 1559. A party qualifies as a third party beneficiary where the contracting parties intend to benefit the party, such intent appearing from the terms of the agreement. Brinton v. Bankers Pension Services, Inc., 76 Cal.App.4th 550, 558 (1999). While the third party need not be named in the agreement, Lucas v. Hamm, 56 Cal.2d 583, 591 (1961), FFPE was expressly named in the franchise agreement as the owner of the Pat & Oscar's System. As the owner of the Pat & Oscar's System, the agreements were intended to benefit FFPE by requiring the franchisees to take certain actions if their agreements terminated so as to protect FFPE's property. Plaintiff purchased FFPE's property, thereby purchasing FFPE's position as third party beneficiary entitled to protect and use FFPE's property. As third party beneficiary, Plaintiff seeks damages from Defendants' failures to comply with the termination provisions of the franchise agreements.

Paragraph 15.2 states the termination provisions:

> 15.2 Requirements Upon Termination
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> Upon the expiration or earlier termination of this Agreement for any reason, You (the franchisee) must:
>
> (a) immediately discontinue the use of the Marks and the System, including all PAT & OSCAR'S recipes and proprietary procedures;
>
> (b) unless We (Development) consent to the contrary, remove the Marks from Your Restaurant building and its signs, fixtures and furnishings, eliminate entirely PAT & OSCAR'S trade dress and alter and paint Your Restaurant building and other improvements a design and color which is basically different from the PAT & OSCAR'S image and design so that there will no longer be any indication to the public that your Restaurant was a PAT & OSCAR'S Restaurant. If You fail to make or cause to be made any such change within thirty (30) days after written notice, We will have the right to enter upon Your Restaurant premises, without being deemed guilty of trespass or any other tort, and make or cause to be made such changes and You will reimburse Us for all of Our reasonable expenses immediately following demand.
>
> (c) not thereafter use any identifying characteristic that is in any way associated with Us or similar to those associated with Us, or operate or do business under any name or in any manner that might tend to give the public the impression that You are or were a franchisee or otherwise associated with Us.

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These provisions are enforceable even though Plaintiff never acted as the franchisor for the chain because the termination provisions were intended to benefit FFPE, the owner of the brand, by requiring franchisees, who received a turnkey store with an existing loyal customer base, to turn that benefit back to FFPE (or its successor beneficiary) if the franchisee decided to no longer participate in the Pat & Oscar's franchise system.

Section 15.2(c) prevents Defendants from using any characteristic that was ever associated with or related to Pat & Oscar's or that could give anyone the impression that Defendants' restaurant was ever at any time in the past operated as a Pat & Oscar's. Defendants have violated this section by the following conduct:

- Retaining a similar logo. The Pat & Oscar's logo incorporated a uniquely scripted "O." (Exh. 1019.1.) O's American Kitchen continued to use the same "O." (Exh. 1021.3, 1022.8, 1024.1, 1107.1.) To help ease customers over the transition, O's developed a slogan "Names change, values don't." (Exh. 1022.18, 1023.17, 1024.75, 1027.6, 1067.2.) This slogan was specifically intended to send the message to the public that O's was the same as Pat & Oscar's even if the Sarkisians were able to prevent the franchisees from using their characteristics. (Exh. 59.) After the lawsuit was filed, O's changed the style of the "O" for some, but not all, of its restaurants. (Exh. 3021.1, 3022.1, 1023.1.)
- Retaining the Family Value Meals. Pat & Oscar's was known for its family-style menu, allowing a family group to order a variety of entrees to share. (Exh. 1019.6.) O's American Kitchen continued to offer these same family value meals. (Exh. 1022.17, 1023.19, 1024.90, 1030.7.) A few years later, after the lawsuit was filed, they changed the menu category on some items to "Signature Combo Meals;" however, the meal bundles remain the same. (Exh. 1030.5.) Even within the same store, however, some menus referenced "Family Value Meals" while others referenced the same menu category as "Signature Combo Meals". The link to Pat & Oscar's was retained. (Exh. 1030.13, compared with 1030.14.)
- Retaining the signature menu items. The Pat & Oscar's restaurants depended on several core menu items that included breadsticks, lemon chicken, ribs, Caesar salad and Greek salad. (Exh. 1019.73, 1019.168, 1019.203.) These were the best sellers, providing the supporting

