FILED: November 20, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1501
(2:15-cv-00558-RBS-RJK)

JTH TAX, INC., d/b/a Liberty Tax Service

Plaintiff - Appellee

v.

CHARLES HINES

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1501

JTH TAX, INC., d/b/a Liberty Tax Service,

Plaintiff - Appellee,

v.

CHARLES HINES,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca Beach Smith, Chief District Judge. (2:15-cv-00558-RBS-RJK)

Submitted: September 28, 2018 Decided: October 28, 2018

Before WILKINSON and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Charles Hines, Appellant Pro Se. Jason Eli Ohana, WILLCOX & SAVAGE, PC, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Defendant Charles Hines appeals the district court's orders accepting the recommendations of the magistrate judge and dismissing his counterclaims alleging breach of contract, fraud, and related claims against Plaintiff JTH Tax, Inc. We have reviewed the record and find no reversible error. Accordingly, we grant leave to proceed in forma pauperis and affirm for the reasons stated by the district court. *JTH Tax, Inc. v. Hines*, No. 2:15-cv-00558-RBS-RJK (E.D. Va. Aug. 24, 2017; Mar. 2, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JTH TAX INC. d/b/a
LIBERTY TAX SERVICE,

Plaintiff,

Case No. 2:15cv558

v.

CHARLES HINES,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by the Court. This action came for decision before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the court hereby GRANTS the Plaintiff's Motion and DISMISSES THE ACTION WITHOUT PREJUDICE pursuant to Federal Rule of Civil Procedure 41(a)(2). This case is now CLOSED on this court's docket.

DATED: April 2, 2018

FERNANDO GALINDO, Clerk

By /s/
J. Rinehart, Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JTH TAX, INC. d/b/a
LIBERTY TAX SERVICE,

Plaintiff,

v. CIVIL ACTION NO. 2:15cv558

CHARLES HINES,

Defendant.

MEMORANDUM ORDER

This matter comes before the court on the Plaintiff's, JTH Tax, Inc., d/b/a/ Liberty Tax Service ("Liberty"), motion to dismiss or, in the alternative, stay Defendant's counterclaim pending arbitration ("Motion to Dismiss") and Memorandum in Support, filed on September 18, 2017. ECF Nos. 88, 89. On September 28, 2017, the pro se Defendant, Charles Hines ("Hines") filed a "Memorandum and Initial Response to ECFs 88, 89, 90, and 91." ECF No. 92. On October 5, 2017, the matter was referred to United States Magistrate Judge Robert J. Krask, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), to conduct hearings, including evidentiary hearings, if necessary, and to submit to the undersigned district judge proposed findings of fact, if applicable, and recommendations for the disposition of the Motion to Dismiss. ECF No. 94. On October 10, 2017, the

Plaintiff filed a Motion for Leave to File a Reply Brief After Deadline ("Motion for Leave to File"). ECF No. 98. On November 6, 2017, the Motion for Leave to File was also referred to United States Magistrate Judge Robert J. Krask.

The United States Magistrate Judge's Report and Recommendations ("R&R") regarding both the Motion to Dismiss and the Motion for Leave to File was filed on December 15, 2017. ECF No. 120. First, the Magistrate Judge denied the Plaintiff's Motion for Leave to File. R&R at 4. Next, the Magistrate Judge recommended the Plaintiff's Motion to Dismiss be granted in part and denied in part. Id. at 29.[1] Lastly, the Magistrate Judge recommended that that the Plaintiff's alternative motion to stay be denied as moot, because all of the Defendant's counterclaims would be dismissed, either with or without prejudice. Id. Nonetheless, the Magistrate Judge recommended that the Plaintiff's alternative motion to stay be granted in part, because the arbitration clauses to which the Defendant agreed are enforceable. Id. The Magistrate Judge directed that the Defendant pursue any of his counterclaims dismissed without

[1] Specifically, the Magistrate Judge recommended that the Defendant's counterclaims brought pursuant to the Franchise Rule, the Virginia Retail Franchising Act, the Virginia Consumer Protection Act, the Maryland Franchise Registration and Disclosure Law, and the Maryland Consumer Protection Act be dismissed with prejudice. The Magistrate Judge recommended that the Defendant's remaining counterclaims be dismissed without prejudice.

prejudice, to the extent he so desires, before an arbitrator, pursuant to the arbitration clauses in the franchise agreements. Id.

By copy of the R&R of the Magistrate Judge, the parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge within fourteen (14) days from the date of the R&R's mailing to the objecting party. Id. at 29-30.[2] On January 9, 2018, the Defendant filed "Last Minute Motion for Leave of the Court to Extend the Delivery of Defendant's Reply to ECF 120 to Tuesday, January[] 9, 2018," subject to defect. ECF No. 122 [hereinafter Def. Objs.]. The court subsequently lifted the defect and construed the Defendant's filing as the entirety of the Defendant's objections to the R&R. ECF No. 123.

I. LEGAL STANDARDS

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a de novo determination regarding those portions of the R&R to which the Defendant has specifically objected. Fed. R. Civ. P. 72(b). The portions of the R&R to which no objections have been filed are reviewed by the court to ensure that there is no clear error on the face of the record.

[2] The court allows three (3) additional days for the mailing of the R&R. See Fed. R. Civ. P. 6(d); R&R at 30.

Fed. R. Civ. P. 72(b) advisory committee's note to 1993 addition. The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

II. DISCUSSION

A. Motion for Leave to File

No objections were filed against the Magistrate Judge's denial of the Plaintiff's Motion for Leave to File. ECF No. 98; see R&R at 3-4. The Motion for Leave to File was submitted after the deadline to submit such a motion, in violation of Local Civil Rule 7(F)(1). Therefore, the Plaintiff's Motion for Leave to File is **DENIED**.

B. Motion to Dismiss

The Defendant's Second Amended Counterclaim ("SAC"), ECF No. 82, includes six (6) counts, many with multiple sub-counts, considered by the Magistrate Judge in his evaluation of the Plaintiff's Motion to Dismiss, ECF No. 88. The court will make de novo determinations regarding the findings and recommendations made for the counts to which the Defendant has objected. See supra Part I. As to the sections of the R&R to which no objections have been filed, the court will review the Magistrate Judge's findings and recommendations to ensure that no clear error appears on the face of the record. Id.

For the reasons stated below, the court hereby **OVERRULES** the Defendant's objections to the R&R, and **ADOPTS AND APPROVES IN FULL** the findings and recommendations set forth in the R&R of the United States Magistrate Judge, filed on December 15, 2017. ECF No. 120.

1. Factual History

The Defendant makes two objections to the "Factual History" section of the R&R. First, the Defendant objects to the language in the R&R that "Liberty is in the business of selling franchises engaged in the preparation of tax returns." R&R at 2 (citing SAC ¶ 4; Compl. ¶ 7, ECF No. 1); see also Def. Objs. at 4-6. Second, the Defendant seems to dispute the factual statement that the Defendant operated three (3) Liberty kiosks located inside Walmart stores for four (4) months in 2014. See R&R at 2 (citing SAC ¶¶ 8-9); Def. Objs. at 8.

These objections do not materially challenge any of the findings or recommendations made by the Magistrate Judge. Further the R&R's characterization of these facts is correct, based on the language used in the Complaint and the SAC. Therefore, the Defendant's objections to specific language used on page two (2) of the R&R are **OVERRULED**.[3]

[3] Within the Defendant's objections to the "Factual History" section of the R&R, the Defendant also alleges that Liberty breached the franchise agreements by allowing other Liberty franchisees to operate within his territory. Def. Objs. at 8. As

2. Procedural History

The Defendant makes two objections to the "Procedural History" section of the R&R. First, the Defendant objects to the R&R's characterization of his "Motion to Stay or Pause this Case for Fourteen Additional Days," ECF No. 93. See R&R at 3 ("[T]he Court denied Hines' motion to stay or pause the case for 14 days to allow Hines to file an additional opposition to Liberty's motion to dismiss."); Def. Objs. at 10. Such an objection does not materially challenge any of the findings or recommendations made by the Magistrate Judge.

Second, the Defendant appears to object to this court's prior Order, ECF No. 84, which dismissed the Defendant's earlier counterclaim without prejudice, for failure to comply with the Federal Rules of Civil Procedure. See R&R at 2-3; Def. Objs. at 10, 16. This issue was resolved with the court's Order of August 24, 2017, and an objection to the present R&R is not an appropriate procedure for contesting that prior Order. Therefore, the Defendant's objections to both the specific language on page three (3) of the R&R and this court's Order of August 24, 2017, are **OVERRULED**.

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explained infra Part II.B.5. (addressing Defendant's breach of contract objections), to the extent Hines wishes to allege that Liberty breached the franchise agreements, he must specifically allege which provision of the franchise agreements was breached, when, and by whom. A conclusory statement that the agreements were breached is insufficient.

3. Choice of Law

The Defendant makes several objections to the Magistrate Judge's findings regarding the appropriate law applicable to this case. First, the Defendant objects to the finding that the Virginia Retail Franchising Act does not apply to his counterclaims. See R&R at 6-7 (citing Va. Code Ann. § 13.1-559 (2009)); Def. Objs. at 10-11. After making a de novo determination, the court **OVERRULES** this objection, and **FINDS** that the Virginia Retail Franchising Act does not apply to the Defendant's counterclaims.

Second, the Defendant objects to the R&R's characterization of his argument regarding the correct venue for this case. See R&R at 4 ("[H]e continues to insist that the correct venue for the case is Maryland."); Def. Objs. at 11. This objection does not materially challenge any of the ultimate findings or recommendations made by the Magistrate Judge. The determination of the proper venue for this case is not the same as the determination of which state's laws apply. The latter is the subject of the franchise agreements' choice of law provisions. See ECF Nos. 1-5, 1-6, 1-7 (collectively the "Franchise Agreements") at 16. Accordingly, the Defendant's objection to the specific language on page four (4) is **OVERRULED**.

The Defendant next objects to the Magistrate Judge's application of Hooper v. Musolino, 364 S.E.2d 207, 211 (Va.

1988), because the Defendant maintains that this court should apply Maryland law to his counterclaims. See R&R at 5; Def. Objs. at 11-12. However, the Virginia Supreme Court in Hooper enforced a choice of law provision, which led to another state's laws being applied. See Hooper, 364 S.E.2d 207 (Va. 1988). The situation is analogous to the Magistrate Judge's finding; the Magistrate Judge recommends that the choice of law provisions be enforced, which would lead to Virginia law applying to the Defendant's counterclaims. The Defendant's objection to the application of Hooper is **OVERRULED**.

The Defendant next objects to the finding that the party challenging a choice of law provision must establish, by clear and convincing evidence, that the provision itself was the product of impropriety such as overreaching or fraud. R&R at 5 (quoting Zaklit v. Global Linguist Sol., LLC, No. 1:14cv314, 2014 WL 3109804, at *7 (E.D. Va. July 8, 2014)); Def. Objs. at 12-15. The Defendant argues that he has met this burden by showing that Liberty has violated the Franchise Rule. See Def. Objs. at 12-15; see generally 16 C.F.R. § 436 (the "Franchise Rule"). For the same reasons that the Defendant's objections to the finding regarding the Franchise Rule must be overruled, see infra Part II.B.5, this objection to the Magistrate Judge's finding regarding choice of law is **OVERRULED**.

