

2019 SEP 17 A 9 36

**In the United States District Court  
for the District of Utah, Central Division**

PRO-FIT WORLDWIDE FITNESS, INC., an  
Island of Nevis corporation, and SPORTS  
HYGIENE, an Israeli partnership, by  
JOSEPH (YOSEF) and JACKIE (JAACOV)  
SIMSOLO, its general partners

Plaintiffs,

vs.

FLANDERS CORPORATION, a North  
Carolina corporation, PRECISIONAIRE OF  
UTAH, INC., a Utah corporation,  
FLANDERS/PRECISIONAIRE, INC., a  
foreign corporation, PRECISIONAIRE, INC.,  
a foreign corporation, AIRSEAL WEST,  
INC., a Utah corporation, and STEVEN K.  
CLARK, an individual, and  
HEALTHWORKS, INC., a foreign  
corporation or assumed name

Defendants.

Case No: 2:00 CV 0985

MEMORANDUM DECISION  
and ORDER

This matter is before the court on defendants' Motion for Summary Judgment and defendants' further Motion for Partial Summary Judgment on its Counterclaim. Although several claims and defenses are asserted, the basic matter presented has to do with the contractual relationship between the parties. The parties started doing business concerning the manufacture and distribution of treadmills in 1998 under an "Exclusive Distribution Agreement." The parties

dispute whether the 1998 Agreement remained in force and effect in spite of the conduct of the parties after extensive negotiations to replace it in the summer of 1999 failed. The said agreement which was to take the place of the original agreement was never executed by the parties because of disagreement as to certain terms, including pricing of the treadmill machines. Thereafter, interim pricing arrangements were entered into, but disputes arose, allegedly unauthorized letters were sent by defendants to plaintiffs' customers, and certain sales were made directly by defendants. As a result, plaintiffs filed this action for breach of contract as well as tortious conduct and trademark infringement.

This court rules that the 1998 Distribution Agreement was valid and remained in full force and effect at all pertinent times herein. Further, that the 1999 alleged replacement agreement never became valid or of any force and effect and in any event it is barred by the Statute of Frauds. Except for these rulings, defendants' other motions are denied because of genuine issues of fact to be determined at trial, or are deferred for ruling in the context of the trial.

#### **FACTUAL BACKGROUND**

Plaintiff Pro-Fit Worldwide Fitness is a corporation incorporated under the laws of the Island of Nevis, doing business in Israel. Plaintiff Sports Hygiene is a partnership formed under the laws of Israel, with its principal place of business in Israel. Individual plaintiffs Joseph (Yosef) and Jackie (Jaacov) Simsolo are general partners of Sports Hygiene and are officers of Pro-Fit. Plaintiffs herein are referred to collectively as "Pro-Fit".

Defendant Flanders Corporation is incorporated under the laws of North Carolina with its principal place of business in Florida. Flanders Corporation does business in the District

of Utah either directly or through wholly-owned subsidiaries or divisions, which are named parties in this litigation. Individual defendant Steven K. Clark is claimed to be the alter ego of all defendants. Defendants herein are referred to collectively as "Flanders."

On July 28, 1998, the parties entered into an Exclusive Distributorship Agreement with defendants as distributor.<sup>1</sup> Defendants were granted the exclusive right to distribute all fitness equipment produced by plaintiffs as manufacturer in specified territories and countries. The agreement provided for minimum annual purchases, prices for the first twelve months which were subject to change by mutual agreement, a term of three years including an automatic renewal clause for each year, and a modification clause which required that any modification be made in writing and signed by both parties.

In the spring and early summer of 1999, plaintiffs and defendants began to negotiate what apparently was intended as a replacement manufacturer/distributor agreement. Plaintiffs and defendants engaged in numerous negotiations regarding the terms of the new distributorship agreement throughout most of the summer of 1999. The final result was a draft agreement calling for an execution date in July 1999. However, it is undisputed that the draft agreement in question was never signed, dated, or finalized by either party.