revenue for the entire restaurant. (Exh. 1368.) These menu items were associated with Pat & Oscar's due to their flavor that was created by proprietary spice mixes and sauces. (Exh. 1019.151.) O's American Kitchen continued to use that same menu. (Exh. 1332.) O's also continued to use these spices and sauces. (Exh. 1020.89, 1022.188, 1023.166, 1023.181, 1024.31, 1024.154, 1025.55, 1026.124, 1054, 1069.5, 1275.8.) O's also continued to use the preparation directions that had been included in the Pat & Oscar's recipe book. (Exh. 1025.94, 1034.1, 1046.1.) While it is true that over time the franchisees made small changes to the menu, they intentionally kept "the backbone intact" by making "low touch" changes only. (Exh. 11A.) The result was no real net change. (Exh. 11H.) This was designed to retain the Pat & Oscar's customer base. (Exhs. 21 and 177.)

- Retaining the catering menu offerings. Pat & Oscar's developed a unique niche in the catering market, resulting in a significant revenue source. (Exh. 1019.13.) In furtherance of this, Pat & Oscar's developed a catering order form. (Exh. 1019.262.) O's American Kitchen continued to profit from this revenue source using the same menu. (Exhs. 1021.12 and 1331.) O's also copied the Pat & Oscar's catering form. (Exh. 1022.202, 1025.110, 1063.2.)

- Retaining the décor. The Pat & Oscar's restaurants were decorated with photographs depicting their signature menu offerings. (Exh. 1019.21, 1019.30, 1019.35, 1019.38, 2218, 2220, 2229.) They also displayed the Mission Statement that had been used since 1991. (Exhs. 1019.26 and 1025.9.) O's American Kitchen used the same photographs of Pat & Oscar's food. (Exh. 1022.4, 1022.19, 1022.24, 1023.3, 1023.11, 1023.12, 1024.70, 1024.71, 1024.81, 1275.94.)

- Retaining the serving style. Beginning with their second restaurant, Pat & Oscar's enhanced its family service brand by setting up a condiment station where the customer family could select its place settings and sauces to set their table while waiting for their first course to arrive. (Exhs. 1019.22, 1019.29 and 1084.) O's American Kitchen continues to use this serving style. (Exh. 1020.9, 1021.24, 1022.22, 1023.14, 1024.76, 1025.8, 1026.21, 1031.3, 1275.86.)

The intent of section 15.2 in its entirety is to ensure that departing franchisees make a completely clean break so that Pat & Oscar's can retain its loyal customer base and its goodwill. Use of the same method of operations gives the customer the familiar feeling of being at a Pat &

Oscar's. As such, even if every other person in the world could copy the Pat & Oscar's operational system from observation, these franchisees cannot because they expressly agreed not to do so.

With regard to two of the individually named Defendants, Maria Bertagnoli and Frank Jiminez, the defense claims neither signed personal guarantees as to the Carmel Mountain Ranch and Eastlake restaurants, respectively. However, Section 13.1 of those agreements states:

> 13.1 <u>Definition of Principals: Personal Guarantees</u>
>
> For purposes of this Section 13, the term "Principals" will include the persons signing this Agreement as Principals, any of Your (the franchisee) future owners and the spouses, minor children or any trust for the benefit of any such Principal. Unless We (Development) have given Our written consent to the contrary, each of the Principals signing this Agreement hereby personally guarantees, jointly and severally, the full payment and performance of Your obligations under this Agreement. (Exhs. 17 and 1024.)

Such language forms the basis for individual liability pursuant to this cause of action.

2. Waiver

Waiver is the intentional relinquishment of a known right. *Gould v. Corinithian Colls., Inc.* 192 Cal.App.4th 1176 (2011). Defendants had the burden of proving by clear and convincing evidence that Plaintiff knowingly gave up its right to enforce the franchise agreements.

Based on the facts stated above, the court finds that Defendants have failed to meet their burden.

3. Damages

CACI 303 states that Plaintiff must prove it was harmed by the conduct of the Defendants.

