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MARIO DELUCA -vs.- ALLSTATE INSURANCE COMPANY	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET Nos. BER-C-185-11 BER-C-291-11 BER-C-299-11
AUBURN INSURANCE AGENCY -vs.- ALLSTATE INSURANCE COMPANY	CIVIL ACTION
RICHARD SORGE -vs.- ALLSTATE INSURANCE COMPANY	<u>DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT</u>

ARGUED DECEMBER 21, 2011

DECIDED DECEMBER 28, 2011

CORRECTED JANUARY 6, 2012

APPEARANCES:

W. Michael Garner, Esq. appearing on behalf of Plaintiff, Mario DeLuca.

Michael S. Wernick, Esq. appearing on behalf of Plaintiffs, Auburn Insurance Agency and Richard Sorge.

David D. D'Aloia, Esq., appearing on behalf of Defendant, Allstate Insurance Company (Saiber LLC).

ROBERT P. CONTILLO, P.J.CH.

Background

This matter is before the court upon cross-motions for summary judgment. Plaintiffs are Allstate insurance agents. Allstate seeks to terminate its relationship with the agents. At issue is whether or not the parties' relationship is governed by the New Jersey Franchise Practices Act

("NJFPA") N.J.S.A. 56:10-1, et seq. and whether Allstate had a legal basis to terminate the agents. For the reasons set forth below, the court determines that the Franchise Act does not apply to the insurer – agent relationships at issue here, and that Allstate is entitled to summary judgment dismissing the claims of the plaintiffs.

I. PROCEDURAL HISTORY

Mario DeLuca ("DeLuca" or "Plaintiff") is an Allstate insurance agent with an office at 77 Jefferson Avenue, Westwood, Bergen County, New Jersey. He has been an Allstate agent since 1969. Until 2000, DeLuca was a W-2 employee agent of Allstate Insurance Company ("AIC"). Starting in 2000, and pursuant to an Exclusive Agency ("EA") Agreement with Allstate New Jersey ("ANJ"), DeLuca became an independent contractor, exclusive to ANJ. DeLuca commenced this action by way of Order to Show Cause on July 5, 2011, to enjoin Allstate New Jersey's ("ANJ" or "Defendant") proposed termination of his EA Agreement, to be effective September 30, 2011. On July 6, 2011, the court entered an Order to Show Cause, without temporary restraints, directing that the Defendant show cause on August 5, 2011, why an order should not be issued preliminarily enjoining and restraining Allstate from, among other things, "taking any action to terminate, cancel, refuse to renew or otherwise interfere with the Plaintiff's EA Agreement and operation of his Allstate agency;…" On July 19, 2011, Defendant removed this action to federal court on the grounds that ANJ had its principal place of business in Illinois, and therefore, there was complete diversity between the parties. DeLuca moved to remand the case to the Superior Court of New Jersey and on August 26, 2011, the District Court remanded the matter to the Superior Court of New Jersey.

The matter then came before the undersigned again on September 26, 2011, by way of DeLuca's application for the entry of a preliminary injunction pursuant to an Order to Show Cause entered by the court on August 31, 2011. Following colloquy with the court, DeLuca and ANJ agreed that the effective date of termination of DeLuca's EA Agreement with ANJ would be extended to December 31, 2011, so that the factual record could be more fully developed and a determination on the merits could be reached on an expedited basis via a motion for full or partial summary judgment.[1] Pursuant to the parties' agreement, the court made no decision as to the preliminary injunction.

Nearly concomitantly, applications for orders to show cause against ANJ were filed on behalf of Plaintiffs, Richard Sorge ("Sorge") and Douglas Young ("Young") of the Plaintiff Auburn Insurance Agency, LLC ("Auburn"). Each was made returnable on October 3, 2011, before Hon. Harry G. Carroll, J.S.C. Sorge is an Allstate insurance agent with an office at 498 Inman Avenue, Colonia, New Jersey. Auburn is an Allstate insurance agency owned by Douglas Young, with offices at 494 Route 17 North, Paramus, New Jersey. As the facts and legal issues in the three matters are substantially similar, the parties agreed that all three cases would be heard together before the undersigned.[2] Additionally, on that day, plaintiffs in the two subsequent lawsuits agreed to the same arrangement made between DeLuca and ANJ: the court would make no decision at that time as to the preliminary injunction, and the effective date of the termination of plaintiffs' EA Agreements with ANJ would be extended to December 31, 2011, so that the factual record could be more fully developed and a determination on the merits could be reached on an expedited basis by motion for full or partial summary judgment.

It was later agreed that the motions for summary judgment would all be returnable December 21, 2011. Expedited discovery was engaged in by the parties. All parties thereafter filed for summary judgment. Oral argument was had on December 21, 2011. The court reserved decision.

II. FACTUAL HISTORY

Allstate New Jersey is a wholly owned subsidiary of Allstate Insurance Company, although they are separate companies doing business in separate markets. (Schueller Cert. ¶107).

Deluca had been an employee agent of Allstate Insurance Company since 1969, Auburn

[1] At oral argument on December 21, 2011, the effective date of termination was extended by consent to January 6, 2012.
[2] In fact, in the papers filed on behalf of Sorge and Auburn, counsel for those plaintiffs adopted the arguments advanced

(Young) since 1972, and Sorge since 1990. All changed to independent contractor status in 2000, having entered into Exclusive Agency Agreements with ANJ.

The EA Agreements gave plaintiffs an economic interest in the EA Agreement, which they can sell or transfer to another qualified buyer or, alternatively, the right to a termination payment from ANJ when the EA Agreement terminates. The plaintiffs did not pay any initial capital investment to ANJ to become EAs. Nor did they pay any franchise fees or fees of any nature to ANJ. Instead, ANJ pays them commissions on new business as well as on renewal business they have placed as agents of the Company.

At oral argument, the parties clarified for the court that as employee agents, the plaintiffs had no equity or ownership interest in the business they did for the insurer. Upon converting to independent contractors/exclusive agents in 2000, the plaintiffs acquired both the right to transfer their contract in their respective agencies to third parties acceptable to ANJ, for consideration, or receive a termination fee. At the present time, the termination fees payable to each of the plaintiffs, if enforceably implemented, would be as follows:

Mario Deluca:	$1,100,000
Auburn Insurance Agency:	$ 290,000
Richard Sorge:	$ 483,000

a. Exclusive Agency Agreements

The express terms of the EA Agreements provide that all business produced by plaintiffs under the EA Agreement belongs to ANJ (Schueller Cert., Exh. C, EA Agreements, Section I.A), and that all customers are ANJ's customers, not the agents' customers. (D'Aloia Cert., Exh. B).