Lastly, the Defendant objects to the application of Global One Communications, LLC v. Ansaldi, No. C165948, 2000 WL 1210511 (Va. Cir. Ct. May 5, 2000). See R&R at 5; Def. Objs. at 17-18. After making a de novo finding, the court **FINDS** that this case properly applies to the circumstances of this matter. As the Magistrate Judge states, Virginia courts do not presume that a contract is unenforceable if the parties to the contract have unequal bargaining power. See R&R at 5. To the extent one party seeks to challenge the contract, the burden is on him "to establish that the provision in question is unfair, unreasonable, or affected by fraud or unequal bargaining power." Global One Commc'n, 2000 WL 1210511, at *2. As explained, infra Parts II.B.5. and II.B.6, the Defendant fails to allege a breach of contract or fraud regarding the choice of law provisions with sufficient specificity to survive the Motion to Dismiss. Accordingly, the court **OVERRULES** the Defendant's objection to the application of Global One Communications.

With all of the Defendant's objections to the choice of law findings overruled, the court hereby **ADOPTS AND APPROVES** the Magistrate Judge's findings that (1) Virginia law applies to the Defendant's breach of contract claims and related non-contract claims, and (2) the Maryland Franchise Registration and Disclosure Law applies to the Defendant's allegations of state statutes violations. See R&R at 6-7.

4. Standard of Review

The Defendant objects to the language of the Federal Rules of Civil Procedure, which govern the standard of review for a Motion to Dismiss. See R&R at 7-9; Def. Objs. at 19-20. Such an objection does not state a claim for which relief can be granted. Furthermore, the Magistrate Judge correctly explains the proper standard of review in this case. See generally Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Therefore, the Defendant's objection to the standard of review in this case is **OVERRULED**.

5. Count I - Breach of Franchise Agreements

The Defendant objects to all of the Magistrate Judge's recommendations regarding the Defendant's breach of contract claims. See R&R at 9-16; Def. Objs. at 22-23. Specifically, the Defendant argues that he has shown a breach of contract pursuant to Virginia law. See Def. Objs. at 22-23; R&R at 9. First, the Defendant states that he has shown extensive expenditures and losses suffered during the course of his franchise relationship with the Plaintiff. Def. Objs. at 22. Second, he states that Liberty breached the franchise agreements by violating the Franchise Rule. Id. Third, the Defendant states that Liberty has a legally enforceable obligation to him because the Federal Trade Commission ("FTC") is entitled to enforce the Franchise Rule. Id. at 23.

With regard to the requirement of a legally enforceable obligation, the obligation must be evident in a particular provision of the franchise agreements, in the form of a promise or duty to perform. With regard to the Defendant's allegation regarding a breach of the Plaintiff's obligations, the Defendant cannot solely allege a violation of the Franchise Rule as the breach of the contract between Liberty and himself, for the reasons described infra. Lastly, with regard to the financial losses alleged by the Defendant, they do not, on their own, entitle the Defendant to relief, because the legally enforceable duty and breach that he alleges are not cognizable claims. Therefore, the Defendant's general objection to this section of the R&R, encompassing all of the Magistrate Judge's recommendations regarding the Defendant's breach of contract claims, is **OVERRULED**.

More specifically, the Defendant first objects to the finding that neither the FTC nor the Franchise Rule allows for franchisees to bring suit to enforce the Franchise Rule. R&R at 11; Def. Objs. at 9-10, 12-14, 20, 23-24. After making a de novo determination, the court agrees with the Magistrate Judge, that the Franchise Rule does not create a private right of action enabling franchisees to enforce it. See R&R at 11. Thus, the court **OVERRULES** the Defendant's objection to the recommendation regarding the application of the Franchise Rule.

In order for the Franchise Rule to be enforced against the Plaintiff, such enforcement must come from the FTC. See, e.g., Senior Ride Connection v. ITNAmerica, 225 F.Supp.3d 528, 531 n.1 (D.S.C. 2016) ("However, it is well-settled that there is no federal private right of action to enforce the Franchise Rule." (citation omitted)). Accordingly, an individual franchisee cannot invoke the Franchise Rule in order to obtain relief in a claim against a franchisor; simply put, franchisees cannot enforce the Franchise Rule.[4] Accordingly, the court **ADOPTS AND APPROVES** the Magistrate Judge's recommendation that the Defendant's Franchise Rule claims be dismissed with prejudice. See R&R at 12.

The Defendant also objects to the finding regarding the Defendant's claim that the Plaintiff failed to generate customers. See R&R at 12-13; Def. Objs. at 20, 24-25. Specifically, the Defendant states that the average H&R Block Office averaged more returns than the average Liberty Office. Def. Objs. at 24-25. However, this fact, even if presumed true, does not materially alter the Magistrate Judge's findings and recommendations regarding this claim. The court agrees with the Magistrate Judge, that the Defendant does not identify a

[4] To the extent the Defendant is attempting to allege a violation of the Franchise Rule, he must raise such an issue with the appropriate agency with the authority to enforce the Franchise Rule, the FTC.

provision of the franchise agreements that the Plaintiff allegedly breached, and that there is language to which the Defendant agreed stating that the Plaintiff does not guarantee success or customers. See R&R at 12-13. Accordingly, the court **OVERRULES** the Defendant's objection, and **ADOPTS AND APPROVES** the Magistrate Judge's recommendation that the Defendant's claim of failure to generate customers be dismissed without prejudice. See R&R at 13.

Third, the Defendant objects to the finding that the franchise agreements do not fail to provide any consideration. See R&R at 13-14; Def. Objs. at 20-22. The Defendant argues that consideration must be tangible, and that "Liberty Tax doesn't give you a damn thing!" Def. Objs. at 21-22. After making a de novo determination, the court agrees with the Magistrate Judge in finding that there is no requirement that consideration be an equal exchange. See R&R at 14; see also Neil v. Wells Fargo Bank, N.A., 596 F. App'x 194, 197 (4th Cir. 2014). Further, neither the Defendant's SAC nor objection contains an allegation that the Plaintiff did not fulfill any of its obligations as required by the franchise agreements, such as providing the Defendant with training, an operations manual, software, and support. R&R at 14 (citing Franchise Agreements at 6-8). Accordingly, the court **OVERRULES** the Defendant's objection and **ADOPTS AND APPROVES** the Magistrate Judge's recommendation that

the Defendant's lack of consideration claims be dismissed without prejudice. See R&R at 14.

The last of the Defendant's objections to the recommendations regarding the Defendant's breach of contract claims involves the implied covenant of good faith and fair dealing. See R&R at 14-16; Def. Objs. at 22. However, this objection raises no new allegations aside from those already addressed by the Magistrate Judge. See R&R at 14-16. Therefore, after making a de novo finding, the court **OVERRULES** this objection regarding the implied covenant of good faith and fair dealing and **ADOPTS AND APPROVES** the Magistrate Judge's recommendation that the Defendant's claims of a violation of the implied covenant of good faith and fair dealing be dismissed without prejudice. See R&R at 16.

6. Count II - "Fraud of the Franchise Agreement"

Count II of the Defendant's SAC is characterized by the Magistrate Judge as a claim of "Fraud of the Franchise Agreement." See SAC ¶¶ 38, 41-46, 51; R&R at 16-19. The Magistrate Judge finds that the Defendant does not state with particularity the time, place, contents, or identity of the person who allegedly fraudulently misrepresented aspects of the franchise, as required by Federal Rule of Civil Procedure 9(b). R&R at 18. The Defendant objects, stating that the Plaintiff "used false and fake numbers in the Disclosure Document's Item

19." Def. Objs. at 30. However, the Disclosure Document to which the Defendant refers has never been filed with the court. The Defendant has not provided the document as an attachment or exhibit, nor has he alleged how the figures in the document are false. Therefore, the Defendant fails to state a claim for relief with particularity. Accordingly, the court **OVERRULES** the Defendant's objection regarding this fraud claim and **ADOPTS AND APPROVES** the Magistrate Judge's recommendation that the Defendant's "fraud of the franchise agreement" claims be dismissed without prejudice. See R&R at 19.

7. Count III - "Fraud as a 'Legitimate' Business"

The Magistrate Judge characterizes Count III of the SAC as "Fraud as a 'Legitimate' Business." See R&R at 19-22. No objections were filed to section (a), "Fee Intercepts," or to section (b), Virginia Retail Franchising Act and Consumer Protection Act. Id. at 19-21. Accordingly, after reviewing the record for clear error on its face, the court hereby **ADOPTS AND APPROVES** the Magistrate Judge's recommendations that (1) the Defendant's "fee intercepts" claim be dismissed without prejudice, and (2) the Defendant's claims regarding both the Virginia Retail Franchising Act and the Virginia Consumer Protection Act be dismissed with prejudice. See R&R at 20-21.

The Defendant objects to the findings that an action under the Maryland Franchise Registration and Disclosure Law must be

brought within three (3) years after the grant of the franchise, and that the Defendant's first attempt to raise a claim under this statute was after the three (3) year statute of limitations ran. See R&R at 21-22; Def. Objs. at 6-7. Specifically, the Defendant alleges that the Plaintiff's three (3) year delay in terminating the franchise agreements constitutes fraud. Def. Objs. at 6-7. After making a de novo determination, the court **FINDS** that the Defendant has not alleged with sufficient specificity how this three (3) year period before the Plaintiff terminated the franchise agreements constitutes fraud. Therefore, the court **OVERRULES** the Defendant's objections and **ADOPTS AND APPROVES** the Magistrate Judge's recommendation that the Defendant's Maryland Franchise Registration and Disclosure Law claims be dismissed with prejudice.

Additionally, no objections were filed as to the recommendation that the Defendant's Maryland Consumer Protection Act claims be dismissed with prejudice. See R&R at 22. Accordingly, finding no error on the face of the record, the court **ADOPTS AND APPROVES** this recommendation.

8. Count IV - Violations

The Defendant raises one objection to the recommendations made in Count IV of the R&R. See R&R at 22-23. The Defendant alleges that the Plaintiff breached the franchise agreements by failing to advertise. Def. Objs. at 21-22. However, the

Defendant does not specify the contract provision allegedly breached by the Plaintiff's actions. See R&R at 23. Accordingly, after a de novo determination, the court **OVERRULES** this objection to the recommendation regarding the failure to advertise contract claim.

No objections were filed to the recommendation regarding a failure to advertise tort claim. The R&R states that any tort claim must be dismissed without prejudice, because in order to bring a tort claim in relation to a contract under Virginia law, the party must allege a breach of duty that is distinct from the duty that exists by virtue of the contract itself. R&R at 23. The court agrees with this conclusion, and hereby **ADOPTS AND APPROVES** the Magistrate Judge's recommendations that (1) any breach of contract claim relating to the Plaintiff's alleged failure to advertise be dismissed without prejudice, and (2) any tort claim based on a failure to advertise be dismissed without prejudice. See id.

9. Count V - "The System"

As to Count V of the R&R, the Magistrate Judge states that the Defendant failed to raise any claims for which relief can be granted. R&R at 23. No objections were raised as to this finding. The court agrees and **ADOPTS AND APPROVES** the recommendation that all allegations in this section of the SAC be dismissed without prejudice. See id.

10. Count VI - "Omnibus & General Points"

As to Count VI of the R&R, the Magistrate Judge states that the Defendant has failed to provide any substantive allegations beyond listing definitions of legal terms. R&R at 24-25. No objections were raised as to this finding. The court agrees and **ADOPTS AND APPROVES** the recommendation that all allegations raised in this section of the SAC be dismissed without prejudice. See id.

C. Motion to Stay Pending Arbitration

Because the Plaintiff's Motion to Dismiss is not granted with prejudice as to all of the Defendant's counterclaims, see supra Parts II.B.5, II.B.6, II.B.7, II.B.8, II.B.9 (dismissing the Defendant's counterclaims without prejudice), the court must address the Plaintiff's alternative motion to enforce the arbitration clauses of the franchise agreements, thereby staying the Defendant's counterclaims pending arbitration. See Pl. Mem. in Supp. at 3-5, ECF No. 89; see also ECF No. 1-5 at 21; ECF No. 1-6 at 23; ECF No. 1-7 at 23 (collectively the "Maryland addenda," which contain the arbitration clauses).