Damages for breach of contract may not be based on speculation or conjecture. Cal. Civ. Code § 3301. "It is fundamental that [contract] damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as the legal basis for recovery." *Earp v. Nobmann*, 122 Cal. App. 3d 270, 295 (1981), *overruled on other grounds by Silberg v. Anderson*, 50 Cal. 3d 205, 266 (1990). At trial, Plaintiff sought lost profits as its only measure of damages on the breach of contract claim. Under California law, "lost profits must be 'reasonably certain' to be recoverable." *Sargon Enters. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 780 (2012) (quoting *Grupe v. Glick*, 26 Cal. 2d 680, 693 (1945)). Plaintiff thus bore the burden of proving with reasonable certainty that "it would have earned profits but for the Defendants' breach of contract." CACI 352. Plaintiff failed to carry this burden because its theory of lost profits was speculative.

a. Plaintiff Limited Its Damages Claim to Lost Profits

Several of the franchise agreements contain liquidated damages provisions. However, Plaintiff did not seek to recover liquidated damages. Indeed, although Plaintiff's damages expert, Dr. Patrick Kennedy, performed a pre-trial analysis of liquidated damages, and Defendants' counsel cross-examined him at trial regarding flaws in that analysis, both Dr. Kennedy and Plaintiff's counsel stated that Plaintiff was not pursuing such damages at trial. Dr. Kennedy testified that he performed liquidated damages calculations for Defendants' restaurants "under what [he] understood Defendants' legal theory to be" and that this calculation did not reflect his "damages opinion." 1/29/15 a.m. Transcript at 4:14-15 and 6:17-18. Further, during Dr. Kennedy's cross-examination on the subject, Plaintiff's counsel objected: "Excuse me, your Honor. I'm going to object. [Liquidated damages are] now irrelevant. If what's already been said that [Defendants] are not claiming the smaller amount of damages, the liquidated damages, this is all irrelevant." 1/29/15 a.m. Transcript at 7:18-22. In sum, Plaintiff abandoned any claim for liquidated damages and sought instead to recover consequential damages for lost profits.[3]

b. Plaintiff's Claim for Lost Profits Rests on Flawed Premises

Plaintiff's claim for lost profits, as expressed by Dr. Kennedy, was based on several factual premises inconsistent with the evidence at trial. This claim was based on the assumptions that, by exercising a clause in the Defendants' franchise agreements allowing the takeover of Defendants' restaurant leases, Plaintiff could have and would have taken over all of Defendants' restaurants in mid-2012, and immediately could have and would have begun earning profits by operating them

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[3] In any event, on cross-examination, Dr. Kennedy conceded that the franchise agreements for Dough Raisers, Inc., RK&R United LP, Mira Mesa LP, Mission Valley LP, and Plaza Bonita P&O LP all had been amended to delete the liquidated damages provision.

successfully. Substantial evidence demonstrated that these events were very unlikely to occur. As a threshold matter, not all of the restaurants at issue were subject to this purported takeover mechanism. The Parkway Plaza restaurant was never a franchise. After the lease for the Buena Park restaurant was terminated by operation of law in the FFPE bankruptcy, the landlord for that location only agreed to several sixty day rolling leases. Thus, Plaintiff had no contractual right to take over those restaurants even if it wanted to. Following the FFPE bankruptcy, the restaurants owned by Dough Raisers, RK&R United, Gilroy Group, and Casual Food had to negotiate new lease agreements with the landlords. The evidence showed that these new leases did not contain the requisite language from the franchise agreements with Development allowing for a takeover. There was thus no mechanism by which Plaintiff could have taken over these new leases with third-party landlords.

Furthermore, even as to the restaurants that did have franchise agreements and leases, Plaintiff's takeover theory was not sufficiently supported by the evidence. Plaintiff presented no evidence that it or anyone on its behalf affirmatively elected to take over Defendants' leases, as the franchise agreements required.[4] *See, e.g.,* 1/26/15 p.m. Transcript at 206:3-16; Trial Exh. 17. In their email communications, Ms. Moore and John Sarkisian discussed how they might finance a franchising company with royalties collected from Defendants and sales of one franchise to a potential investor, Howard Lomas. The evidence, however, did not sufficiently support the conclusion that Plaintiff had the capital or the willingness to take on the burdens and risks of actually taking over Defendants' restaurants. Thus, the claim that Plaintiff could have or would have taken over Defendants' restaurants in mid-2012 has insufficient evidentiary support.