Section XVII of the EA Agreement provides that an Exclusive Agent can be terminated with cause or without cause (Schueller Cert., Exh. C, EA Agreements, Section XVII.B.2 and 3). Specifically, it provides that it can be terminated by either party upon 90 days notice without cause

by DeLuca and requested that the court consider DeLuca's submission as if it were more fully set forth in their papers.

as follows:

> By either party, upon providing ninety (90) days prior written notice to the other, or such greater number of days as in required by law. Once written notice of termination has been given by either party, you will, immediately upon request of the Company, cease to act or to represent yourself in any way as an agent or representative of the Company, but you will receive compensation pursuant to Section XV from the Company for the period up to and including the special termination date…"

(Schueller Cert., Exh. C, EA Agreements, Section XVII.B.2).

Section XVII.B.3 of the EA Agreement provides that the Agreement can be terminated "by the Company, for cause, immediately upon providing written notice to you. Cause may include, but is not limited to, breach of this Agreement…" (Schueller Cert., Exh. C, EA Agreements, Section XVII.B.3).

If the contract is terminated either with or without cause, the agent has 90 days to either sell his economic interest in the EA Agreement to an ANJ approved qualified buyer, or receive the termination payment from ANJ. (Schueller Cert., Exh. C, EA Agreements, Section XVI.D).

The EA Agreement requires agents to "meet certain business objectives established by the company in the areas of profitability, growth, retention, customer satisfaction and customer service," referred to as Expected Results. (Schueller Cert., Exh. C, EA Agreements, Section II.B).

Plaintiffs' Agency Status Review for the year 2007 (administered in 2008) informed them in writing that failure to meet Expected Results may put their relationships with ANJ in "jeopardy". (D'Aloia Cert., Exh. B, DeLuca Tr. at 53:6-24; 236:15-239:14; D'Aloia Cert., Exh. E, Young Tr. at 162:12-163:1; 165:15-166:1; D'Aloia Cert., Exh. F, Sorge Tr. at 175:17-176:17).

Expected Results goals are established for Property & Casualty ("P&C") growth[3] and Allstate Financial ("AF")[4] production credit, as well as other goals. (Schueller Cert., ¶28; D'Aloia Cer., Exh H, Ballinger Tr. at 20:23-21:4) Each year, ANJ's exclusive agents are informed of their Expected Results requirements for that year and an agent or agency's results are measured against

[3] Property and Casualty ("P&C") Growth. This measure primarily concerns automobile insurance whereby ANJ establishes goals for an agent's sale of new automobile policies and the retention of existing policies. (Wernick Brief, p5)

[4] Allstate Financial ("AF") Production. "Allstate Financial Production" primarily concerns the goals established by ANJ for the premium volume to be generated by an agent's sales of products such as annuities and life insurance. (Wernick Brief, p5)

the established goals. (Schueller Cert., ¶¶8 and 32). Expected Results are also discussed and reviewed with the agent during business meetings with ANJ Field Sales Leaders (“FSLs”). (Scheuller Cet., ¶¶29, 31).

ANJ claims that plaintiffs consistently failed to meet the P&C and AF production credit goals over multiple years, and the plaintiffs were therefore placed in the Expected Results process by which the agent must improve performance or be considered for termination. (Schueller Cert., ¶31) Plaintiffs dispute that they were ever informed that they would be placed in the Expected Results process (DeLuca Cert. ¶¶14-15). DeLuca states that he was never told until July of 2010 that he was in the Expected Results process and subject to “termination”. (DeLuca Cert. ¶¶14-16).

Plaintiffs’ 2007 Agency Status Review informed them in writing that failure to meet those goals could jeopardize their relationship with the Company. (Schueller Cert., ¶29) However, Plaintiffs state that “jeopardize” was never defined as termination (DeLuca Cert. ¶¶14-15) and point out that in 2008, 2009, the Agency Status Review did not say anything about jeopardizing the relationship (Schueller Tr. at 65:8-25, 69:25, 70:3-4, 70:9-71:1)

ANJ states that in order to be placed in the Expected Results process in 2010, an EA had to have a P&C growth score of -3.0 points or lower (with the lowest score being capped at -3.6 points) and -60% score in AF production credit for the years 2008 and 2009 (Schueller Cert. ¶¶33-34).

b. Expected Results

There is a dispute between the parties as to the factors that ANJ takes into consideration in determining the Expected Results. Plaintiffs argue that the Expected Results Goals do not take into account local demographics, economic or socioeconomic factors; they do not take into account ANJ’s market share or market share of the agents; they do not reflect the competitiveness of ANJ’s rates in the local territory. (Schueller Tr. at. 76:17-77:19, 78:3-25, 79:1-16). ANJ states that Expected Results Goals take into account local market conditions, rates, underwriting, historical performance and corporate plans. (D’Aloia Cert, Exh. G, Schueller Tr. 77:20-78:2) ANJ further states that while Expected Results goals do not directly take into account how competitive rates are, ANJ's rates are competitive and ANJ provides an array of discounts and lower cost options for agents to use and to assist them in writing and retaining business to achieve Expected Results goals. (Supplemental Schueller Cert. ¶7). ANJ also adds that other agents in the same geographic areas have achieved Expected Results with the same rates. (Schueller Cert. ¶88).

i. Mario DeLuca

DeLuca's P&C growth score was -3.5 points in 2008, and in 2009 and 2010, DeLuca's P&C score was capped at the bottom of the scale at -3.6 points though it was actually much lower (Schueller Cert. ¶¶37-38). In 2008, 2009, and 2010, DeLuca missed the minimum Expected Results by over 450% based on his scores. (Schueller Cert. ¶¶37-38).

In 2011, agents servicing similar sized standard auto books of business were permitted to lose a certain number of standard auto items in force ("IIF") in order to account for market conditions but DeLuca lost 117 IIF, more than twice the IIF he was permitted to lose. This resulted in a score that was 90% below the minimum Expected Results goal. (Schueller Cert. ¶¶37-38).