The R&R first states that the Defendant, while not directly attacking the arbitration clauses or the Maryland addenda, argues that the franchise agreements are unconscionable, and that he was fraudulently induced into signing them. See R&R at 27 (citing SAC ¶¶ 22-26, 41-46, 60). As stated in the R&R, "a

district court cannot adjudicate claims that an arbitration clause is unenforceable because the underlying contract is the result of fraud." Id. (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967); Hayes v. Delbert Servs. Corp., 811 F.3d 666, 671-72 (4th Cir. 2016); Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 307 (4th Cir. 2001)). Further, even if the Defendant had directly attacked the arbitration clauses in the Maryland addenda as unconscionable, such an attack would fail. See R&R at 28 n.14.

The Defendant objects to this finding, stating that he was told he was required to sign the Maryland addenda, and that this experience shows the Plaintiff's abuse of power and unequal bargaining power. Def. Objs. at 7-8. After making a de novo finding, the court **OVERRULES** the Defendant's objections to the arbitration clause unconscionability findings, and **ADOPTS AND APPROVES** the Magistrate Judge's finding that the Defendant has not shown that the arbitration clauses in the Maryland addenda are unconscionable. See R&R at 28.

Additionally, the Defendant claims that the Maryland addenda were not originally part of the franchise agreements, perhaps suggesting that they may not be legitimate. Def. Objs. at 7-8 ("[T]he Maryland Addendum was 'slid into' the Franchise Agreement of the individuals from Maryland, after the fact."). However, the Defendant does not claim that the signatures

appearing just below the arbitration clauses in each of the Maryland addenda are not his own, nor that the Maryland addenda are otherwise inaccurate or falsified. Further, the Defendant acknowledges that he remembers the meeting during which the Maryland addenda were signed. See Def. Objs. at 7 ("At a District Meeting, we were told . . . that, 'You have to sign the Addendum.'").

Accordingly, the remainder of the Defendant's objections to the recommendation regarding the arbitration clauses of the Maryland addenda are **OVERRULED**. The court hereby **ADOPTS AND APPROVES** the Magistrate Judge's recommendation that the Plaintiff's alternative motion to stay the Defendant's counterclaims pending enforcement the arbitration clauses be granted in part, thereby finding the arbitration clauses of the Maryland addenda enforceable. See R&R at 28. However, because the court dismisses the Defendant's SAC, the Plaintiff's motion to stay the counterclaim is **DENIED AS MOOT**. To the extent the Defendant intends to pursue any of the counterclaims hereby dismissed without prejudice, he must raise those claims before an arbitrator, pursuant to the arbitration clauses of the Maryland addenda.

III. CONCLUSION

The Plaintiff's Motion for Leave to File is **DENIED**. The court **ADOPTS AND APPROVES IN FULL** the Magistrate Judge's findings and recommendations regarding the Plaintiff's Motion to Dismiss. Accordingly, the Plaintiff's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**. As outlined supra Part II.B, the Defendant's statutory claims as presented in the SAC are **DISMISSED WITH PREJUDICE**,[5] and the Defendant's remaining non-statutory claims are **DISMISSED WITHOUT PREJUDICE**.[6]

Further, the court **GRANTS IN PART** the Plaintiff's alternative motion to stay the Defendant's counterclaim, to the extent that the court **FINDS** the arbitration clauses of the Maryland addenda enforceable. However, because the SAC is **DISMISSED**, the Plaintiff's alternative motion to stay the Defendant's counterclaims is **DENIED AS MOOT**. The court **DIRECTS** the Defendant, to the extent he wishes to pursue those

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[5] These claims are those brought pursuant to the Franchise Rule, the Virginia Retail Franchising Act, the Virginia Consumer Protection Act, the Maryland Franchise Registration and Disclosure Law, and the Maryland Consumer Protection Act.

[6] These claims are: breach of contract for failure to generate customers, failure to provide any consideration, breach of the implied covenant of good faith and fair dealing, fraud regarding the franchise agreements, fraud regarding the Plaintiff's "fee intercepts," breach of contract for failure to advertise, any tort claim based on a failure to advertise, claims raised in Count V entitled "The System," and claims raised in Count VI entitled "Omnibus and General Points."

counterclaims that have been dismissed without prejudice,[7] to raise such claims before an arbitrator, as detailed in the arbitration clauses of the Maryland addenda.

The Defendant is **ADVISED** that he may not appeal from this Memorandum Order, or from any other adverse order against him, see, e.g., Order, ECF No. 129, until entry of the Final Order in this case. See 28 U.S.C. § 1291; Fed. R. Civ. P. 54(b).

The Clerk shall forward a copy of this Memorandum Order to all parties.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Chief Judge

REBECCA BEACH SMITH
CHIEF JUDGE

March 1, 2018

[7] See supra note 6.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JTH TAX, INC.,
d/b/a Liberty Tax Service,

Plaintiff,

v. Action No. 2:15cv558

CHARLES HINES,

Defendant.

UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the Court on plaintiff JTH Tax, Inc., d/b/a Liberty Tax Service's ("Liberty") motion to dismiss or, in the alternative, stay *pro se* defendant, Charles Hines' ("Hines") second amended counterclaim pending arbitration, ECF No. 88. The motion was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). ECF No. 94. For the reasons that follow, the Court recommends that Liberty's motion to dismiss the second amended counterclaim be GRANTED in part and DENIED in part, and Liberty's motion to stay the counterclaim pending arbitration be GRANTED.

I. FACTUAL HISTORY

Liberty is a Delaware corporation and its principal place of business is located at its headquarters in Virginia Beach, Virginia. Second Amended Counterclaim ("SAC") ¶ 1, ECF No. 82 ; Compl. ¶ 1, ECF No. 1. Hines resides in the state of Maryland. SAC ¶ 2; Compl. ¶ 2.

Liberty is in the business of selling franchises engaged in the preparation of tax returns. SAC ¶ 4; Compl. ¶ 7. During 2012, Hines signed three, separate franchise agreements with Liberty to establish and operate tax service franchises within three, specified territories located in Maryland. SAC ¶¶ 5–9; Compl. ¶¶ 9–11; ECF Nos. 1-5, 1-6, 1-7. Attached to the end of each franchise agreement is a separately signed one-page "Maryland Addendum" that includes an arbitration clause. ECF No. 1-5 at 21; ECF Nos. 1-6, 1-7 at 23.

Hines operated a Liberty franchise office from 2012 through 2015, and a second from 2014 through 2015. SAC ¶¶ 5, 7. Hines also operated three Liberty kiosks located inside Walmart stores for four months in 2014. SAC ¶¶ 8–9. Hines' Liberty offices and kiosks were all located in Maryland. SAC ¶¶ 5, 7–9.

On June 3, 2015, Liberty "[a]bandoned Hines' Franchise Agreements and [t]erminated him, based on multiple breaches, including, advertising outside of his franchise territory, and failure to pay amounts owing." SAC ¶ 10; *see also* Compl. ¶ 12.

II. PROCEDURAL HISTORY

On December 23, 2015, Liberty filed this action against Hines seeking injunctive relief and damages for alleged breach of the franchise agreements, trademark infringement, past due accounts receivable, and breach of the promissory notes. ECF No. 1. Following extensions of time to file a responsive pleading, ECF Nos. 5, 10, 37; and denial of Hines' motion to dismiss and motion for change of venue, ECF No. 31, Hines submitted an answer on November 10, 2016, and corrected the defect with the answer on December 12, 2016, ECF Nos. 41, 45. Following the denial of Liberty's motion for default judgment, ECF No. 50; denial of Liberty's motion to dismiss and motion to strike, and Hines being granted leave to file an amended counterclaim, ECF No. 65; and the grant of Liberty's motion to dismiss the amended counterclaim without

prejudice to Hines filing a second amended counterclaim in an effort to comply with Rules 8(a)(2), 8(d)(1), and 10(b), ECF No. 80; Hines submitted a second amended counterclaim subject to defect on August 11, 2017. ECF No. 82. Hines alleges that Liberty breached the franchise agreements (Count I), committed fraud (Counts II and III), violated the Franchise Rule, 16 C.F.R. § 436.5(t)(6) (Count IV), and operated a failed system (Count V). *Id.* Hines also included other omnibus claims and general points (Count VI). *Id.* The second amended counterclaim was ordered filed on August 28, 2017, and Liberty was ordered to file a responsive pleading within 21 days. ECF No. 85.[1]

On September 18, 2017, Liberty filed a motion to dismiss Hines' second amended counterclaim or, in the alternative, stay the counterclaim pending arbitration. ECF No. 88. Hines filed an "initial response and memorandum" in opposition to Liberty's motion to dismiss on September 28, 2017. ECF No. 92. On October 6, 2017, the Court denied Hines' motion to stay or pause the case for 14 days to allow Hines to file an additional opposition to Liberty's motion to dismiss. ECF No. 96.

On October 10, 2017, Liberty filed a motion for leave to file a reply brief, which was submitted on October 9, 2017, after the deadline of October 5, 2017. ECF Nos. 97, 98. Hines submitted an additional opposition to Liberty's motion to dismiss on October 12, 2017. ECF No. 101. The additional opposition was filed subject to defect due to Hines failing to obtain leave of Court to so file. ECF No. 101. Due to the failure to comply with Local Civil Rule 7(F)(1) in filing the memoranda, the Court has not relied upon any information provided in

[1] Hines filed a motion for leave to file a third amended counterclaim on September 13, 2017, ECF No. 87, which was denied on September 20, 2017 due to Hines' failure to attached the proposed third amended counterclaim. ECF No. 91.

Liberty's reply or Hines' additional opposition.[2] Liberty's motion for leave to file a reply brief after the deadline, ECF No. 98, is DENIED.

III. CHOICE OF LAW

The franchise agreements, which form the basis of Hines' relationship with Liberty, each contain a choice of law provision dictating that Virginia law controls any claims arising under or relating to such agreements. ECF Nos. 1-5, 1-6, 1-7 at 16. Paragraph 15(a) of the franchise agreements states:

> This Agreement is effective upon its acceptance in Virginia by our authorized officer. Virginia law governs all claims which in any way relate to or arise out of this Agreement or any of the dealings of the parties hereto. However, the Virginia Retail Franchising Act does not apply to any claims by or on your behalf if the Territory shown on Schedule A below is outside Virginia.

Id.

While Hines does not specifically attack the choice of law provision, he continues to insist that the correct venue for the case is Maryland, his residence and the location of the franchises at issue. SAC ¶ 3.[3] Hines also alleges Liberty has violated both Virginia and Maryland consumer protection acts and franchise protection acts.[4] SAC ¶¶ 74–75.

Prior to addressing Liberty's motion to dismiss, the Court must determine the applicable law. "Virginia law looks favorably upon choice of law clauses in a contract, giving them full effect except in unusual circumstances." *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270,

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[2] Nothing contained in either of these filings would change the recommendations made in this report and recommendation.

[3] Hines' motion for change of venue was previously denied. ECF No. 31.

[4] The correct names for the franchise acts Hines is presumably referring to are the Virginia Retail Franchising Act, Va. Code Ann. § 13.1-559 (2009), and the Maryland Franchise Registration and Disclosure Law, Md. Code Ann., Bus. Reg. § 14-227(e).