In addition, even if Plaintiff had intended or attempted to take over Defendants' restaurants, the evidence demonstrated that Plaintiff was not prepared to, or capable of, operating those

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[4] Section 15.5 included in all of the franchise agreements reads: "(a) If Your restaurant premises are leased by You from a third party, You will have included in such lease and any subsequent lease of the premises the right by You to assign such lease to Us without further consent by the lessor. We may elect to have the lease automatically assigned to Us under such provision if this Agreement is terminated, whether it is terminated by Us or by You. If We so elect, You will immediately vacate the premises, and We will be entitled to take possession of said premises, including all fixtures and leasehold improvements, and We will pay to You the fair market value of the interests owned by You in Your Restaurant's furnishings and equipment."

restaurants successfully. From approximately 2002 to late 2011, neither Moore nor any member of her family had any role in owning or operating a Pat & Oscar's restaurant. During that time period, Moore operated two other restaurants, but neither had been financially successful. And, although in late 2011, Moore did begin operating a Pat & Oscar's restaurant in Temecula, the evidence showed that this restaurant has lost money.

Moreover, Plaintiff had no employees, marketing personnel, human resources personnel, accounting personnel, or purchasing personnel; Plaintiff had no written business plan, marketing plan, budgets, or financial projections for operating a Pat & Oscar's restaurant chain; and Moore, Plaintiff's President, at no time attempted to raise any money for operating such a chain. Indeed, although Moore testified that Plaintiff could have raised funds to run Defendants' restaurants, there was no evidence of any meaningful effort to do so, and no evidence of any investor or lender willing to finance the Plaintiff's takeover of the Pat & Oscar's restaurants. In fact, Plaintiff had only $9,000 in the bank at the time it contends it could have taken over those restaurants.

Given the evidence at trial that not all Defendants' restaurants were susceptible to a takeover, that Plaintiff neither intended nor attempted to take over those restaurants, and that Plaintiff was not likely capable of doing so in any event, the Court finds that Plaintiff has failed to meet its burden to prove with reasonable certainty that it lost profits based on such a takeover theory.

c. Plaintiff's Claim for Lost Profits Rests on Unreliable Expert Opinion

Even if Plaintiff could have and would have taken over Defendants' restaurants, and even if Plaintiff had the means to operate those restaurants, the Court finds Plaintiff's evidence of the extent of its lost profits uncertain and unreliable. Plaintiff's evidence of damages was provided exclusively by Dr. Kennedy, who opined that Plaintiff suffered $22,968,757 in lost profits. 1/28/15 p.m. Transcript 235:6-236:15. Dr. Kennedy's opinion was that Plaintiff would have earned that amount in profits but for Defendants' breaches of the franchise agreements. For several reasons, the Court finds Dr. Kennedy's opinion insufficient to prove the existence or extent of consequential damages, with the degree of certainty the law requires.

First, Dr. Kennedy was required to base his lost profits opinion on assumptions "substantially similar to the lost business opportunity." *Parlour*, 152 Cal. App. 4th at 290. Thus, when offering a lost profits opinion, an expert may not ignore actual "[h]istorical data." *Sargon*, 55 Cal. 4th at 774, 778 (rejecting a lost profits opinion that failed to account for actual performance). Dr. Kennedy's opinion failed to meet these standards. He assumed that, under Plaintiff's control, Defendants' restaurants would have been immediately profitable and that their revenues would have grown by three percent per year, in perpetuity. However, the actual financial performance of these restaurants, both before and after Plaintiff's hypothetical takeover, contradicts these assumptions. In 2011, after a decade-long decline, the Pat & Oscar's restaurant chain fell into Chapter 7 bankruptcy. Thus, by the time of Plaintiff's hypothetical takeover, the chain was in poor financial health.