DeLuca failed to meet the AF production credit goal by 31% in 2008, 98% in 2009, 43% in 2010 and 44% as of May 2011. (Schueller Cert. ¶¶37-39).

However, DeLuca points out that he has consistently exceeded ANJ's Expected Results in the areas of profitability and retention and has never missed them (DeLuca's Response to Undisputed Statement of Material Facts, p 28).

DeLuca's assigned FSL, Karen Mitchell ("Mitchell") met with DeLuca on a monthly basis to discuss goals, remind him of the Expected Results requirements and to suggest ways to improve. (Schueller Cert. ¶88). DeLuca disputes this statement in so far as he contends that Mitchell never told him he was subject to termination (DeLuca Cert. ¶15).

DeLuca agrees that on or about July 14, 2010, he was notified by Territorial Sales Leader Chris Frusco ("Frusco") that he was not on pace to achieve minimum Expected Results in P&C growth and AF production and that he needed to do so to avoid jeopardizing his relationship with ANJ. (Schueller Cert. ¶31). However, he disputes that he received an early March 18, 2010 letter from Fusco advising him that he would be terminated if he did not reach Expected Results.

On February 15, 2011, DeLuca received a letter from Dale Schueller ("Schueller"), ANJ's Regional Sales Leader, which advised that DeLuca's agency had not met the business objectives in P&C growth and AF production credit for 2008, 2009, and 2010 and that he was being provided with 90 days until May 31, 2011, to meet and be on pace for these Expected Results goals for 2011 and that failure to meet those objectives by May 31, 2011 could "jeopardize [the] agency's continued relationship with Allstate." (Schueller Cert. ¶¶31, 100, 101 and Exh. F).

After DeLuca filed this lawsuit claiming he is a franchise and can only be terminated for cause, ANJ provided him with a supplemental letter dated July 25, 2011, setting forth that the termination was also for cause under Section XVII B.3 of the EA Agreement and set forth the Expected Results that DeLuca's agency had failed to meet on a yearly basis from 2008 through May 2011. (Schueller Cert. ¶¶13, 103). Based on the size of the ANJ book of business DeLuca services and other factors, he would be entitled to receive a termination payment of roughly $1.1 million under the EA Agreement.

Although, Schueller suggested that DeLuca hire more staff, he did not do so. DeLuca's agency had on average on 1 LSP for every 1,340 households in the book of business as of May 2011. Statewide, as of May 2011, the ratio was 1 LSP for every 805 households. (Schueller Cert., ¶48, D'Aloia Cert., Exh. B, DeLuca Tr. at 117:2-18, 280:4-12; 177:16-22).

DeLuca agrees that he did not utilize any of the resources offered by ANJ to assist agents in meeting business goals and increasing sales, but he also notes that all of the ANJ witnesses have testified that there was no statistical evidence to support the proposition that the resources were at all effective. (D'Aloia Cert., Exh. B, DeLuca Tr. at 309:1-310:12, 310:13-311:23, 313:14-314:1, 315:18-316:1, 316:16-317:8, 319:11-323:13, Schueller Cert. ¶¶49, 83 and Exh. N; Ballinger Tr. at 26:8-18, Mitchell Tr. at 34:8-19; Schueller Tr. at 84:24-25, 851-86:22). DeLuca agrees that EAs can also work with a Series 6-licensed Exclusive Financial Specialist and that he worked with one. DeLuca acknowledges that he only found four leads per month for the specialist to pursue. (D'Aloia

Cert., Exh. B. DeLuca Tr. at 195:18-23)

DeLuca spends at least five months out of the year in Florida where he maintains a second home, when he is in New Jersey he spends about six hours a day at the agency, though sometimes only two hours if everything is running smoothly. (D'Aloia Cert., Exh. B. DeLuca Tr. at 30:16-23, 198:24-199:10, 341:23-342:5, 34:12-11, 36:14-24).

ii. Richard Sorge

Sorge failed to meet the P&C growth or AF production credit Expected Results in 2008, 2009, and 2010 through April 2011. ANJ states that Sorge's P&C growth score in 2008, 2009, and 2010 was capped at the bottom of the scale at -3.6 points, but was actually much lower (Schueller Cert., ¶¶69-70), and that in those years, he missed the P&C Expected Results goal by over 450% based on his score, but Sorge does not concede the specifics. Additionally, ANJ states that to be on pace to meet P&C goals as of April 2011, Sorge could have lost up to 16 auto IIF, but he lost 58 IIF and therefore is not on pace. (Schueller Cert. ¶70). Sorge disputes this statement, alleging that he was on pace to meet his goals but ANJ changed the calculation previously used to incorporate policies that were in cancellation status (e.g. a late payment) but not terminated. (D'Aloia Cert. Exh F. Sorge Tr. at 94:4-95:17). All parties also agree that Sorge failed to meet the AF Expected Results goal by 58% in 2008, 92% in 2009, 94% in 2010 and 79% as of April 2011. (Schueller Cert., ¶71).

On April 15, 2009, Sorge received a letter advising that he needed to achieve business objectives in the areas of P&C growth and AF production credit. (Schueller Cert., ¶31). On October 28, 2009, because Sorge was not on pace to meet minimum Expected Results for either the P&C growth or AF production credit goals for the third consecutive year, he was notified in writing that his failure to achieve these Expected Results could jeopardize his relationship with ANJ. (Schueller Cert., Exh. E) Sorge agrees that thereafter he had multiple meetings with his FSL, Mitchell, but disputes that she ever provided him with specific suggestions on how to improve or that he was told he could be subject to termination. (D'Aloia Cert. Exh I. Mitchell Tr. at 78:8-22).

On April 9, 2010, and July 15, 2020, Sorge was again informed of his failure to meet

Expected Results and that his relationship with ANJ was in jeopardy. (Schueller Cert., ¶¶31, 101, Exh. F). On April 30, 2011, ANJ notified Sorge that his EA Agreement was being terminated on 90 days notice under Section XVII.B.2 of the EA Agreement effective September 30, 2011.(Schueller Cert., ¶¶13, 31, 102).