275 (4th Cir. 2007) (quoting *Hitachi Credit Am. Corp. v. Signet Bank,* 166 F.3d 614, 624 (4th Cir. 1999)); *see also Artistic Stone Crafters v. Safeco Ins. Co.*, 726 F. Supp. 2d 595, 600–01 (E.D. Va. 2010) (citing *Colgan*, 507 F.3d at 275, and adhering to choice of law clause); *Hooper v. Musolino,* 364 S.E.2d 207, 211 (Va. 1988) (applying the choice of law provision providing for the application of North Carolina law because the state "was reasonably related to the purpose of the agreement").

"[T]o avoid the operation of a choice-of-law provision . . . the party resisting the clause must establish by clear and convincing evidence that the clause itself, as opposed to the contract as a whole, was the product of impropriety," such as overreaching or fraud. *Zaklit v. Global Linguist Sol., LLC*, No. 1:14cv314, 2014 WL 3109804, at *7 (E.D. Va. July 8, 2014) (citing *Ash–Will Farms v. L.L.C. v. Leachman Cattle Co.*, Nos. 02–195, 02–200, 2003 WL 22330103, at *3 (Va. Cir. Ct. Feb. 13, 2003); *Global One Commc'n, L.L.C. v. Ansaldi*, No. C165948, 2000 WL 1210511, at *2 (Va. Cir. Ct. May 5, 2000) ("Virginia does not presume the unenforceability of contracts entered into by parties of unequal bargaining power but rather presumes contracts to be valid, and the burden is on the party challenging the validity to establish that the provision in question is unfair, unreasonable, or affected by fraud or unequal bargaining power.")). Although Hines generally argues that his franchise agreements with Liberty are invalid due to a lack of consideration, SAC ¶¶ 19, 22, 47, 76, 77, 102, 110, and should be invalidated on grounds of unconscionability, SAC ¶¶ 22–26, 41–46, 60, such arguments are insufficient to establish clear and convincing evidence of fraud or overreaching by Liberty with respect to the choice-of-law provision at issue. *Zaklit*, No. 1:14cv314, 2014 WL 3109804, at *8. This is particularly so here,

where the dispute between the parties has a genuine connection to Virginia.[5] Because Hines has failed to show fraud or overreaching by Liberty with respect to the choice-of-law provision, the Court finds that Virginia law applies to the breach of contract claims raised in Hines' second amended counterclaim.

"Where a choice of law clause in the contract is sufficiently broad to encompass contract-related tort claims," courts will apply the choice of law provision to related non-contract claims. *Hitachi Credit Am. Corp.*, 166 F.3d at 628; *see also Zaklit*, No. 1:14cv314, 2014 WL 3109804, at *9–11. The choice of law provision in the franchise agreements at issue here was intended to have a broad scope, providing that Virginia law applies to "all claims which in any way relate to or arise out of this Agreement or any of the dealings of the parties hereto," with the exception of the Virginia Retail Franchising Act. ECF Nos. 1-5, 1-6, 1-7 at 16. Accordingly, Virginia law applies to Hines' related non-contract claims.

The only portions of Hines' second amended counterclaim not governed by Virginia law are his counts alleging violations of state statutes. The franchise agreements provide that "the Virginia Retail Franchising Act does not apply to any claims by or on your behalf if the Territory shown on Schedule A below is outside Virginia." *Id.* More importantly, the terms of the Virginia Retail Franchising Act provide that that Act applies "only to a franchise the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the Commonwealth of Virginia." Va. Code Ann. § 13.1-559 (2009). Moreover, the Maryland

[5] Liberty maintains its headquarters and principal place of business in Virginia, and the franchise agreements forming the basis of the parties' relationship specify that such agreements take effect "upon . . . acceptance in Virginia" by one of Liberty's authorized representatives. ECF No. 1-5 ¶ 15a, ECF No. 1-6 ¶ 15a, ECF No. 1-7 ¶ 15a. In addition, Hines traveled to Virginia Beach to attend training, and regularly submitted reports to and communicated with persons located at Liberty's Virginia Beach headquarters. Compl. ¶ 3a.

Franchise Registration and Disclosure Law applies to the sale of a franchise where the franchise fee exceeds $100.00 and the franchisee is a resident of Maryland or the franchised business will be or is operated in Maryland. Md. Code Ann., Bus. Reg. § 14-203(a) (1992). The parties agree that Hines is a resident of Maryland, SAC ¶ 2; Compl. ¶ 2, and that the franchises at issue were located in Maryland, SAC ¶¶ 5–9; Compl. ¶¶ 9–11. Therefore, the Maryland Franchise Registration and Disclosure Law applies to the transactions at issue, and will govern Hines' allegations of Liberty's violations of state statutes.

IV. STANDARD OF REVIEW FOR MOTION TO DISMISS

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss complaints, or claims within complaints, upon which no relief can be granted. Fed. R. Civ. P. 12(b)(6); *Sonnier v. Diamond Healthcare Corp.*, 114 F. Supp. 3d 349, 354 (E.D. Va. 2015). In order to survive a motion to dismiss, a counterclaim must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This pleading standard requires that the counterclaim state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In essence, "[a] claim has facial plausibility when the [counterclaimant] pleads factual content that allows the court to draw the reasonable inference that the [plaintiff] is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Ascertaining whether a counterclaim states a plausible claim for relief is a "context-specific task" that requires the court to "draw on its judicial experience and common sense." *Id.* at 679.

A motion to dismiss pursuant to Rule 12(b)(6) challenges "the sufficiency of a [counterclaim]; it does not resolve disputes over factual issues, the merits of a claim, or the applicability of a defense." *SunTrust Mortg., Inc. v. Simmons First Nat'l Bank*, 861 F. Supp. 2d

733, 735 (E.D. Va. 2012) (citing *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)). Therefore, "[i]n ruling on a 12(b)(6) motion, a court 'must accept as true all of the factual allegations contained in the [counterclaim]' and 'draw all reasonable inferences in favor of the [counter-claimant].'" *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462, 467 (4th Cir. 2012) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)). The factual allegations, however, "cannot be mere speculation, and must amount to more than 'a sheer possibility that a [party] has acted unlawfully.'" *Brach v. Conflict Kinetics Corp.*, 221 F. Supp. 3d 743, 747 (E.D. Va. 2016) (quoting *Iqbal*, 556 U.S. at 678). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do . . . [n]or does a [counterclaim] suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Iqbal*, 446 U.S. at 678 (internal quotations omitted); *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). However, courts do construe *pro se* complaints liberally. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277–78 (4th Cir. 1985).

Apart from the general pleading standard set forth in Rule 8(a) of the Federal Rules of Civil Procedure, Rule 9 sets forth pleading requirements for "special matters." Fed. R. Civ. P. 9. Subsection (b) of Rule 9, which establishes the pleading requirements for "fraud or mistake" provides that:

> (b) In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Fed. R. Civ. P. 9(b). Under Rule 9(b), the circumstances that must be pled with particularity are "the time, place, and contents of the false representations, as well as the identity of the person

making the misrepresentation and what he obtained thereby." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783–84 (4th Cir. 1999) (citation and internal quotation marks omitted). A plaintiff's failure to plead fraud with particularity under Rule 9(b)'s pleading requirements "is treated as a failure to state a claim under Rule 12(b)(6)." *Id.* at 783 n.5.

V. ANALYSIS

The Court will first address Liberty's motion to dismiss Counts I though VI of Hines' second amended counterclaim, and then will address Liberty's motion to stay the counterclaims pending arbitration.

A. Motion to Dismiss the Second Amended Counterclaim

1. Count I—Breach of the Franchise Agreements

In Count I, Hines alleges Liberty breached the franchise agreements by: (a) violating the Franchise Rule provision in the Federal Trade Commission Act, 16 C.F.R. § 436.5(t)(6) (SAC ¶¶ 13–14, 16, 19); (b) failing to generate enough customers through their brand to allow Hines to comply with the franchise agreements (SAC ¶¶13, 16); (c) failing to provide consideration for the $40,000.00 franchise fee and royalties (SAC ¶ 19); and (d) breaching the implied covenant of good faith and fair dealing (SAC ¶¶ 16, 20).

Under Virginia law, to establish a breach of contract, Hines must demonstrate: (1) a legally enforceable obligation of Liberty to Hines; (2) Liberty's violation or breach of that obligation; and (3) injury or damage to Hines caused by Liberty's breach of the obligation. *Sunrise Continuing Care, LLC v. Wright,* 671 S.E.2d 132, 135 (Va. 2009) (citing *Filak v. George,* 594 S.E.2d 610, 614 (Va. 2004)).

a. The Franchise Rule

Although first raised in Count I, Hines references 16 C.F.R. § 436.5, or "the Franchise Rule," throughout his second amended counterclaim. SAC ¶¶ 13–14, 16, 19, 68–72, 87, 109, 111–12, 136(a). In Count I, Hines alleges that Liberty violated this rule when it failed to cite the Franchise Rule in the franchise agreements, and failed to notify Hines of his rights and of the fact that the territory he was purchasing had previously failed as a Liberty franchise. SAC ¶¶ 14, 19. Hines alleges that he would not have purchased a Liberty franchise if he had been provided with this information. SAC ¶ 14.

In Count III, Hines alleges that Liberty violated the Franchise Rule by failing to include in the franchise disclosure document the identification of, and contact information for, the previous franchise owners of the territories Liberty was selling to Hines. SAC ¶¶ 69–70.

In Count IV, Hines alleges Liberty violated the Franchise Rule, SAC ¶¶ 87, 109, 111–12, by reselling failed territories, which is the "foundation of income generation for Liberty Tax and John Hewitt," SAC ¶¶ 93–99. Hines specifies that John Hewitt violated the Franchise Rule provision "willingly, purposefully, and by calculation." SAC ¶ 87.

In Count VI, Hines cites the Franchise Rule in his list of omnibus and general points. SAC ¶ 136(a).

In each of these counts, regardless of the heading under which the allegations fall, Hines is alleging that Liberty violated the Franchise Rule. The District Court for the District of Columbia provides the following helpful explanation of the "Franchise Rule":

> The Federal Trade Commission ("FTC") has promulgated regulations titled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. § 436 (2013) (commonly known as the "Franchise Rule" *see* John Bourdeau, *et al.*, 62B Am. Jur. 2d Private Franchise

> Contracts § 26 (2d ed. 2014)), which apply nationwide. Before selling a franchise, the Franchise Rule requires a franchisor to provide a prospective franchisee with a detailed disclosure statement—known as a "uniform franchise offering circular" or a "franchise disclosure document"—that includes information like the franchisor's corporate history and current financial condition, the track record of any other franchises, and the background of the franchisor's principal officers. *See* 16 C.F.R. § 436.5; *see also FTC v. Jordan Ashley, Inc.*, No. 93–2257–CIV, 1994 WL 200775, at *3 (S.D. Fla. Apr. 5, 1994); Bourdeau, *supra*, § 26. The disclosure requirements set forth in the Franchise Rule are "designed to protect prospective purchasers from the financial hardships that arise when they purchase franchises and other business opportunity ventures without essential, reliable information about them." Bourdeau, *supra*, § 26.

A Love of Food I, LLC v. Maoz Vegetarian USA, Inc., 70 F. Supp. 3d 376, 382 (D.D.C. 2014).