Further, revenues at Defendants' restaurants declined by over 15 percent the first year in which the purported takeover was supposed to occur, and had declined by a total of 40 percent by the end of the following year. By the time of trial, most of the restaurants had either closed or were suffering losses. Indeed, revenues at the single Pat & Oscar's restaurant actually run by Moore—who under Dr. Kennedy's assumptions would have been responsible for running Defendants' restaurants—declined by approximately 33 percent in the year following Plaintiff's proposed takeover and were flat the year after.

Second, Dr. Kennedy failed to account for factors that actually depressed the restaurants' revenues and profits in the years following Plaintiff's proposed takeover, and in all likelihood would have also done so under Plaintiff's watch. As explained in the testimony of the franchise owners and Defendants' damages expert, Tom Lambert, each individual restaurant faced its own unique challenges, such as highway construction, mall renovations, and increasing competition by particular fast casual competitors near each particular store. These individual circumstances for each store caused significant differences in sales and profitability for each restaurant, and impacted the likelihood of future sales and profits for each restaurant. Dr. Kennedy did not take these individual circumstances into account in grouping all of the stores together and projecting uniform revenue and profit growth for all of them.

Based on these undisputed facts and others, Defendants' expert, Tom Lambert opined that Dr. Kennedy's lost profits projections were too speculative to be relied upon, and that Plaintiff did not appear to have suffered any economic loss. The Court finds Mr. Lambert's conclusions to be more reliable than those of Dr. Kennedy, particularly in light of the substantial evidence of the actual value of Plaintiff's allegedly lost opportunity. Dr. Kennedy generally agreed that evaluating the fair market value of an asset involves determining the amount for which it would change hands between a willing buyer and a willing seller when both have reasonable knowledge of the facts and are not under compulsion. 1/28/15 p.m. Transcript at 283:18 – 284:28. Here, the evidence showed that nobody other than Defendants and the Sarkisian family bid on the Pat & Oscar's brand when Sysco sought to sell it. Defendants offered $350,000, and the Sarkisian family outbid them to purchase it for $370,000. The Sarkisians then unsuccessfully attempted to sell that asset to Defendants for $1 million. Dr. Kennedy, nevertheless, proposed that what Plaintiff claims Defendants prevented it from exploiting—the Pat & Oscar's brand—was actually worth $22,968,757.

In the face of these facts, Dr. Kennedy's opinion that Plaintiff, under Moore's leadership, would have earned millions in profits by taking over Defendants' restaurants is "based on assumptions of fact that are without evidentiary support." *Bushling v. Freemont Med. Ctr.*, 117 Cal. App. 4th 493, 510-11 (2004); *see also Berge v. Int'l Harvester Co.*, 142 Cal. App. 3d 152, 163 (1983) (rejecting an expert opinion on lost profits, where the business at issue had actually been losing money). Because Dr. Kennedy did not credibly account for "profits [the restaurants] had ever actually realized" (*Sargon*, 55 Cal. 4th at 759), he has no "acceptable basis for ascertaining lost future profits" (*id.* at 774).

Regarding its lost profits claim, the Plaintiff claims that the current reality is not reflective of the reality that would exist if the Defendants had not breached the termination provisions of the franchise agreements. And, accordingly, Pat Kennedy could appropriately make assumptions that had there been no breach and had the restaurants remained Pat & Oscar's restaurants and been operated competently, then he could properly analyze the supposed performance of the restaurants to arrive at a reasonably certain determination of past and future lost profits.

However, the court, as trier of fact, is left to speculate. When asked about her vision for the brand, Tammy Moore testified, in part, "... I thought we could do a multiple of things. I thought we could open some franchise stores, some company stores, and actually a footprint of maybe some of the smaller carryouts, too. So it was going to be a combination of all of these." 1-21-15 p.m.

Transcript at 45:9-13.

Lost profits sustained by the Plaintiff in a company store would obviously differ in amount than those sustained in a franchise store. The number of each type of store relative to the other would have a dramatic effect on any lost profit calculation.

The court finds that the Plaintiff has failed to prove the extent of the lost profits it claims to have suffered. Such lost profits are not reasonably certain. CACI 352. The court can only speculate. The court cannot do so. Accordingly, nominal damages are awarded in the amount of one hundred dollars against all defendants, except P&O Parkway Plaza LP, jointly and severally.