A modified pricing arrangement for the treadmills was put into effect on August 17, 1999. This pricing agreement was signed by both parties and provided for specified prices on four treadmill models. On April 3, 2000, the parties again began to negotiate a new pricing

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<sup>1</sup> The 1998 Agreement was signed by Air Seal West, Inc. Division of Flanders Fitness as "Manufacturer," and Pro-fit Worldwide Fitness, Inc. as "Distributor." However, that agreement is regarded by the parties as having been entered into on behalf of all named parties plaintiff and all named parties defendant herein. Also, the parties regard the actions of any plaintiff and any defendant to be on behalf of all plaintiffs and all defendants respectively, in connection with motions before the court.

agreement. In a letter sent from Jackie Simsolo of Pro-Fit to Steve Clark of Precisionaire, final prices for four treadmill models were specified. The letter also indicated that the prices would be valid for a period of six months. On May 23, 2000, the said April 3rd letter was signed by both parties, which modified the prices of the treadmills once again. However, on July 11, 2000, in a letter from Flanders to Pro-Fit, defendants claimed that the costs of manufacturing Pro-Fit's treadmills had been grossly underestimated, requiring an adjustment in the prices of the treadmills of over one-hundred dollars per unit. The letter described the bottom line to be that "we will not continue to sell products at a loss." In response, Pro-Fit sent Flanders a letter on July 16, 2000, stating that pursuant to the pricing agreement signed on May 23, 2000, Pro-Fit regarded that the prices for the treadmills had already been established for a six month period, and that since May 23, 2000 Pro-Fit relied on that pricing arrangement and had offered it to all of its customers. Pro-Fit stressed that if Flanders did not honor Pro-Fit's most recent purchase orders in a timely manner in accordance with the said pricing agreement, Pro-Fit would sustain substantial damages.

Beginning at the end of September 2000, on three separate occasions, September 28, 2000, October 18, 2000, and October 31, 2000, Flanders sent letters to Pro-Fit's treadmill customers without Pro-Fit's permission. All three letters to Pro-Fit's customers indicated that Flanders was willing to offer Pro-Fit's customers the same prices it would offer Pro-Fit and that Pro-Fit's customers could buy directly from Flanders. In addition, Flanders allegedly made misrepresentations in these letters, and made statements that the orders placed by Pro-Fit had been cancelled. At approximately the same time, Flanders also began to send treadmills directly to some of Pro-Fit's customers. In December 2000, Pro-Fit filed suit against Flanders claiming

breach of the distribution agreement, as well as other grievances including alleged interference with Pro-Fit's business relations.<sup>2</sup>

#### STANDARD FOR SUMMARY JUDGEMENT

Summary Judgment is appropriate where the evidence presented "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In determining whether the evidence weighs heavily enough in favor of one party that summary disposition is merited, "the court views the record and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Jeffries v. Kansas, 147 F.3d 1220, 1228 (10th Cir. 1998).

#### DEFENDANTS' CONTRACTUAL CLAIMS

##### A. The 1999 Unsigned Draft Agreement

The Uniform Commercial Code (UCC) adopted by Utah states:

a contract for the sale of goods for the price of \$500 or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought.

Utah Code Ann. § 70A-2-201 (1991) ("the Statute of Frauds"). In interpretation of this statute, the Utah Court of Appeals has explained "all that is required [to satisfy the Statute of Frauds] is that the [agreement] be . . . declared by a writing subscribed by the party to be charged." Smith v. D.A. Osguthorpe, 58 P.3d 854, 859 (Utah 2002) (quoting Guinand v. Walton, 450 P.2d 467,

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<sup>2</sup> Plaintiffs' claims include (1) breach of contract, (2) breach of duty of good faith and fair dealing, (3) promissory estoppel, (4) unfair competition, (5) breach of fiduciary duty, (6) intentional interference with contract and or economic relations, (7) injunctive relief, (8) trademark and trade name infringement, and (9) alter ego. Defendants deny and have asserted defenses and factual disputes as to all of plaintiffs' claims.

In support of its Counterclaim, defendants claim to be entitled to present compensation for treadmills accepted by and inventory procured for Pro-Fit. However, plaintiffs have raised factual disputes concerning this claim.

469 (Utah 1969)).