The Franchise Rule regulations invest the FTC with the authority to bring suit to enjoin a franchisor that fails to provide the disclosures required by the Franchise Rule. *See FTC v. Sage Seminars, Inc.*, No. C95–2854, 1995 WL 798938, at *7 (N.D. Cal. Nov. 2, 1995);[6] John Boudreau, *et al.*, 62B Am. Jur. 2d Private Franchise Contracts § 26 (2d ed. 2014). However, neither the FTC nor the Franchise Rule provide for franchisees to bring suit to enforce the regulations. *See Yumilicious Franchise, L.L.C. v. Barrie*, No. 3:13cv4841, 2015 WL 2359504, at *3 (N.D. Tex. May 18, 2015), *aff'd*, 819 F.3d 170 (5th Cir. 2016) (holding "no private right of action is available to franchisees under these regulations"); *Bans Pasta, LLC v. Mirko Franchising, LLC*, No. 7:13cv360, 2014 WL 637762, at *12 (W.D. Va. Feb. 12, 2014) ("[N]either the FTC Act nor [16 CFR § 436.5] gives rise to a private cause of action, and numerous courts have so held."); *A Love of Food I*, 70 F. Supp. 3d at 382 ("no private right of action is available to

[6] "Pursuant to Section 18(d)3 of the FTC, 15 U.S.C. § 57a(d)(3), and 16 C.F.R. § 436.1, violations of the Franchise Rule constitute unfair or deceptive acts or practices in or affecting commerce, in contravention of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Such acts may therefore be enjoined under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b)." *Sage Seminars*, No. C95–2854, 1995 WL 798938, at *7.

franchisees under" the Franchise Rule) (collecting cases); *Robinson v. Wingate Inns Int'l, Inc.*, No. 13cv2468, 2013 WL 6860723, at *2 (D.N.J. Dec. 20, 2013) ("It is well settled that there is no private cause of action for violation of the FTC franchise disclosure rules.") (citations omitted); *Vino 100, LLC v. Smoke on the Water, LLC,* 864 F. Supp. 2d 269, 281 (E.D. Pa. 2012) (same).

Accordingly, the portions of Hines' counterclaim that allege Liberty is liable for violations of the Franchise Rule, contained in Counts I, III, IV, and VI, should be DISMISSED with prejudice, because the Franchise Rule does not provide a private cause of action to franchisees.

b. Failure of the Liberty Brand to Generate Customers

Hines next alleges that Liberty breached the franchise agreements when it failed to "by brand, [] generate and provide enough Taxpayer volume [customers] for Hines" to satisfy his obligations under the agreement. SAC ¶¶ 13, 16; *see also* SAC ¶¶ 98, 118. Hines does not identify a provision in the franchise agreements that Liberty breached. To allege that Liberty breached the franchise agreements, Hines "cannot rely upon conclusory statements but must identify which provisions [of the franchise agreements] imposed the purportedly breached obligation." *Compel v. Citi Mortg. Inc.*, No. 1:04cv1377, 2005 WL 4904816, at *2 (E.D. Va. Feb. 23, 2005).

A review of the franchise agreements attached to the complaint reveals two paragraphs that reference the success of the franchise. See ECF Nos. 1-5, 1-6, 1-7. Paragraph 5 outlines "obligations of franchisor," and subpart c of that paragraph, titled "Site Selection," states in part, "[o]ur approval of the location of a site is not a guarantee of success in that location or a warranty

or assurance as to any aspect of the office or its location." *Id.* at 6. Paragraph 20 is titled "Acknowledgments," and states in part:

> Except as may be stated in Item 19[7] of our Franchise Disclosure Document, you acknowledge that no person is authorized to make and no person has made any representations to you as to the actual, projected or potential sales, volumes, revenues, profits or success of any Liberty Tax Service franchise.

Id. at 18.

Accordingly, Hines' allegation that Liberty breached the franchise agreements by failing to provide customers should be DISMISSED without prejudice, because Hines has failed to specify "a legally enforceable obligation of Liberty to Hines" to generate and provide enough customers for Hines to satisfy his obligations under the agreement.

c. Liberty's Failure to Provide Consideration

Hines alleges throughout the second amended counterclaim that the franchise agreements provide no consideration for the $40,000.00 franchise fee and 19% royalty that he agreed to pay. SAC ¶¶ 19, 22, 47, 76, 77, 102, 110.

Under Virginia law, consideration represents "the price bargained for and paid for a promise." *Neil v. Wells Fargo Bank, N.A.*, 596 F. App'x 194, 197 (4th Cir. 2014) (quoting *Smith v. Mountjoy,* 694 S.E.2d 598, 602 (Va. 2010)). It can be "a benefit to the party promising or a detriment to the party to whom the promise is made." *Id.* (quoting *GSHH–Richmond, Inc. v. Imperial Assocs.,* 480 S.E.2d 482, 484 (Va. 1997)). Further, "[p]roof of consideration is not a high hurdle; rather, '[a] very slight advantage to the one party or a trifling inconvenience to the

[7] The Franchise Rule requires the franchisor to disclose twenty-three specified items in the franchise disclosure document. 16 C.F.R. § 436.5 (2007). Item 19 is titled "Financial Performance Representations," and appears at subsection (s). *Id.*

other is generally held sufficient to support the promise.'" *Id.* (quoting *Brewer v. First Nat'l Bank of Danville,* 120 S.E.2d 273, 279 (Va. 1961)).

While Hines does not believe he received sufficient consideration for the franchise fee and royalties paid to Liberty, the franchise agreements do outline several obligations of Liberty (the franchisor) that constitute consideration. *See* ECF Nos. 1-5, 1-6, 1-7 at 6–8. The franchise agreements state that Liberty is obligated to provide Hines with training, an operations manual, advertising and marketing, software, technical support, financial products, operational support, and financing, among others. *Id.* Allegations in Hines' counterclaim provide evidence that he did receive some consideration. He admits that he "operated as a Liberty Tax Franchisee in four calendar years and three tax seasons," or "thirty-seven months." *See* SAC ¶¶ 50, 55. Presumably, he was given some of the consideration listed above, such as, training, an operations manual, and software, in order to operate the franchises. As a result, Hines' allegation that the franchise agreements fail to provide any consideration in return for the franchise fee and royalties should be DISMISSED without prejudice.

d. Implied Covenant of Good Faith and Fair Dealing

Hines further alleges that Liberty breached the franchise agreements by breaching the implied covenant of good faith and fair dealing. SAC ¶¶ 16, 20, 121.

Contracts governed by Virginia law contain an implied covenant of good faith and fair dealing. *Va. Vermiculite, Ltd. v. W.R. Grace & Co.,* 156 F.3d 535, 541–42 (4th Cir. 1998). This implied duty exists regardless of whether the contracts fall under the Uniform Commercial Code. *See SunTrust Mortg., Inc. v. United Guar. Residential Ins. Co. of North Carolina,* 806 F. Supp. 2d 872, 893–95 (E.D. Va. 2011), *vacated on other grounds,* 508 F. App'x 243 (4th Cir. 2013). This

duty prohibits the "exercise [of] contractual *discretion* in bad faith," but "does not prevent a party from exercising its explicit contractual *rights*," *Va. Vermiculite, Ltd.*, 156 F.3d at 542, and "cannot be used to override or modify explicit contractual terms." *Riggs Nat'l Bank v. Linch*, 36 F.3d 370, 373 (4th Cir. 1994).

> [T]he implied covenant of good faith and fair dealing is 'simply a recognition of conditions inherent in expressed promises. To that end, the covenant does not compel a party to take affirmative action not otherwise required under the contract, does not establish independent duties not otherwise agreed upon by the parties, and cannot be invoked to undercut a party's express contractual rights.

Johnson v. Countrywide Home Loans, Inc., No. 2:15cv513, 2016 WL 7042944, at *3 (E.D. Va. Jan. 26, 2016), *aff'd*, 669 F. App'x 117 (4th Cir. 2016) (quoting *Monton v. America's Servicing Co.*, No. 2:11cv678, 2012 WL 3596519, at *7 (E.D. Va. Aug. 20, 2012)). Further, "a breach of those duties only gives rise to a breach of contract claim, not a separate cause of action." *Id.* (citing *Bagley v. Wells Fargo Bank, N.A.*, No. 3:12cv617, 2013 WL 350527, at *6 (E.D. Va. Jan. 29, 2013), *aff'd*, 669 F. App'x 117 (4th Cir. 2016)).

Hines' allegation that Liberty breached the franchise agreements by breaching the implied covenant of good faith and fair dealing is vague. Hines alleges "Liberty Tax breached the Franchise Agreement" through "the failure to act in the manner of the Implied Covenant of Good Faith and Fair Dealings," and asks, "what part of the Covenant of Good Faith and Fair Dealings did I get out of this?" ¶¶ 16, 20. Hines fails to specify what contractual discretion Liberty exercised in bad faith. As with Hines' other breach of contract allegations, Hines has failed to identify the provision in the franchise agreements that gives Liberty contractual discretion, or specify how Liberty exercised that discretion in bad faith. The only substantive allegations of breach of contract in Count I—violation of the Franchise Rule, failing to provide a sufficient

customer base, and failing to provide consideration—do not state a claim for the reasons discussed above. These allegations similarly cannot state a claim for a breach of the implied covenant of good faith and fair dealing, as "the covenant does not compel a party to take affirmative action not otherwise required under the contract." *Johnson*, No. 2:15cv513, 2016 WL 7042944, at *3. Therefore, Hines' allegation that Liberty breached the contract by violating the implied covenant of good faith and fair dealing should be DISMISSED without prejudice.

2. Count II—"Fraud of the Franchise Agreement"

In Count II, Hines alleges that Liberty committed fraud by misrepresenting certain aspects of the franchises to induce him to purchase the franchises. Hines asserts that "[a] serious case and pattern of Fraud starts with Liberty even before one becomes a Franchisee. With Liberty, I believe Fraud starts with INTENTION, and is woven into the fabric of the Franchise Agreement, continues with the Franchise Disclosure Document (FDD), and is anchored and perpetrated in Liberty's day to day operational realities as espoused, carried through, and implemented by ubercomplicit butt kissers." SAC ¶ 38.

Hines then alleges the following misrepresentations:

> 41. At the "Open House" - a Franchise Prospect's first blush with Liberty Tax, John Hewitt supplied ambiguous, misleading, inaccurate, and - as time would tell - false verbal statements as to the actuality of success of Liberty Tax Franchisees.
>
> 42. Liberty Tax exaggerated many aspects of the Liberty Franchise in order to induce the Franchisee Prospects to purchase the franchise.
>
> 43. Liberty Tax LIED about many aspects of the Liberty Franchise in order to induce the Franchisee Prospects to purchase the franchise.
>
> 44. Liberty misrepresented Item 19 information to induce the Prospect to buy into Liberty Tax.

> 45. In the Financial Disclosure Document (FDD), Liberty Tax provided inaccurate written statements as to the initial expenses pertaining to the operation of the franchise and to the potential profitability of the franchise.
>
> . . .
>
> 51. Liberty Tax and John Hewitt willingly, purposely, and pathetically LIED about many aspects of the Liberty Tax Walmart Kiosk "opportunity", so costly to the Liberty Franchisees, as the debacle "Walmart" turned out to be!

SAC ¶¶ 41–45, 51.[8] Hines alleges that, as a result of Liberty's fraud, he "expended over '$300,000' and lost 'a quarter of a million dollars.'" SAC ¶ 55.

The elements of fraud in Virginia are: "(1) a false representation, (2) of material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) damages resulting from that reliance." *Bank of Montreal v. Signet Bank,* 193 F.3d 818, 826 (4th Cir. 1999) (citing *Van Deusen v. Snead,* 441 S.E.2d 207, 209 (Va. 1994)). Fraud in the inducement occurs when a false promise is given before a contract is entered into, in an effort to induce the promisee to enter the contract, and with the present intention of not fulfilling such promise. *See Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 507 S.E.2d 344, 348 (Va. 1998); *Colonial Ford Truck Sales, Inc. v. Schneider*, 325 S.E.2d 91, 94 (Va. 1985) ("When he makes the promise, intending not to perform, his promise is a misrepresentation of *present* fact, and if made to induce the promisee to act to his detriment, is actionable as an actual fraud."); *Orbit Corp. v. Fedex Ground Package Sys., Inc.*, No. 2:14cv607, 2015 WL 12516611, at *1 (E.D. Va. Dec. 4, 2015).