In Defendants' and Cross-Complainants' Objection to Court's Proposed Statement of Decision, they inquire as to the basis of a no liability finding in favor of Defendant P&O Parkway Plaza LP on the breach of contract cause of action. The Court makes no finding on the liability of P&O Parkway Plaza LP on that cause as it did not waive jury. Accordingly, that issue is not properly addressed here. The jury issue raised will be the subject of a separate ruling and order.

B. Plaintiff's Fifth Cause of Action for Violation of the UCL

The Unfair Competition Law empowers the Court to enjoin business practices that are unlawful, unfair, or fraudulent. Cal. Bus. & Prof. Code §17200. Plaintiff presented evidence at trial of Defendants' business practices in marketing and operating their O's American Kitchen restaurants, and Plaintiff submitted a Declaration from Dr. Kennedy after trial purporting to quantify the cash from operations generated by Defendants in the operation of their restaurants.

A UCL claim is equitable in nature and must, therefore, be decided by the Court. *Bank of the West v. Super. Ct.,* 2 Cal. 4th 1254, 1266 (1992); *Nwosu v. Uba,* 122 Cal. App. 4th 1229, 1244. Plaintiff's UCL claim has a very limited recovery: "A UCL claim is equitable in nature; damages cannot be recovered." *Bank of the West,* 2 Cal. 4th at 1266. Under the UCL, "[p]revailing Plaintiffs are generally limited to injunctive relief and restitution." *Cel-Tech Commc'ns v. L.A. Cellular Tel. Co.,* 20 Cal. 4th 163, 179 (1999); *ABC Internat. Traders, Inc. v. Matsushita Elec. Corp.,* 14 Cal. 4th 1247, 1268 (1997). "A court cannot, under the equitable powers of section 17203, award whatever form of monetary relief it believes might deter unfair practices." *Korea Supply Co. v. Lockhead Martin Corp.,* 29 Cal. 4th 1134, 1149 (2003).

As pled, the Second Amended Complaint alleges that Defendants engaged in the following conduct between October 2011 and the present, in violation of the UCL: (a) representing to the public that they are rebranding the Pat & Oscar's restaurant chain; (b) representing to the public that nothing has changed in their restaurants, thereby deceiving the general public into believing that the Pat & Oscar's chain no longer exists; (c) representing that the only change in the operation of their restaurants is the composition of the barbecue sauce; (d) executing an illegal agreement, during FFPE's bankruptcy, purporting to give themselves the right to use FFPE's property in the O's American Kitchen restaurants; (e) operated a "deceptively named company" P&O Restaurants, LLC; (f) Defendants contacted the State of California to cancel Development's franchise agreement; (g) Defendants "hijacked the Pat & Oscar's website" by circumventing FFPE to submit payment to the service provider; (h) Defendants included hidden data of "Pat & Oscar's" in its www.osamericankitchen.com website; and (i) Defendants are operating an illegal and unregistered franchise system.

1. Injunctive Relief

As to items (a) through (c), there was insufficient evidence that Defendants are presently representing to the public that they are rebranding the Pat & Oscar's restaurant chain, or that nothing in their restaurants has changed, or that the only change in their restaurants is the barbecue sauce. The only evidence of such conduct was that statements to that effect were made three and four years ago, when the restaurants were first being rebranded. The O's American Kitchen brand is now being advertised and marketed by Defendants as its own brand with its own identity, so there is no unlawful, unfair, or fraudulent conduct regarding statements to the public that the Court should enjoin.

As to item (d), Defendants attempted to introduce evidence that on May 24, 2012, John Kaufman executed a Trademark License Agreement on behalf of FFPE (Trial Exh. 117), permitting P&O Restaurants, LLC to use the Pat & Oscar's trademarks and intellectual property during a rebranding period, until October 21, 2012. On April 18, 2012, the FFPE bankruptcy was terminated by the Bankruptcy Court, but FFPE continued to exist as an entity. 2/9/15 a.m. Transcript at 65:1-8. As of May 24, 2012, Plaintiff had not yet foreclosed on FFPE's assets. As a result, neither the

Bankruptcy Court, nor the trustee, nor Plaintiff appeared to own the Pat & Oscar's trademarks and intellectual property at that time. The Court sustained Plaintiff's objection to Exh. 117. Defendants ceased using the Pat & Oscar's trademark as they rebranded their restaurants, and there was no evidence of any continuing use of those trademarks at the time of trial, or at any recent time before trial. Accordingly, there is no unlawful, unfair, or fraudulent business practice to enjoin with respect to this item.