On July 25, 2011, Sorge received a letter from ANJ setting forth that the termination was also for cause under Section XVII B.3 of the EA Agreement and setting forth the Expected Results that Sorge failed to meet on a yearly basis from 2008 through April 2011. (Schueller Cert. ¶¶13, 103, Exh. B). Based on the current size of the ANJ book of business Sorge services and other facts, Sorge would be entitled to receive a termination payment of roughly $483,000. (Schueller Cert. ¶105).

ANJ states that according to their records, between April and September 2009, Sorge either opened his agency late or closed early 244 times (out of a total of 260 times), which is a violation of agency standards. (Schueller Cert., ¶77, Exh Z). Sorge disputes that statement citing that the phone system was not working properly and either Sorge or one of his staff was present during normal working hours. (D'Aloia Cert., Exh. F, Sorge Tr. at 202:22-204:16). Sorge also disputes that he failed to use the call forwarding system as ANJ states. (D'Aloia Cert., Exh. F, Sorge Tr. at 215:16-216:13, 218:24-221:20).

Sorge did not utilize all of ANJ's suggested programs to meet business goals and increase sales. (D'Aloia Cert., Exh. F, Sorge Tr. at 259:2-18; 252:4-253:18). He has not done any outside advertising since prior to 2008, and he did not participate in Allstate's weekly conference calls, which include discussions of sales strategies, marketing initiatives and promotions. (D'Aloia Cert., Exh. F, Sorge Tr. at 252:4-253:18).

ANJ has alleged that Sorge improperly used the email system to send pornographic photos and sexually explicit emails to other ANJ agents and to conduct an internet liaison of a sexual nature with a woman in Germany during his business hours. (D'Aloia Cert., Exh. F, Sorge Tr. at 261:9-271:25). Sorge disputes the mischaracterization of "pornographic" and "liaison of a sexual nature", and denies that he was using the email system improperly. (D'Aloia Cert., Exh. F, Sorge Tr. 261:16-17, 263:11-15, 264:17-21, 268:19-269:4). Sorge concedes that he used the ANJ email system in regards to a horse racing venture in which he is involved that led him to file for Chapter 11 bankruptcy in 2010, which is still pending. (D'Aloia Cert., Exh. F, Sorge Tr. at 277:23-279:3, 280:20-281:1).

iii. Auburn Insurance Agency, LLC (Douglas Young)

Auburn failed to meet the P&C growth and AF production credit Expected Results for the six years prior to 2008. (D'Aloia Cert., Exh. F, Young Tr. at 162:12-22, 170:18-25). ANJ states that Auburn's P&C growth score was -3.5 points in 2008, and in 2009 and 2010, Auburn's score was capped at the bottom of the scale at -3.6, but was actually much lower. (D'Aloia Cert., Exh. F, Young Tr. at 162:4-163:5). Additionally, from 2008-2010, Auburn missed the P&C growth Expected Results goal by over 450% based on his scores (Schueller Cert., ¶¶56-57) Auburn, however, disputes the specifics of these allegations.

Additionally, ANJ states that in 2011, agents servicing similarly-sized standard auto books of business were allowed to lose a certain number of IIFs; however, Auburn's score as of May 2011 was still 30% below the P&C Expected Results goal. (Schueller Cert. ¶57). Auburn disputes this statement, agreeing that he failed to meet the goal, but stating that ANJ changed the calculation previously used to incorporate policies that were in cancellation status (e.g. a late payment) but not terminated. (D'Aloia Cert. Exh F. Sorge Tr. at 94:4-95:17). All parties also agree that Auburn failed to meet the AF Expected Results goal from 2008 – May 2011. (Schueller Cert., ¶58).

In March of 2009, Young met with Schueller and Frusco and was told he had not met Expected Results. (D'Aloia Cert., Exh. E, Young Tr. at 121:4-16). Young states that at that time, he was only told that his relationship with ANJ could be "jeopardized" not that he was in danger of termination. (D'Aloia Cert., Exh. E, Young Tr. at 121:11-16). He also acknowledges that he received a March 25, 2010 letter from Frusco which discussed that Auburn did not meet 2009 goals.

Thereafter, Auburn had multiple meetings with the agency's FSL, Mitchell, but Young disputes that Mitchell ever provided the agency with specific suggestions on how to improve or stated that it could be subject to termination. (D'Aloia Cert. Exh I. Mitchell Tr. at 79:12-82:13). Auburn's failure to achieve Expected Results in 2010, Young was notified in writing in February 2011 that his agency had failed to meet minimum goals in P&C growth and AF production credit for 2008, 2009, and 2010 and was given another 90 days until May 31, 2011 to be on pace for those goals for 2011. (Schueller Cert. ¶¶31. 100, 101, Exh. F).

On May 31, 2011, ANJ notified Auburn that its EA Agreement was being terminated on 90 days notice under Section XVII.B.2 of the EA Agreement effective September 30, 2011. (Schueller Cert. ¶¶13. 102, Exh. A). ANJ Also provided Auburn with a supplemental letter dated July 25, 2011, setting forth that the termination was also for cause pursuant to Section XVII.B.3 of the EA Agreement and set forth the Expected Results that Auburn had failed to meet from 2008 through May 2011. (Schueller Cert. ¶¶13. 103, Exh. B).

Based on the current size of the ANJ book of business that Auburn services and other factors, Auburn would be entitled to receive a termination payment of roughly $290,000. (Schueller Cert. ¶105). Young did receive an offer of $200,000 in cash with a note for the balance of the asking price when he put up the business for sale, but he rejected the offer. (D'Aloia Cert., Exh. E, Young Tr. at 153:23-154:1).

Young states that he has taken steps to improve his business such as following ANJ's program, which was to engage telemarketers and reach out to quote other lines to existing customers. (D'Aloia Cert., Exh. E, Young Tr. at 203:10-16, 188:20-190:16). He also states that he did participate in a webinar and played CDs of presentations, and though he did not personally participate in each program offered by ANJ, a licensed producer in his office did participate in some of those programs at his instruction. (D'Aloia Cert., Exh. E, Young Tr. at 225:12-23, 226:7-15, 271:12-23, 199:8-20).