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[8] In Count II, Hines also alleges Liberty committed a fraud when it entered into the franchise agreements with Hines, a form contract that was not negotiated, that lacks consideration, and that strips the franchisee of rights, SAC ¶¶ 22–25, such as the right to retain his own customers, SAC ¶¶ 28–32. The Court has addressed Hines' assertions regarding lack of consideration. Hines' remaining arguments regarding the unequal bargaining power may be asserted as a defense to Liberty's breach of contract claim, but do not state a claim for relief.

Under Virginia law, however, a fraud claim cannot be based on a statement of opinion, rather,

> The mere expression of an opinion, however strong and positive the language may be, is no fraud. Such statements are not fraudulent in law, because . . . they do not ordinarily deceive or mislead. Statements which are vague and indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing, though they may not be true, for a man is not justified in placing reliance upon them.

Mortarino v. Consultant Eng'g Servs., Inc., 467 S.E.2d 778, 781 (Va. 1996) (quoting *Saxby v. S. Land Co.*, 63 S.E. 423, 424 (Va. 1909)). As a result, "'commendatory statements, trade talk, or puffing, do not constitute fraud because statements of this nature are generally regarded as mere expressions of opinion.'" *Glaser v. Enzo Biochem, Inc.*, 126 F. App'x 593, 600 (4th Cir. 2005) (quoting *Lambert v. Downtown Garage, Inc.*, 553 S.E.2d 714, 717 (Va. 2001)).

While Hines has made conclusory allegations of fraud, he does not state with particularity "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation" as required by Rule 9(b). *See also Harrison*, 176 F.3d at 783–84. In paragraph 41, Hines alleges that "[a]t the 'Open House,'" John Hewitt "supplied ambiguous, misleading, inaccurate, and . . . false statements as to the actuality of success of Liberty Tax Franchisees." Hines has failed to provide the actual misrepresentation, but the allegation suggests that John Hewitt made a statement of opinion about the success of a franchise that is not actionable. In paragraphs 42, 43, and 51, Hines asserts Liberty and John Hewitt exaggerated or lied about "many aspects of the Liberty Franchise," and "many aspects of the Liberty Tax Walmart Kiosk." Hines has again failed to provide the actual misrepresentation (including any promise made with a present intention of not fulfilling the promise), and the time and place of the misrepresentation. Further, in each of these paragraphs, Hines states that Liberty made the

misrepresentations, and in one paragraph identifies John Hewitt in addition to Liberty. Hines must specify the identity of the person who made each misrepresentation. Hines alleges in paragraphs 44 and 45 that Liberty misrepresented or provided inaccurate information in the financial disclosure document. Hines has not attached the financial disclosure document, or identified the specific misrepresentation made in the document.

Hines' fraud allegations should be DISMISSED without prejudice due to Hines' failure to state with particularity the misrepresentations made, as well as the circumstances surrounding any misrepresentation, as required under Rule 9(b).

3. Count III—"Fraud as a 'Legitimate' Business"

In Count III, Hines alleges that, in a practice he refers to as "Fee Intercepts," Liberty diverted Hines' earned tax preparation fees, "without permission, to apply those fees against the Defendant[']s fees or accounts payable, due Liberty."[9] SAC ¶¶ 78–79. Hines also alleges in Count III that Liberty has violated the Maryland and Virginia consumer protection acts and franchise protection acts (SAC ¶¶ 74–75, 86).

a. "Fee Intercepts"

Hines alleges that over three years, Liberty diverted approximately $23,000.00 of Hines' earnings (tax preparation fees), "without permission, to apply those fees against the Defendant[']s fees or accounts payable, due Liberty." SAC ¶¶ 78–79. Hines refers to this practice as "Fee Intercepts." *Id.* Hines asserts Liberty's practice of fee intercepts violates public policy, "amount[s] to an inequitable assertion of its powers and position," is unfair and deceptive, is unconscionable, and violates the standard guarantees of federal and state law. SAC ¶¶ 78, 82–86.

[9] Hines realleges in Count III that the franchise agreements lack consideration (SAC ¶¶ 76–77), and Liberty violated the Franchise Rule (SAC ¶¶ 68–72).

Hines alleges that "$16,809 of Fee Intercepts in the 2014 tax season put [Hines], the Defendant, 'out of business' in three of [his] five operations." SAC ¶ 81. While Hines may feel that this practice is unfair, Liberty is permitted to collect fees paid by Hines' customers and apply the fees to Hines' debt held by Liberty due to a provision in the franchise agreements that states:

> All of the tax preparation . . . fees, and any rebates that you receive from Financial Products or customers who purchase Financial Products, shall initially be paid to us. From these fees and any rebates, we will deduct monies that you owe to us and deduct and hold monies to apply to upcoming amounts due to us, and remit the balance to you.

ECF Nos. 1-5, 1-6, 1-7 at 6. By signing the franchise agreements, Hines agreed to Liberty applying customer fees to Hines' debt held by Liberty. Because the franchise agreements provide that Liberty can perform the specific acts complained of with respect to the "fee intercepts," Hines has failed to allege Liberty acted fraudulently, and this portion of Count III should be DISMISSED without prejudice.

b. Virginia Retail Franchising Act and Consumer Protection Act

Next, Hines alleges Liberty violated the "Virginia Consumer Protection Act and Virginia Franchise Protection Act." SAC ¶ 75; *see also* SAC ¶¶ 86, 136(c). As discussed in the choice of law section above, the Virginia Retail Franchising Act does not apply to Hines' purchase of the Maryland franchise territories. The Virginia Retail Franchising Act applies "only to a franchise the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the Commonwealth of Virginia." Va. Code Ann. § 13.1-559 (2009). Further, the Virginia Consumer Protection Act, Va. Code Ann. § 59.1–196 *et seq.*, does not apply to the sale of franchise territories. The act only applies to "consumer transactions," the sale of goods or services "to be used primarily for personal, family or household purposes," or the sale of a

"business opportunity" that enables a consumer to start a business "out of his residence." Va. Code. Ann. § 59.1-198 (2011). Hines operated Liberty franchises at two office locations in Maryland as well as from kiosks inside three Walmart stores in Maryland; but, did not attempt to start a business out of his residence.[10] SAC ¶¶ 5–9; Answer, ECF No. 41 at 41, 54–57. Therefore, Hines' claims that Liberty violated Virginia's Retail Franchising Act and Consumer Protection Act (SAC ¶ 75) should be DISMISSED with prejudice.

c. Maryland Franchise Registration and Disclosure Law and Maryland Consumer Protection Act

Hines further alleges Liberty violated Maryland's Franchise Registration and Disclosure Law and Consumer Protection Act. SAC ¶¶ 74, 86. Maryland's Franchise Registration and Disclosure Law applies to Hines' purchase of the Liberty franchise territories in Maryland, because the franchise fee exceeds $100.00, Hines is a resident of Maryland, and the franchised business operated in Maryland. Md. Code Ann., Bus. Reg. § 14-203(a) (1992); SAC ¶¶ 2, 5–9; Compl. ¶¶ 2, 9–11. Therefore, the Maryland Franchise Registration and Disclosure Law applies to the transactions at issue, and will govern Hines' allegations that Liberty violated a state statute.

The Maryland Franchise Registration and Disclosure Law requires that "[a]n action under this section must be brought within 3 years after the grant of the franchise." Md. Code Ann., Bus. Reg. § 14-227(e). Hines' franchise agreements are dated July 3, 2012 (ECF No. 1-5 at 19) and August 7, 2012 (ECF Nos. 1-6, 1-7 at 19). Hines attempted to file his first counterclaim on February 8, 2017, ECF Nos. 52, 53, well past the three year statute of limitations for bringing an action under Maryland's Franchise Resolution and Disclosure Law. *See Fabbro v. DRX Urgent*

[10] Hines' two Liberty franchise offices were located at 1658-B Annapolis Road, Odenton, Maryland, and 2030 Liberty Road, Eldersburg, Maryland. Answer, ECF No. 41 at 54–55.

Care, LLC, 616 F. App'x 485, 490 (3d Cir. 2015) (upholding dismissal of claims brought pursuant to the Maryland Franchise Registration and Disclosure Law, "because, as is evident on the face of the pleadings, these claims were not 'brought within 3 years after the grant of the franchise'") (internal citations omitted). Hines' allegations that Liberty failed to comply with Maryland's Franchise Registration and Disclosure Law are barred by the statute of limitations.

Further, Maryland's Consumer Protection Act provides protection for consumers who are purchasing goods or services "which are primarily for personal, household, family, or agricultural purposes." Md. Code Ann., Com. Law § 13-101 (2013). By its terms, the act does not apply to Hines' purchase of the Liberty franchises. Accordingly, Hines' allegations that Liberty violated Maryland's Franchise Registration and Disclosure Law and Consumer Protection Act should be DISMISSED with prejudice.

4. Count IV—Violations

In Count IV, Hines discusses "the system" by addressing Liberty's poor success rate and practice of reselling territories of previously failed Liberty franchises to new franchisees (SAC ¶¶ 93–101); and Liberty's failure to advertise and diversion of franchisee fees paid for advertising to other purposes (SAC ¶¶ 103–108, 113–16).[11] Hines alleges that these Liberty practices are willful and unconscionable (SAC ¶¶ 90–91); and violate the Franchise Rule (SAC ¶¶ 87, 109), public policy (SAC ¶¶ 88–89), and federal and state laws protecting consumers and franchisees (SAC ¶ 92). As discussed above, the Franchise Rule does not provide a private right of action for franchisees to bring suit to allege a franchisor sold them a failed franchise without proper disclosure. Also addressed above, Hines has failed to raise a claim with respect to the Maryland

[11] Paragraphs 113 and 115–116 repeat allegations contained in paragraphs 106 and 108.

Franchise Registration and Disclosure Law within the statute of limitations, and the remaining state statutes raised in the second amended counterclaim do not apply.

Hines did not raise his allegations regarding Liberty's failure to advertise and failure to appropriately use advertising fees in his breach of contract count, Count I. To the extent that Hines is attempting to bring a breach of contract claim, such claim should be DISMISSED without prejudice to Hines specifying the contract provision allegedly breached by Liberty. To the extent Hines is attempting to raise a tort claim based on these allegations, the claim must fail. To bring a tort claim in relation to a contract, a party must allege a breach of duty that is *different from* the duty that "exist[s] between the parties solely by virtue of the contract." *Foreign Mission Bd. of Southern Baptist Convention v. Wade,* 409 S.E.2d 144, 148 (Va. 1991); *see Kamlar Corp. v. Haley,* 299 S.E.2d 514, 518 (Va. 1983) (requiring "proof of an independent, wilful tort, beyond the mere breach of a duty imposed by contract"). To the extent that Liberty owes Hines a duty to advertise, such a duty only exists as a result of the franchise agreements. Any tort claim that Hines is attempting to raise based on Liberty's failure to advertise should be DISMISSED without prejudice.

5. Count V—"The System"

In the one paragraph that makes up Count V, Hines asserts that the system, as described in Count IV, is not "getting it done," and that too many Liberty franchises will not "make it." SAC ¶ 120. These allegations fail to state a claim for which relief can be granted, and Count V should be DISMISSED without prejudice.