As to item (e), P&O Restaurants, LLC was created before the bankruptcy of FFPE as the potential buyer of FFPE's assets. When the purchase of FFPE's assets could not be effectuated by Defendants, nine months later, the then-dormant P&O Restaurants, LLC was used to formalize among Defendants their cost-sharing percentages and licensing of the intellectual property in O's American Kitchen. Since P&O Restaurants LLC is and was merely a holding company, and not used as a trade name or in any public manner in the O's American Kitchen restaurants, there is no unlawful, unfair or fraudulent conduct to enjoin with respect to this item.

As to item (f), there was no evidence that Defendants contacted the State to cancel Development's franchisor registration. The evidence was that Development abandoned its application for registration as a franchisor licensed by the State of California. 2/5/15 a.m. Transcript at 52:11-24. Development's parent company was in Chapter 7 bankruptcy, and it was not receiving any franchise royalties. In addition, because Plaintiff did not and is not seeking to register as a franchisor, there is no unlawful, unfair, or fraudulent conduct by Defendants to enjoin with respect to this item.

As to items (g) and (h), Plaintiff obtained control of the Pat & Oscar's website in 2011, a short time after it purchased FFPE's assets. In addition, while a Pat & Oscar's name appeared in the html code of the O's American Kitchen website for some period of time, the undisputed evidence was that this metatag was removed from the website as soon as Plaintiff brought it to the attention of Defendants through its opposition to Defendants' motion for summary adjudication. That metatag was removed by approximately March 26, 2013. Accordingly, there is no ongoing conduct by Defendants concerning the former Pat & Oscar's website, or the current O's American Kitchen website, that is unlawful, unfair or fraudulent, and thus, there is no conduct for the Court to enjoin with respect to these items.

As to item (i), insufficient evidence was presented to persuade the Court that Defendants are operating an illegal and unregistered franchise system. The evidence indicates that Defendants are not offering franchises to any potential franchisees, and they are not otherwise violating the Franchise Investment law. Instead, they are sharing a commonly licensed O's American Kitchen trademark, and they are sharing expenses associated with collectively running and promoting their O's American Kitchen brand. There is no unlawful, unfair or fraudulent business practice to enjoin.

In sum, the Court finds no basis to grant injunctive relief under the UCL.

In Plaintiff's Objections to Proposed Statement of Decision, Plaintiff objects to the Court declining to enjoin some of the Defendants business operations, because the breaches of contracts are continuing. Plaintiff argues that further breaches should be prevented because the breaches are preventing Plaintiff from re-entering the markets. Additionally, Plaintiff objects that because a breach of contract is unlawful and therefore a violation of the UCL, an injunction should issue to prevent further violations.

The Court is not persuaded, as a matter of equity, that any of the business practices of Defendants should be enjoined here. This finding is based on all of the facts and circumstances of this case recited above.

The Fifth Cause of Action alleging violations of the UCL specifically pleads items (a) – (c) stated above. Those items form the heart of the basis for injunctive relief sought by Plaintiff. Yet the evidence showed that those actions of the Defendants took place primarily three and four years ago. This evidence does not persuade the Court that continuing breaches and violations are occurring, or will occur in the future, such that, in equity, an injunction should issue now.

For the reasons stated above, the Court is left to wonder if anything the Defendants still in business are doing is preventing Plaintiff from re-entering the markets should it desire to do so.

2. Restitution

After trial, Plaintiff submitted Exhibits A and 4024. Exh. A is a "Summary of Earnings by Store". Exh. 4024 is a Declaration from Mr. Kennedy setting forth an estimate of Defendants' cash flow from operations "from October 1, 2011 through present." Plaintiff requests the total amount reflected in Exh. A, i.e., $4,662,344.00, as monetary relief under the UCL. The evidence as stated above does not support Plaintiff's request, even if Dr. Kennedy's estimates of Defendants' cash flow from operations were sufficiently reliable to enable the Court to quantify a restitutionary remedy.