Young spends about 50% of his time in the office and that the other half of his time is spent on personal pursuits, though he states that for the past four years, Auburn has employed three licensed producers. (D'Aloia Cert., Exh. E, Young Tr. at 151:25-152:4; 150:12-23).

c. Plaintiffs' Commission Rates

While commissions for AIC agents nationwide are 10% across the board for new and renewal business, that 10% is capped. (Schueller Cert. ¶105). In New Jersey, agents are paid a base commission of 6.5% on new and renewal business and can increase this percentage if they reach certain performance goals. They can raise their compensation up to 13.2% (Schueller Cert. ¶108). DeLuca's commission and bonus compensation is 10%; Young's is 9.8%; and Sorge's is 8.2%. All are below the average 10.65%. (Schueller Cert. ¶90).

In summary, then, the plaintiffs contend that they are franchisees entitled to the protections of the New Jersey Franchise Practices Act; that they accordingly cannot be terminated without "good cause"; that no good cause for termination has been demonstrated; and that, accordingly, the court should enjoin termination and award them statutory attorneys' fees and costs. In addition, plaintiffs assert common law claims of breach of contract and breach of the fiduciary duty of good faith and fair dealing.

ANJ contends that the parties are not in a franchise relationship and never have been, that per the EA Agreements, the plaintiffs were subject to both "no cause" and "for cause" termination, that the terminations were implemented under either or both standards, and were fully enforceable, entitling ANJ to summary judgment on all plaintiffs' claims, statutory and common law.

Argument

I. EA Agreement

a. Alleged Breach

Section II.B of the Agency Agreements provides that each agent will "meet certain business objectives established by [ANJ] in the areas of profitability, growth, retention, customer satisfaction and customer service…" ANJ states that it was entitled to terminate plaintiffs under the express language of the EA Agreement because they failed to meet the business objectives of the Company.

ANJ has stated that it primarily focused on two goals: P&C Growth and AF Production.

Plaintiffs argue that they did not breach their EA Agreements with ANJ. To support this claim, DeLuca begins by citing 23 Williston on Contracts 63.1 (4th ed.) for the proposition that in order for a party to breach an agreement it must fail to discharge a duty. Plaintiffs argue that they did not breach the EA Agreements, because the terms of the Agreement, and therefore the duty to which they were to be held, were never articulated by ANJ. It is argued that this is demonstrated by the following facts:

- ANJ had "Expected Results" since at least 2002; they were presented as part of ANJ's "Resources for Growth", a program that emphasized how agents could increase their commissions, obtain bonuses and win awards (PSUMF 11, 12, 13, 14).
- No agent in NJ was terminated for failure to reach Expected Results until 2011 even though over a fifth of ANJ's agents missed the results year after year.
- ANJ never articulated in the "supplement" or "manuals" in 2008, 2009, or 2010 the actual standards for termination for failure to achieve Expected Results.
- DeLuca was never told that if he met one of two results in one of three years that he would not be subject to termination.

Plaintiffs argue that ANJ's failure to articulate the "business objectives" means there was no meeting of the minds on what "business objectives" had to be met in order to avoid termination. See, e.g. Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J.Super. 596, 606 (N.J. Super. Ct. App. Div. 2011) Therefore, they contend, there can be no breach of contract. Furthermore, they argue, they were only told that failure to meet Expected Results might "jeopardize" their agency relationship with ANJ, but they were never told what precisely that meant.

DeLuca also points out that where a party contends that a contract is ambiguous, the party is bound by the apparent intention that was outwardly manifested. Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (N.J. Super. Ct. App. Div. 2002) DeLuca emphasizes that although ANJ contends that the contract states that an agent may be terminated for failing to reach Expected Results, only 11 of 39 agents who have failed to meet Expected Results were treated as having breached the Agreement; therefore, plaintiffs contend that there is obviously a secret definition of "Expected Results", upon which ANJ should not be permitted to rely.

In addition, DeLuca finds that ANJ's failure to enforce "Expected Results' repeatedly for years, coupled with its failure to explain that termination could ensue, shows that it did not consider Expected Results to be grounds for termination until 2011. He cites the proposition that where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of agreement. Quick v. National Labor Relations Board, 245 F.3d 231, 247 (3d. Cir. 2001)(quoting Restatement (Second) of Contracts §202(4)).

Sorge and Auburn add to DeLuca's argument that a large part of all plaintiffs' inability to grow as requested by ANJ results from the fact that the market sought to be penetrated by ANJ was already oversaturated with ANJ and non-ANJ agents. Said differently, for Auburn and Sorge to grow, they would have to take business away from each other. ANJ could benefit if they were to take business away from non-ANJ agents, but plaintiffs fail to see how ANJ benefits from them taking each other's business.

In response, ANJ argues that it had no obligation to inform plaintiffs that the level for actual termination was set lower. ANJ's goal is to have all agents meet minimum Expected Results so that it can meet its own corporate goals, but it certainly cannot be faulted for terminating only the very worst performing agents. ANJ also finds it incomprehensible that Plaintiffs argue that the fact that ANJ gave them several years to meet the minimum goals and only chose to terminate them in 2011shows that they acted unreasonably. In fact, ANJ argues, it shows the exact opposite.

b. Materiality of Breach

DeLuca argues that even if it were to be found that plaintiffs breached the EA Agreement, the breach was not material. A "material" breach is a breach that goes to the "heart of the contract" and that deprives the non-breaching party of the benefit of its bargain. See, e.g. Saltz v. Mark-O-Lite Sign Contractors, Inc. 210 N.J.Super. 646, 654 (1986). For this argument, DeLuca relies on its previously articulated claim that where a party acquiesces in a breach over a repeated period of time, its acquiescence is given great weigh in construing the agreement. The repeated acceptance by ANJ of failure by its agents shows that not reaching the Expected Results was not a material breach,

DeLuca also claims the lack of materiality is evidenced by the fact that there is no material adverse consequence to ANJ. ANJ has admitted that it can achieve P&C and AF growth by hiring new agents (PSUMF 46) and that if DeLuca is terminated, it will serve no purpose in advancing ANJ's interests (PSUMF 45). Accordingly, DeLuca argues, the breach is immaterial.

ANJ counters that the decision to terminate the three plaintiffs is a proper exercise of ANJ's business judgment. Though ANJ acknowledges that it may lose customers in the short term, (D'Aloia Cert., Exh. G, Schueller Tr. 54:17-55:17), eventually it will be able to replace underperforming agents with potentially higher performing ones, ultimately advancing ANJ's business interests.