6. Count VI—"Ominbus and General Points"

In this last count, Hines summarizes several points that were made in his previously filed counterclaims, that were left out of the second amended counterclaim "to stay away from wordiness." SAC ¶ 122. The first paragraph of this section states:

> Unfair and Deceptive information from Liberty Tax and John Hewitt - which takes the form of Misrepresentation, Concealment, Omission, Deceit, Lies, Unjust Enrichment, Conversion, Statutory Negligence, Malicious Interference, Criminal Mischief, and Fraud, to name most - possesses the tendency to mislead and create unexpected, unanticipated, unfavorable, obverse, and financially and fiscally threatening outcomes, inconsistent with, and adverse to, the inherent outcomes and expectations implied by the common law concept of the Implied Covenant of Good Faith and Fair Dealings.

SAC ¶ 121. Hines then provides the definitions obtained "[o]ff the Internet" for misrepresentation, implied covenant of good faith and fair dealing, inducement, concealment, omission, conversion, unjust enrichment, deceit, and tortious interference. SAC ¶¶ 123–32. Next, Hines provides a list of seventeen "Agents of Loss" followed by a list of forty-two "Facts." SAC ¶¶ 135–36. Hines provides these two lists "to give the [opposing party] fair notice of what the . . . claim is and the grounds upon which it rests," to "frame the issues and provide the basis for informed pretrial proceedings," and to give an account of "what would come from the defendant[] in the trial." SAC ¶ 133 (internal quotation marks omitted). Hines explains that these lists are bullet points that were used as a table of contents in a previously filed counterclaims. *Id.* The lists consist of items such as "(a) the May, 2012, Open House, meeting 'John', and John's 1/3, 1/3, 1/3," and "(b) the Liberty Disclosure Document and 1,000 returns," SAC ¶ 135, and do not provide any substantive allegations.

Hines has not alleged the elements of any cause of action in Count VI, and merely lists the definitions of several legal words and provides several bullet points for items he would like to

explain at a later time. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do . . . [n]or does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal citations omitted). Accordingly, Hines' Count VI should be DISMISSED without prejudice.

7. Recommendation

For the reasons stated above, Liberty's motion to dismiss Hines' second amended counterclaim with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) should be GRANTED in part and DENIED in part, , as the Court recommends dismissing some claims without prejudice. Hines' counterclaims brought pursuant to the Franchise Rule, the Virginia Retail Franchising Act, the Virginia Consumer Protection Act, the Maryland Franchise Registration and Disclosure Law, and the Maryland Consumer Protection Act should be DISMISSED with prejudice. Hines' remaining counterclaims should be DISMISSED without prejudice.[12]

VI. MOTION TO STAY HINES' SECOND AMENDED COUNTERCLAIM PENDING ARBITRATION

Because Liberty's motion to dismiss may not be granted with prejudice as to all of Hines' claims, and Hines has expressed an interest in filing a third amended counterclaim,[13] the Court will address Liberty's motion to enforce the arbitration clauses contained in the franchise

[12] "When a *pro se* complaint contains a potentially cognizable claim, a plaintiff should be allowed to particularize the claim." *U.S. ex rel. Kwami v. Ragnow*, No. 2:09cv11, 2009 WL 6560227, at *1 (E.D. Va. Feb. 6, 2009) (quoting *Coleman v. Peyton*, 340 F.2d 603, 604 (4th Cir. 1965)).

[13] Hines has filed a motion for leave to file a third amended counterclaim, ECF No. 87, which was denied on September 20, 2017 due to Hines' failure to attached the proposed third amended counterclaim. ECF No. 91.

agreements and motion to stay Hines' counterclaims pending arbitration. Liberty asserts "Hines agreed to arbitrate any claim he has against Liberty 'which in any way relates to or arises out of [the Franchise] Agreement, or any of the dealings of the parties [t]hereto,'" and "to the extent Hines wishes to assert a claim against Liberty, he must arbitrate it 'before the American Arbitration Association.'" ECF No. 89 at 2 (citing the Maryland Addendum).

In determining the validity and enforceability of the Maryland addenda to the franchise agreements, the Court will apply the following policies. Federal policy favors arbitration, and the Supreme Court has directed courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). Section 2 of the Federal Arbitration Act ("FAA") makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The Supreme Court has directed that 'we apply ordinary state-law principles that govern the formation of contracts' when assessing whether the parties agreed to arbitrate a matter." *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 607 (4th Cir. 2013) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

Like federal policy, "the public policy of Virginia favors arbitration." *TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C.*, 557 S.E.2d 199, 202 (Va. 2002). Virginia law, like the FAA, provides that a written arbitration agreement "is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract." Va. Code. Ann. § 8.01-581.01 (2017). "Under limited circumstances, 'equity may require invalidation of an arbitration agreement that is unconscionable.'" *Carson v. LendingTree LLC*, 456 F. App'x 234, 236 (4th Cir. 2011) (quoting *Murray v. United Food & Commercial Workers*, 289 F.3d 297, 302

(4th Cir. 2002)). Hines bears the burden of proof for this affirmative defense. *Id.* (citing *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 369 (N.C. 2008)).

In addition to signing the three franchise agreements, Hines signed the three Maryland addenda. ECF No. 1-5 at 21; ECF Nos. 1-6, 1-7 at 23. Each addendum is one page long, and contains the following arbitration clause directly above Hines' signature line:

> You agree to bring any claim against us, including our present and former employees, agents, and affiliates, which in any way relates to or arises out of this Agreement, or any of the dealings of the parties hereto, solely in arbitration before the American Arbitration Association.

Id.

Hines has not directly attacked the arbitration clause or the Maryland addenda, but has asserted that the franchise agreements are unconscionable, and that Liberty fraudulently induced him into signing the franchise agreements. SAC ¶¶ 22–26, 41–46, 60. The United States Supreme Court has found that, under the statutory provisions of the FAA, a district court cannot adjudicate claims that an arbitration clause is unenforceable because the underlying contract is the result of fraud. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–404 (1967) (holding the FAA "does not permit the federal court to consider claims of fraud in the inducement of the contract generally" and "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"); *see also Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (reversing district court holding that arbitration agreement was unenforceable due to allegations of fraud because "[c]laims of fraud applicable to the entire contract are generally resolved by an arbitrator"); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 671–72 (4th Cir. 2016) (holding "any grounds given for revocation must concern the validity of the arbitration agreement in particular, not simply the validity of the underlying contract as a

whole") (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010)).[14] Because Hines has only attacked the franchise agreements as the product of fraud, and has not attacked the arbitration agreement contained in the separately signed Maryland addendums, the Court recommends a finding that the arbitration clauses are enforceable.

Accordingly, Liberty's motion to stay should be GRANTED in part, finding the arbitration clauses contained in the Maryland addenda are enforceable. Because the Court has recommended dismissing Hines' second amended counterclaim, Liberty's motion to stay the counterclaim pending arbitration should be DENIED AS MOOT. To the extent Hines intends to pursue any of the counterclaims dismissed without prejudice, he is DIRECTED to raise those claims with an arbitrator pursuant to the arbitration clauses in the franchise agreements.

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[14] Even if Hines had directly attacked the arbitration agreement in the Maryland addenda, his claims of unconscionability due to unequal bargaining power are not persuasive. Under Virginia law, a contract is unconscionable if it is one that "'no man in his senses and not under delusion would make on the one hand, and [that] no honest and fair man would accept on the other.'" *Lee v. Fairfax Cty. Sch. Bd.*, 621 F. App'x 761, 762 (4th Cir. 2015) (*per curiam*) (quoting *Chaplain v. Chaplain*, 682 S.E.2d 108, 113 (Va. App. 2009)). "The inequality must be so gross as to shock the conscience." *Id.* (citation omitted). "[T]he law currently does not provide a basis for a court to invalidate an arbitration agreement because it was formed by 'parties of greatly disparate economic power.'" *March v. Tysinger Motor Co., Inc.*, No. 3:07cv508, 2007 WL 4358339, at *6 (E.D. Va. Dec. 12, 2007); *see also Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 639 (4th Cir. 2002) (enforcing arbitration agreement and dismissing argument that requiring consumers to arbitrate against company is against public policy relating to consumer protection); *Hawthorne v. BJ's Wholesale Club*, No. 3:15cv572, 2016 WL 4500867, at *6 (E.D. Va. Aug. 26, 2016) ("when plaintiffs maintain an option to refuse to sign the form and to work elsewhere," an arbitration clause in an employment contract is not unconscionable). Further, Virginia courts have not required mutuality in arbitration agreements, and have upheld arbitration agreements that only bind one party. *See Sanders v. Certified Car Ctr., Inc.*, 93 Va. Cir. 404 (Va. Cir. 2016) (enforcing an arbitration clause that permitted car dealer to litigate if the buyer did not pay any sums due to the dealer, but required the buyer to arbitrate any claims for $1,000.00 or more); *Bramow v. Toll VA, LP*, 67 Va. Cir. 56 (Va. Cir. 2005) (enforcing arbitration agreement that only bound purchaser of home and not seller); *See also JTH Tax, Inc. v. Lee*, No. 2:06cv486, 2007 WL 1795751, at *5 (E.D. Va. June 19, 2007) (finding an arbitration clause similar to the one at issue in this case was not unconscionable).

VII. RECOMMENDATION

For the forgoing reasons, the Court RECOMMENDS that Liberty's motion to dismiss Hines' second amended counterclaim with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6), ECF No. 88, be GRANTED in part and DENIED in part, as the Court recommends dismissing some claims without prejudice. Hines' counterclaims brought pursuant to the Franchise Rule, the Virginia Retail Franchising Act, the Virginia Consumer Protection Act, the Maryland Franchise Registration and Disclosure Law, and the Maryland Consumer Protection Act should be DISMISSED with prejudice. Hines' remaining counterclaims should be DISMISSED without prejudice.

The Court further recommends that Liberty's motion to stay should be GRANTED in part, finding the arbitration clauses contained in the Maryland addenda are enforceable, and Liberty's motion to stay Hines' second amended counterclaim pending arbitration, ECF No. 88, be DENIED AS MOOT.

Should Hines intend to pursue any of the counterclaims dismissed without prejudice, he is DIRECTED to raise those claims with an arbitrator pursuant to the arbitration clauses in the franchise agreements.

VIII. REVIEW PROCEDURE

By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within 14 days from the date of mailing of this report to the objecting party, *see* 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal

Rules of Civil Procedure. Rule 6(d) of the Federal Rules of Civil Procedure permits an extra 3 days, if service occurs by mail. A party may respond to any other party's objections within 14 days after being served with a copy thereof. *See* Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

/s/
Robert J. Krask
~~United States Magistrate Judge~~
Robert J. Krask
United States Magistrate Judge

Norfolk, Virginia
December 15, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JTH TAX, INC.,
d/b/a Liberty Tax Service,

Plaintiff,

v. Action No. 2:15cv558

CHARLES HINES,

Defendant.

UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the Court on *pro se* defendant, Charles Hines' ("Hines") motion for sanctions against Willcox and Savage, P.C., requesting sanctions for Liberty's failure to answer Hines' counterclaims. ECF No. 102. The motion has been referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). ECF No. 108. For the reasons that follow, the Court recommends that Hines' motion for sanctions be DENIED.

I. PROCEDURAL HISTORY

While the procedural history of this action is extensive, the pertinent filings are outlined below. On December 23, 2015, Liberty filed this action against Hines, ECF No. 1, and Hines answered the complaint on November 10, 2016. ECF No. 41. On December 12, 2016, Hines requested leave to file a "Counter-Complaint." ECF No. 46. On January 18, 2017, the Court granted Hines 21 days to file his counterclaim. ECF No. 51.

On February 8, 2017, Hines filed a 97-page incomplete counterclaim ("Partial Counter-Complaint"), ECF No. 52, and a 169-page counterclaim ("Full Counter-Complaint"),

ECF No. 53, which failed to comply with the Court's signature block and certificate of service requirements. The Court entered an order, on February 13, 2017, advising Hines that the deficiencies needed to be corrected within 30 days. ECF No. 55.