Plaintiffs argue that although the 1999 Draft Agreement was never signed, the parties continued in their relationship as if it had been signed. In particular, plaintiffs argue that the course of conduct exhibited by the parties is sufficient to show the formation of a contract. Plaintiffs rely on § 70A-2-204 of the Utah Code which provides: “a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties, which recognizes the existence of such a contract.” Although Plaintiffs’ argument would be correct in certain situations, it fails under the facts of this case. First, in order to find an exception to the Statute of Frauds, the party seeking to enforce the agreement may find recourse only within that section of the statute which deals with the Statute of Frauds. In this regard, Utah Code § 70A-2-201(1) provides that “[e]xcept as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made.” (Emphasis added.) It is clear that any exception to the Statute of Frauds must be found within that very Section 2-201 of the UCC. It is also clear that no writing sufficient to indicate a contract was made under that Section exists. Section 2-204 of the UCC does not trump the requirements of the Statute of Frauds. Second, the Utah Supreme Court has noted “that if an original agreement is within the Statute of Frauds, a subsequent agreement that modifies the original agreement must also satisfy the requirements of the Statute of Frauds to be enforceable.” R.T. Nielson Co. v. Cook, 40 P.3d 1119, 1124 (Utah 2002) (citing Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985)). The 1999 Draft Agreement does not satisfy the requirements since it was never signed, dated, or finalized. In addition, an e-mail from defendant Steve Clark to plaintiffs stated, “it does

not appear that we have any major differences but lets get together to finalize the agreement the week after next.” This evidences ongoing negotiations, and that Flanders did not intend to be bound by the agreement before it was finalized in a “get together” meeting.

It is manifest that the 1998 Exclusive Distributorship Agreement was an original agreement within the requirements of the Statute of Frauds, i.e. the agreement was in writing, signed by both parties, with an established price in excess of \$500, and with a positive validity period of three years. It is also manifest that the 1999 Draft Agreement was not within the requirements of the Statute of Frauds. Nevertheless, defendants claim that even in the absence of a writing sufficient to establish a contract the 1999 unsigned document modified the original 1998 Exclusive Distributorship Agreement and became effective based on the conduct of the parties. That contention is rejected by the court as contrary to clearly established law in the State of Utah. Accordingly, even assuming without deciding that the conduct of the parties could be determined by a fact finder to amount to acceptance of the unsigned agreement, the Utah Statute of Frauds would render the unsigned contract invalid and of no force and effect.

This court rules that the unsigned 1999 draft agreement never came into existence and in any event is barred by the Statute of Frauds as a matter of law.

**B. The 1998 Distributorship Agreement**

This court holds that the 1998 Agreement was a valid and subsisting agreement from its inception and until the end of the three year specified term. In this regard, it is undisputed that the 1998 Exclusive Distributorship Agreement was signed by both parties on July 28, 1998 and that it provided that “this agreement shall be in full force and effect for a period of three years from the date it is signed by all parties.” Thus, according to the terms of the

agreement, the contract was valid until July 28, 2001. Unless it was extended or otherwise modified by mutual written agreement (which it was not), it automatically terminated immediately after July 28, 2001.

**C. Defendant's Other Contractual Claims**

The court makes no ruling at this time concerning other contractual claims or the impact of the 1998 Exclusive Distribution Agreement upon other collateral claims including contractual damages, consequential or otherwise, whether such damages were "covered" under the UCC and whether the cut off date necessarily bars damages thereafter. Issues of fact appear to exist as to some of these matters, including what damages if any the parties contemplated as being "reasonably foreseeable" beyond the contract expiration date. These matters are deferred to trial in the context of the evidence to be presented.

**DEFENDANTS' NON-CONTRACTUAL CLAIMS**

Defendants claim for injunctive relief is denied as moot, as a result of prior rulings and hearings before this court.

The court regards the trademark infringement claim by defendants as requiring factual determinations, particularly as to the likelihood of confusion. Accordingly, summary judgment on that claim is denied at this time. Also, alleged interference with contractual and economic relations, unfair competition and other non-contractual claims by defendants require factual determinations. Accordingly defendant's motion for summary judgment as to all non-contractual claims is denied at this time.

**DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTERCLAIM**

Defendants have moved for Partial Summary Judgement on their counterclaim

against the Pro-Fit plaintiffs. The grounds for this Motion are that Pro-Fit received and failed to pay for treadmills manufactured and shipped by defendant Airseal. Furthermore, the Flanders defendants allege that Pro-Fit failed to pay for unused inventory procured for treadmills to be purchased. As a result, defendants seek a final judgment for monies claimed to be owed by Pro-Fit. Pro-Fit argues that there are numerous questions of fact which preclude partial summary judgment. Flanders argues, in response, that Pro-Fit conceded that plaintiffs owe at least \$228,007.95 for treadmills received and accepted. This is denied and offsets are asserted. Nevertheless, defendants urge the court to enter final judgment against plaintiffs at this time at least for \$228,007.95, and that certification by this court to that effect should be entered.

In a case involving more than one claim, such as an action like this with a counterclaim, “the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgement.” FED. R. CIV. P. 54(b). The Supreme Court has stated: “A Rule 54(b) finality decision is ‘left to the sound judicial discretion of the district court.’ . . . The first concern is the judicial administrative interest, such as avoidance of duplicative appellate effort. . . . The second concern is with the equities.” Curtis-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 8, 10-12 (1980), *see also* Schieffelin & Co. v. Valley Liquors, Inc., 823 F.2d 1064, 1065-66 (7th Cir. 1987).

Recently the Tenth Circuit held that “Rule 54(b)’s finality requirement is only satisfied if ‘the claims resolved are distinct and separable from the claims left unresolved.’” Old Republic Ins. Co. v. Durango Air Serv., Inc., 283 F.3d 1222, 1225 (10th Cir. 2002) (quoting Oklahoma Turnpike Auth. v. Bruner, 259 F.3d 1236, 1241 (10th Cir. 2001)). In addition, the

Tenth Circuit has declared that "Rule 54(b) entries are not to be made routinely," and that if factual issues of the remaining claims are intertwined with the ones disposed of, Rule 54(b) certification should be declined. Oklahoma Turnpike, 259 F.3d at 1242-43.

In the case at bar, the facts regarding defendants' claims as to this issue are so intertwined with plaintiffs' claims as to be inseparable. For instance, there are disputed issues of material fact as to whether and how the purchase orders for treadmills which were shipped and accepted by plaintiffs were connected with the alleged breach of contract; the circumstances and facts concerning the disputed May 23, 2000 Pricing Agreement; the dispute as to when the alleged breach of contract occurred in relation to when the monies were due; and the dispute as to facts and circumstances concerning the alleged concession by plaintiffs that at least \$228,000 is presently due, and whether that amount is or should be offset by amounts allegedly due to plaintiffs. These factual disputes, among others, indicate that there is just reason for delay, based on judicial administrative interest as well as the equities. The claims set forth in the counterclaim are so intertwined with claims by plaintiffs as to the same matter as to be inseparable. Accordingly, the court exercises its discretion and denies defendants' Motion for Partial Summary Judgment on their counterclaim.

Based on the foregoing, it is hereby

ORDERED, that defendants' Motion for Summary Judgment on plaintiffs' claim concerning the unsigned draft agreement of July 1999 is GRANTED. The 1998 Exclusive Distribution Agreement is declared to govern contractual aspects of this case, but other claims by defendants of a contractual nature are deferred to trial in the context of the evidence to be presented; it is

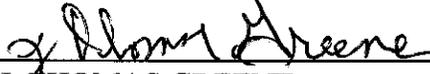
FURTHER ORDERED, that defendants' Motion for Summary Judgment as to trademark infringement and as to non-contractual claims asserted require factual determinations and are DENIED at this time; it is

FURTHER ORDERED, that defendants' Motion for Partial Summary Judgment on their counterclaim against plaintiffs is DENIED; it is

FURTHER ORDERED, that a pretrial conference is scheduled for November 23, 2004 at 10:00am. The parties are directed to meet and jointly submit to the court on or before November 16, 2004, a stipulated Pretrial Order in compliance with Local Rule 16-1(e) and the Pretrial Order form attached to the local rules.

IT IS SO ORDERED.

DATED this 16<sup>th</sup> day of September 2004.

  
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J. THOMAS GREENE  
UNITED STATES DISTRICT JUDGE

United States District Court  
for the  
District of Utah  
September 20, 2004

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:00-cv-00985

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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