II. Applicability of the New Jersey Franchise Practices Act, NJSA 56:10-1, et seq.

DeLuca argues that ANJ's termination of plaintiffs violates the New Jersey Franchise Practices Act ("NJFPA"), because failure to achieve Expected Results is not, in the terms of the NJFPA, a failure to "substantially comply" with the franchise requirements. As an introduction to this argument, DeLuca notes that in enacting the NJFPA, the legislature sought "to protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power between national and regional franchisors and small franchisees." N.J.S.A. 56:10-2.

Defendant ANJ argues that Plaintiffs are not "franchises" subject to protections of the New Jersey Franchise Practices Act and therefore only the EA Agreement governs their relationship.

The NJFPA applies

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

N.J.S.A. 56:10-4(a).

Under the NJFPA, a "franchise" is defined as:

> A written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement or otherwise.

N.J.S.A. 56:10-3(a).

a. Place of Business

The NJFPA defines "place of business" as "a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services." N.J.S.A. 56:10-3(f). The statute also provides that a "place of business shall not mean an office, a warehouse, a place of storage, a residence or a vehicle…" Id.[5]

ANJ argues that an insurance agent does not satisfy the NJFPA's "place of business" requirement as courts interpreting the definition of "place of business" have held that it "excludes geographic locations utilized for solicitation only." Greco Steam Cleaning Inc. v. Associated Dry Goods Corp., 257 N.J. Super. 594, 598 (Law Div. 1992). The Greco court found that a franchisee's "place of business" must offer for sale "and sell the franchisor's services" to satisfy the place of business requirement of the FPA. Id. Therefore, according to ANJ, as an insurance agency does not "sell" the insurer's goods or services, it does not satisfy this test.

Plaintiffs agree that they need to meet the "place of business" requirement, but argue that they did, in fact, maintain a "sales location" in New Jersey under the agreement with ANJ. They contend that this argument is easily resolved by the fact that the EA Agreement provides that they will act as an agent "for the purpose of soliciting, selling and servicing insurance", (Ex. 3 II.A) and that they may select its *sales* location. (Ex. 3 to V.C.)(Emphasis added). ANJ should be estopped from arguing otherwise, in plaintiffs' view.

ANJ replies that that language of the EA Agreement can not be interpreted as an admission

[5] In January 2010, the statute was amended to provide that where "the majority of sales are not made directly to consumers," the term "place of business" shall include a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services or an office or a warehouse from which franchisee personnel visit or call upon customers or from which the franchisor's goods are delivered to customers." N.J.S.A. 56:10-3(f). ANJ emphasizes that the legislative history shows that the 2010 amendments were intended to address a wholesale distributor of a franchised product where the distributor makes off-site sales calls: "these Assembly amendments further clarify the definition of 'place of business' to specify that the current definition of 'place

by ANJ that plaintiffs "sell" insurance, as the Agreement clearly limits their authority to only accept applications for insurance on behalf of ANJ. Therefore any argument by plaintiffs that the EA Agreement refers to a "sales location" is purely semantic.

b. Sales Requirement

ANJ next argues plaintiffs fail to meet the sales requirement of the NJFPA and therefore they are not franchises. In support of this argument, ANJ relies on a case with what it describes as an identical insurer/agent relationship as here, Mazziotti Ins. Agency v. State Farm Indem., et. al., Dkt No. C-338-98 (N.J. Super. 2001) (Cohen, J). There, the Court held that an insurance agent was not a franchise under the FPA because the FPA "only applies to relationships involving 'sales' between the alleged franchisor and franchisee." See D'Aloia Cert., Exh. K, p.24. In that case, Mazziotti, a State Farm agent, brought an action seeking to preclude the enforcement of new sales requirements. Plaintiff later moved to amend his complaint to add claims for an alleged violation of the FPA. In denying the motion to amend the complaint, the court stated that it had "not found a single case, state or federal, where a statute similar to the New Jersey Franchise Practices Act has been applied in the context of the relationship between an insurance company and an insurance agency." Id. at 22. The court continued, "in fact, the only reported case [in New Jersey] addressing the issue of whether the New Jersey Practices Act applies to the insurer-agent relationship concludes that the Act does not apply." Id. at 22-23 (citing Borbely v. Nationwide Mut. Ins. Co., 547 F.Supp. 959 (D.N.J. 1981)).

ANJ also emphasizes that the Mazziotti court found that as a "matter of law the Mazziotti Agency does not sell insurance," because it cannot do so under New Jersey law. Instead, the Agency could only earn a commission for each policy written by State Farm. The court further held that due to the "express requirement in the Act that it only applies to relationships involving 'sales' between the alleged franchisor and franchisee" and that "as a matter of law there are no 'sales' of insurance by the Mazziotti Agency at all", the "relationship between State Farm and the Mazziotti

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of business' continues to apply to persons who sell directly to consumers, including most 'business format' franchises

Agency fails to quality for franchise protection under the Act." Id. at 24-26.

Likewise, in the instant matter, ANJ argues, the EAs do not and cannot sell insurance polices to third parties. Rather, the EA Agreement limits plaintiffs' authority to acting as ANJ's "agents" to "receive and accept" insurance applications, "subject to such restrictions on binding authority as may be established by the Company" whereby they submit applications to ANJ for approval and earn a commission for each policy written by ANJ. (Schueller Cert. Exh. C, Section I.A). Furthermore, ANJ argues, ANJ, not plaintiffs, owns all of the business generated under the EA Agreement and the EAs are not subject to any of the risk associated with the policies. The EA Agreement further provides that ANJ "will determine in its sole discretion all matters relating to its business and the operation of the Company". (Schueller Cert., Exh. C, Section I.F.2).

ANJ also points out that other jurisdictions have likewise found that the insurer-agent relationship does not constitute a franchise under state franchise statutes like New Jersey's Franchise Practices Act. In what ANJ holds out as a leading case on franchise law, the Eastern District of Wisconsin explained the distinction between a sales agent and a franchisee:

> The [Wisconsin Franchise Dealership Law]…was not designed to protect every business relationship essential to the financial survival of one or more of the parties involved" and that the "statute's protection is restricted to those businesses which have made a substantial capital investment in selling or offering for sale the products of the dealership grantor.