Liberty filed a motion to dismiss Hines' Partial and Full Counter-Complaints (ECF Nos. 52, 53), on February 17, 2017, for failure to comply with Federal Rules of Civil Procedure 8(a), 8(e), and 12(f). ECF No. 56. Hines filed an opposition to the motion to dismiss on March 10, 2017, ECF No. 58, and Liberty filed a reply on March 16, 2017, ECF No. 59.

On March 15, 2017, Hines filed a 176-page counterclaim ("amended counterclaim"). ECF No. 60. On March 24, 2017, Liberty filed a motion to strike untimely pleadings and dismiss counterclaim for failure to comply with the Court's Order, asking the Court to strike or dismiss the Partial and Full Counter-Complaints, and amended counterclaim. ECF No. 62. *See also* ECF No. 63 (Mem. in Support).

The Court construed representations made in Hines' Full Counter-Complaint and opposition to the motion to dismiss as Hines' motion to amend his Full Counter-Complaint.[1] ECF No. 65. The Court granted the motion to amend, denied Liberty's motion to dismiss, denied Liberty's motion to strike, and ordered Liberty to respond to the Amended Counterclaim. ECF No. 65.

[1] The last paragraph of Hines' Full Counter-Complaint, filed on February 8, 2017, states, "I am going to try to wrap this up for presentation tomorrow, 2/8/17,'However it is', with the intention of 'Amending' this Document when I: l) get my phone service back on; and 2) when I get my lap-top in order; or 3) I have the ti[m]e to properly complete what I am submitting, if I cannot quickly correct l) and 2)." ECF No. 53-3 at 19. In his opposition to the motion to dismiss, Hines explains that he will bring his "cured" counterclaim to the court the following week, and states, "what should have been submitted on the 8th, and will be submitted, in whole, next week – is very strong and complete, and is not repetitive or any more prolix than it needs to be." ECF No. 58 at 3, 5.

Liberty filed a motion to dismiss the amended counterclaim on April 14, 2017, for failure to comply with Federal Rules of Civil Procedure 8(a), 8(e), and 10(b). ECF No. 66. *See also* ECF No. 67 (Mem. in Support). Due to Hines' apparent delay in receiving the motion to dismiss, the Court held a telephone conference on June 2, 2017. *See* ECF No. 76. The Court explained the posture of the case, explained that Liberty's motion to dismiss was properly filed, and ordered Hines to file a single document responding to the motion by June 16, 2017. *Id.* Hines timely filed an opposition on June 16, 2017, ECF No. 77, Liberty filed a reply on June 22, 2017, ECF No. 78, and Hines filed a sur-reply on July 13, 2017, ECF No. 79. On July 19, 2017, by report and recommendation, the Court recommended that Liberty's motion to dismiss the amended counterclaim be granted without prejudice to Hines filing a second amended counterclaim. ECF No. 80.

Hines submitted a second amended counterclaim on August 11, 2017, which was filed subject to defect. ECF No. 82. An order entered August 28, 2017 directed the Clerk to file the second amended counterclaim without defect, and directed Liberty to file a responsive pleading within 21 days. ECF No. 85. Twenty-one days later, on September 18, 2017, Liberty timely filed a motion to dismiss Hines' second amended counterclaim or, in the alternative, stay the counterclaim pending arbitration. ECF No. 88.

Hines filed a motion for sanctions against Willcox & Savage, P.C., on October 13, 2017, requesting sanctions due to Liberty's failure to file an answer to Hines' counterclaims. ECF No. 102 at 1–2. Liberty filed an opposition to the motion on October 18, 2017, requesting attorneys' fees incurred in responding to the motion. ECF No. 103. On October 26, 2017, eight days after Liberty filed the opposition, Hines filed a "Narrative on Plaintiff's ECF 103." ECF No. 107.

II. ANALYSIS

Although Liberty has not filed an answer to Hines' counterclaims, Liberty has complied with the rules by timely filing responsive pleadings. A motion to dismiss is a responsive pleading. Under Rule 12 of the Federal Rules of Civil Procedure, "[a] party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim." Fed. R. Civ. P. 12(a)(1)(B). However, if a party serves a motion, the time to answer the counterclaim is postponed, and an answer is not due until fourteen days after such a motion is denied. Fed. R. Civ. P. 12(a)(4)(A).

In this case, Liberty has timely filed a responsive pleading to each of Hines' counterclaims. As outlined above, Liberty moved to dismiss Hines' two counterclaims filed on February 8, 2017, ECF Nos. 52 and 53, nine days after the counterclaims were filed. ECF No. 56. Liberty moved to strike Hines' amended counterclaim, ECF No. 60, fourteen days after it was submitted. ECF No. 62.

On April 5, 2017, the Court granted Hines leave to file the amended counterclaim, denied Liberty's motion to dismiss the partial and full counter-complaints as moot, denied Liberty's motion to strike the amended counterclaim, and ordered Liberty to respond to the amended counterclaim within 21 days. ECF No. 65. Liberty filed a motion to dismiss the amended counterclaim nine days later on April 14, 2017, ECF No. 66, which the Court granted without prejudice to Hines filing a second amended counterclaim. ECF Nos. 80, 84.

Pursuant to the Court's order, Hines' second amended counterclaim was filed on August 28, 2017, and Liberty was directed to file a responsive pleading within 21 days. ECF Nos. 82, 85. Twenty-one days later, on September 18, 2017, Liberty timely filed a motion to dismiss Hines' second amended counterclaim or, in the alternative, stay the counterclaim pending

arbitration. ECF No. 88.

Under Federal Rule of Civil Procedure 12(a)(4)(A), if a party serves a motion, the time to answer the counterclaim is postponed, and an answer is not due until fourteen days after a motion is denied. Fed. R. Civ. P. 12(a)(4)(A). Pursuant to this rule, Liberty has timely responded to each of Hines' counterclaims. Accordingly, the Court recommends that Hines' motion for sanctions against Willcox & Savage, P.C., be DENIED.

In the opposition to Hines' motion, Liberty requests an award of attorneys' fees incurred in responding to Hines' motion for sanctions. ECF No. 103 at 3. Federal Rule of Civil Procedure 11(c)(2) provides:

> A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

Fed. R. Civ. P. 11(c)(2). Hines failed to comply with this rule by failing to serve the motion on Liberty, and giving Liberty 21 days to correct the alleged violation before filing and seeking relief from the Court. *See* ECF No. 103 at 2. Liberty seeks the attorneys' fees incurred in responding to this motion, citing Rule 11(c)(2) and the series of "non-meritorious filings Hines has made in just the first half of this month." *Id.* at 3.

While Hines failed to comply with the provisions of Rule 11(c)(2), the Court does not recommend an award of attorneys' fees. If Hines repeats such conduct in the future, he is now put on notice that Liberty may seek, and the Court may award, attorneys' fees incurred in responding to such a motion. As directed in a previous order, ECF No. 113, Hines is admonished that he must follow Local Civil Rule 7(F)(1) when filing papers with the Court. When filing a

motion, Hines is entitled to one brief in support of the motion, and one reply brief filed no later than six days after plaintiff files an opposition to his motion. In addition, Hines may file one opposition brief within 14 days after service of a motion filed by plaintiff. Additional briefs may not be filed without first obtaining leave of Court as provided by the Local Civil Rule.

The Court recommends that Liberty's request for an award of attorneys' fees be DENIED.

III. RECOMMENDATION

For the forgoing reasons, the Court RECOMMENDS that Hines' motion for sanctions against Willcox & Savage, P.C., be DENIED, and Liberty's request for attorneys' fees incurred in responding to the motion be DENIED.

IV. REVIEW PROCEDURE

By copy of this report and recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing findings and recommendations within 14 days from the date of mailing of this report to the objecting party, *see* 28 U.S.C. § 636(b)(1), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. Rule 6(d) of the Federal Rules of Civil Procedure permits an extra 3 days, if service occurs by mail. A party may respond to any other party's objections within 14 days after being served with a copy thereof. *See* Fed. R. Civ. P. 72(b)(2) (also computed pursuant to Rule 6(a) and (d) of the Federal Rules of Civil Procedure).

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in a waiver of appeal from a judgment of this Court

based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

/s/

Robert J. Krask
United States Magistrate Judge

Robert J. Krask
United States Magistrate Judge

Norfolk, Virginia
December 15, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JTH TAX, INC. d/b/a
LIBERTY TAX SERVICE,

Plaintiff,

v. **CIVIL ACTION NO. 2:15cv558**

CHARLES HINES,

Defendant.

ORDER

This matter comes before the court on the Motion to Dismiss ("Motion") and Memorandum in Support filed by Plaintiff JTH Tax, Inc. ("JTH Tax") on April 14, 2017. ECF Nos. 66, 67. The Defendant, Charles Hines ("Hines"), filed a Memorandum in Opposition on June 16, 2017, ECF No. 77, and JTH Tax filed a Reply on June 22, 2017. ECF No. 78.

On May 20, 2017, this court referred the Motion and Memorandum in Support to United States Magistrate Judge Robert J. Krask, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b), to conduct hearings, including evidentiary hearings, if necessary, and to submit to the undersigned district judge proposed findings of fact, if applicable, and recommendations for the disposition of the Motion. ECF No. 68.

The Magistrate Judge filed the Report and Recommendation ("R&R") on July 19, 2017. ECF No. 80. The Magistrate Judge recommended granting the Motion without prejudice. R&R at 1. By copy of the R&R, the parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge. See id. at 11. On August 3, 2017, Hines filed an Objection to the R&R. ECF No. 81.

I. LEGAL STANDARD

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the R&R to which the Plaintiff has specifically objected. Fed. R. Civ. P. 72(b). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

II. DISCUSSION

Plaintiff's Motion to Dismiss the amended counterclaim alleges that the counterclaim failed to comply with Federal Rules of Civil Procedure 8(a), 8(d)(1), and 10(b). ECF No. 66. In the R&R, the Magistrate Judge agrees, recommending that JTH Tax's "motion to dismiss the amended [counterclaim] be granted without prejudice to Hines filing a second amended counterclaim in an effort to comply with Rules 8(a)(2), 8(d)(1), and 10(b)."

R&R at 11. The Magistrate Judge further recommends that Hines be required to file any second amended counterclaim within twenty-one days from the court's order regarding the R&R and JTH Tax's Motion. Id.

In the Objection to the R&R, Hines opposes the Magistrate Judge's recommendation that Plaintiff's Motion be granted. Obj. at 8. Instead, Hines argues that JTH Tax's Motion should be denied. However, Hines agrees with the Magistrate Judge's recommendation, to the extent that filing a second amended counterclaim, "is the proper way to proceed." Id. at 21.

Having reviewed the matter de novo, the court agrees with the Magistrate Judge's recommendation, that the Motion to Dismiss the counterclaim be granted without prejudice to Hines filing a second amended counterclaim in order to comply with the Federal Rules of Civil Procedure, as explained by the Magistrate Judge. R&R at 4. Accordingly, Hines' Objection is hereby **OVERRULED**.

III. CONCLUSION

The court, having examined the Objections to the R&R filed by the Defendant, and having made de novo findings with respect thereto, does hereby **OVERRULE** the Defendant's Objections, and **ADOPT AND APPROVE IN FULL** the findings and recommendations set forth in the R&R of the United States Magistrate Judge, filed on July 19, 2017. ECF No. 80. Accordingly, Plaintiff's Motion is

GRANTED without prejudice to the Defendant filing a second amended counterclaim within twenty-one days of the entry of this Order.

The Clerk is **DIRECTED** to send a copy of this Order to all parties.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Chief Judge

REBECCA BEACH SMITH
CHIEF JUDGE

August 24, 2017