Under the UCL, "disgorgement of profits" is available only in rare circumstances; the California Supreme Court has explained that "outside the class action context, a disgorgement remedy…is not authorized." *State v. Altus Fin, S.A.,* 36 Cal. 4th 1284, 1304 n.7 (2005). Further, even if disgorgement were available, such a remedy must be "restitutionary" in nature. *Korea Supply Co.,* 29 Cal. 4th at 1148. To constitute restitution under the UCL, any profits must be either 1) money that was at one time in Plaintiff's possession, or 2) money in which Plaintiff has a "vested interest." *Id.* at 1149. The revenues from Defendants' restaurants, or more particularly, any profits that Defendants made from those restaurants are not monies that were ever in Plaintiff's possession. Those monies were paid to Defendants by customers, in exchange for food and beverages the customers received. Plaintiff was never a customer of Defendants' restaurants, and Plaintiff is not representing Defendants' customers as a class representative.

To have a vested interest in Defendants' profits, Plaintiff must be able to show that it had an "ownership interest" in the profits, and more than a mere "contingent expectancy" in the receipt of those monies. *Id.* at 1149-1150. In *Korea Supply,* the Supreme Court rejected the Plaintiff's argument that it had a vested interest in the Defendant's profits, where the Plaintiff contended that the Defendant unfairly profited from a third party. *See Korea Supply,* 29 Cal. 4th at 1149-1150; *see also Madrid v. Perot Sys. Corp.,* 130 Cal. App. 4th 440, 455 (2005) ("We also reject Plaintiff's apparent position that he could recover money [Defendant] received from third parties."). The Court is bound by that precedent here. Like the Plaintiff in *Korea Supply*, Plaintiff here had no "ownership interest" in monies Defendants received from restaurant patrons. Accordingly, Plaintiff is not entitled to monetary relief under the UCL.

Plaintiff objects that the Court fails to justify the refusal to award restitution and misstates and misapplies the law, the *Korea Supply* case in particular. The Plaintiff states that a constructive trust should be imposed. It need only show that it had a vested interest in the money Defendants received. Plaintiff argues the Court should, as a matter of equity, fashion a remedy to prevent Defendants' unjust enrichment at Plaintiff's expense, because Plaintiff has a claim on Defendants' revenues earned by their breach.

A constructive trust was not pled in the Second Amended Complaint. Regardless, though, the Plaintiff has not met its burden to show monetary relief should be awarded pursuant to the UCL.

Korea Supply references the legislative concern to provide an equitable and "streamlined procedure" to prevent unfair business practices and unfair competition when the UCL was enacted. "Because of this objective, the remedies provided are limited." *Id.* at 1150. "As one court has noted: 'Compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims'. (*Mai Systems Corp. v. UIPS* (N.D. Cal. 1994) 856 F. Supp. 538, 542.)" *Id.* at 1151.

Citing the United States Supreme Court case of *Great-West Life & Annuity Ins. Co. v. Knudsen* 534 U.S. 204, 213 (2002), *Korea Supply* held that "a constructive trust requires 'money or property identified as belonging in good conscience to the plaintiff [which can] clearly be traced to particular funds or property in the defendant's possession'. The recovery requested in this case cannot be traced to any particular funds in (defendant's) possession and therefore is not the proper subject of a constructive trust". *Id.* at 1150. The Court so finds here.

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Based on all of the facts and circumstances stated above, the Court finds that the Plaintiff has not met its burden of proof that it is entitled to monetary relief under the UCL. While it is right to utilize the court's broad equitable powers "to fashion a remedy which would prevent defendant from being unjustly enriched at plaintiff's expense," *Martin v. Kehl* 145 Cal.App.3rd 228, 237 (1983), when appropriate as Plaintiff urges, the Court finds that it cannot do so here. Even assuming that some amount of restitution is appropriate here, the Court is left to only speculate as to what percentage or amount of money from which Defendant or Defendants is fair, just and equitable.

Judgment is to be entered accordingly.

IT IS SO ORDERED.

Dated: 8-17-15

KEVIN A. ENRIGHT
Judge of the Superior Court