Aida Engineering, Inc. v. Red Stag Inc., 629 F. Supp. 1121, 1126 (E.D.Wis.1986). Likewise, ANJ argues, plaintiffs only act as sales representatives and have never purchased ANJ products for resale, nor have they assumed any of the risk of nonpayment beyond loss of commission.

According to DeLuca, there can then be no dispute that he does sell insurance and that his sales exceeded $35,000 for the 12 months preceding the filing of this lawsuit, thus satisfying the revenue threshold. DeLuca argues that ANJ's reliance on Mazziotti for the proposition that an agency does not "sell" is misguided as that decision did not consider the agreement between the agent and insurance company. DeLuca further supports his argument by relying on Garbinski v. Nationwide Mut. Ins. Co., 2011 WL 3164057 (D. Conn. 2011), which holds that an insurance agent

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regulated under federal law." Sponsor's Statements to Assembly No. 2491 (January 7, 2010).

can be a franchisee under the Connecticut Franchise Act, which is similar to the NJFPA, and in which the court rejected the same argument ANJ makes here:

> The terms of Paragraph 4, of the Agent Agreement suggest that plaintiff did have the right to offer, sell or distribute Defendants' goods and services. Paragraph 4 provides in relevant part: "[i]t is agreed and understood that you will represent us exclusively in the sale and service of insurance.

Id. at *11.

Furthermore, DeLuca argues, the Mazziotti court's reasoning was recently rejected by Boyle v. Vanguard Car Rental USA, Inc., 2009 WL 3208310 (D.N.J. 2009). There, the defendant contended that although it paid plaintiff in excess of $35,000 in commissions to operate the rental car facility, those commissions were not "gross sales of products or services between the franchisor and franchisee" because the franchisor sold nothing to the franchisee. The court rejected that position, finding that "the purpose of the $35,000 limit is not to distinguish franchise from non-franchise but instead 'to restrict the application of the Act to franchises that [are] sufficiently consequential to the franchisee to merit protection.'" Id. at 5.

Per DeLuca's analysis, Mazziotti should also be rejected as persuasive authority, because the NJFPA does not restrict the term "sell" to the narrow sense of a transfer of title as Mazziotti assumes. Indeed, many entities widely recognized as franchisees – for example, real estate agents – "sell" a product, without taking title. ANJ replies that it is plaintiffs' reliance on Boyle that is misguided as the Boyle court only considered the statute's revenue threshold, which is not at issue in this case. In Boyle, the court held that a business that *had already met* the statutory requirements to be considered a franchise must also satisfy the threshold requirement.

Finally, DeLuca argues, the NJFPA is a remedial statute that was intended to prevent the seizure of a profitable business by a franchisor for the purpose of taking the profits of that business from the franchisee for itself, Kubis & Perszyk, 146 N.J. at 195-6, and that is what is happening in the instant matter.

c. Trade Mark License

In order for an agreement to constitute a "franchise" for purposes of the FPA, there must be

(1) a grant by the alleged franchisor to the alleged franchisee of a "license" permitting him or her to use the franchisor's trade name; and (2) the sharing by both parties of a "community of interest" in the business activities. Neptune T.V. & Appliance Service, Inc. v. Litton Microwave Cooking Prods. Div., 190 N.J. Super. 153, 158 (App. Div. 1983); N.J.S.A. 56:10-3(a).

DeLuca argues that the Agency Agreement clearly grants him a trade mark license within the meaning of the Act. This proposition is based on the fact that DeLuca (a) operates an exclusive agency doing business solely under the "Allstate" name; (b) displays an approved "Allstate" sign prominently on his building; (c) advertises as an "Allstate" agent in the Yellow Pages, in newspapers and elsewhere; (d) carries and distributes a business card that prominently displays the Allstate name and logo; (e) uses stationery that carries the Allstate name and logo; and (f) answers the telephone with the word "Allstate". (PSUMF 7).

Plaintiffs Sorge and Auburn add that Plaintiffs not only use the "Allstate" logo in their advertisements to prospective customers, but the logo also features prominently in marketing efforts by the "Allstate" companies, suggesting that the relationship between the agent and the Allstate company would be that of a franchise. For example, on the website "FranchiseForSale.com", inducements to prospective agents to "Build your own business, be your own boss…" by becoming an "Allstate Agency Owner", an "Allstate Exclusive Agent" and an "Allstate Agent" are prominently advertised.

d. Community of Interest

To establish a "community of interest", ANJ argues that two factors are necessary: (1) the distributor's investments must have been substantial franchise-specific investments and (2) the distributor must have been required to make these investments by the parties' agreement or the nature of the business. Instructional Systems, Inc. v. Comp. Curriculum Corp., 130 N.J. 324, 359 (1992)(quoting Cassidy Podell Lynch, Inc. v. Snydergeneral Corp. et. al, 944 F.2d. 1131, 1143 (3d Cir. 1991))("community of interest exists when the terms of the agreement between the parties or the nature of the business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skill that will be of minimal utility outside the franchise").

In contrast, DeLuca argues that four factors are used to assess a community of interest[6]: (1) the dependence of the putative franchisee on the putative franchisor; (2) the interdependence, or "symbiotic relationship" of the parties; (3) the putative franchisee's franchise-specific investments; and (4) the degree to which the putative franchisor controls how the putative franchisee may conduct its business. Instructional Systems, 130 N.J. at 361-2. Of those factors, DeLuca contends, the franchisee's economic dependence on the franchisor is "perhaps [the] most important" factor in a community of interest analysis. Cooper Distributing Co. Inc. v. Amanda Refrigeration, Inc., 63 F.3d 262, 272 (3d Cir. 1995).

Plaintiffs contend that they were exclusive agents of Allstate products and were not authorized to solicit, sell, or service insurance or any kind for any other company. One hundred percent of their revenue was derived from his sale of products authorized by ANJ. (PSUMF 12) Plaintiffs further argue that the interdependence between the parties is shown by the fact that the parties work together to promote and market insurance; that ANJ recognizes he has an 'economic interest' in the business, that ANJ maintains a call center to answer plaintiffs' phone when their office is closed; and that all of plaintiffs' sales are derived from ANJ. (PSUMF 15) See Instructional Systems, 130 N.J. at 364-65. (distributor prohibited from selling products of other companies; the parties jointly cooperated in resolving maintenance problems, representing products at conferences, cooperating in sales and marketing efforts, and were viewed as one and the same; and "perhaps most important", 97 percent of the distributor's revenue came from the sale of the producer's products).

Furthermore, argues DeLuca, ANJ's undisputed exercise of control over DeLuca's business supports a finding of a community of interest. DeLuca was required to devote all his efforts to the sales of ANJ's products and prohibited from selling a competitor's products. Control extended to his sales location and hours, and how he processed insurance. ANJ set his business objectives,

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[6] In its brief in Opposition to Plaintiffs' Motions for Summary Judgment, ANJ points out that even DeLuca's own attorney has acknowledged that there are only two requirements to create a community of interest in contrast with the four part test cited by plaintiffs. See, W. Michael Garner, 1 Franch & Dist Law & Prac §5.29 (2010).

supervised him through sales leaders and the use of performance scorecards and grids. (PSUMF 13-14).

Finally, plaintiffs argue, they made substantial franchise specific investments, which cannot be used in another business. Instructional Systems, 130 N.J. at 363-64. Here, DeLuca asserts that he has made investments in office furniture, equipment, computers, leasehold improvements and signs (PSUMF 7), but most importantly he has developed franchise specific goodwill. He has spent his life promoting Allstate as the insurance company of choice. To now promote another company, he alleges, would hurt his credibility. Additionally, if DeLuca were terminated, he states that he would lose his telephone number, and would be bound by a one-year covenant not to compete that would prohibit him from using his current location where his business has existed for nearly 20 years.

According to ANJ, the focus is not on the level of control exercised by the alleged franchisor, but instead on the amount of "franchise specific" investments. Instructional Systems, 130 N.J. at 356-66. In support of this point, ANJ argues that plaintiffs did not make any ANJ-specific investment when they became Exclusive Agents with ANJ. They made no capital investment, and pay no monthly franchise fee or any fees to ANJ. (Schueller Cert. ¶16) ANJ provided the plaintiffs with office furniture, paid for their computers and supplied their phone systems. In its opposition papers, ANJ relies on the depositions of plaintiffs in which they state, among other things, that DeLuca paid "less than a hundred dollars" for all of his office furniture and equipment (DeLuca Tr. at 23:1-17), that all three plaintiffs were reimbursed for their computer systems (DeLuca Tr. at 23:18-24:5, Sorge Tr. at 75:23-76:6, 136:15-21, Young Tr. at 65:21-66:4, 136:9-11), and that the advertising and promotional materials sent to ANJ customers were provided at ANJ's expense. Even the telephone line that DeLuca says he would lose, ANJ claims is ANJ's property, not his.

In New Jersey Am., Inc. v. Allied Corp., 875 F.2d 58 (3d Cir. 1989), the Third Circuit observed that New Jersey state courts have interpreted the "community of interest" factor "narrowly, to ensure that the Act reaches only those licensing relationships which .... are singularly susceptible to the type of abuses intended to be remedied by the Act." Id. at 62. ANJ argues that Plaintiffs have made no franchise-specific investments and therefore cannot demonstrate a "community of interest" with ANJ.

To the extent that Plaintiffs claim that they invested in "franchise-specific goodwill" (Complaint, ¶14), ANJ states that it is well-settled that "[t]o develop goodwill generally for a product cannot be enough to create a community of interest[;] [o]therwise, any licensee distributing a brand-name product could claim it has a community of interest with its supplier." Instructional Systems, N.J. at 358. In its opposition papers, ANJ further argues that plaintiffs cannot claim they are losing goodwill (or customers) because those are not investments that even belonged to plaintiffs in the first instance. ANJ states that plaintiffs' only "factual support" for their purported "investments" is the personal belief that customers recognize their identification with the Allstate name, based on one customer's purported statement ("'I will never leave Allstate since 1967 to this day.'" PSUMF 8, 9 Ex.6).

ANJ also disputes Plaintiffs' argument that there is a "community of interest" because ANJ exercised control over them. In Colt Industries v. Fidelco Pump & Compressor Corp. and Fidelco Equip. Corp. 844 F.2d 117, 118 (3d. Cir. 1988) the court found that monitoring of financial performance does not create a "community of interest". In fact, ANJ points out, the EA Agreement expressly gives plaintiffs "full control over [their] time and the right to exercise independent judgment as to the time, place and manner of performing [their] duties." (Schueller Cert. ¶17, Exh. C).

ANJ's opposition papers also stress that ANJ is not terminating the EA Agreements without compensation to plaintiffs. Plaintiffs can transfer or sell the economic interest in the EA Agreements to an approved buyer or receive a termination payment from ANJ on termination of the EA Agreements, thus receiving full value for that interest. (Schueller Cert. Exh. C, EA Agreements Section XVI.D).

III. Relationship Governed by Principles of Agency Law

ANJ argues that the relationship between plaintiffs and ANJ is that of principal-agent which is materially distinct from that of a franchisor-franchisee. Common law holds that "the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person." Rest. 3d Agen. §1.01 (2006) In addition, an "agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." Rst. 3d Agen. §8.01 (2006).

According to ANJ, New Jersey courts have long considered an insurance company to have an agency relationship with its insurance agents. For example, in Bohlinger v. Ward, 34 N.J. Super. 583, 585 (App. Div. 1955), the court held that at principal-agent relationship existed where an insurance company entered into an "Agency Agreement" with an insurance agent authorizing the agent "to receive and accept proposals for insurance on behalf of the company, to collect and give receipts for the premiums and 'to retain out of premiums collected, as full compensation on business so placed with the company' the therein specified allowances." Id. Likewise, ANJ argues, in the instant matter EAs are granted limited agency authority: they can submit policies to be bound within ANJ's sole discretion based on its underwriting requirements and they receive a commission for those accepted. In contrast, "[a] franchisor-franchisee relationship is not fiduciary; the parties contract at arms' length and there is not duty of disclosure where the parties are negotiating at arm's length for a franchise." Katsiavrias v. Cendant Corp., Civ. Action No. 06-4465 (D.N.J. March 30, 2009).

IV. The Franchise Practices Act

a. Regulatory Schemes: in harmony or conflict?

ANJ argues that it is well-established that a statutory claim does not apply to a heavily regulated industry where its application would create a "real possibility of conflict" with the regulatory schemes of other administrative bodies. Richardson v. Standard Guaranty Ins. Co., 371 N.J. Super. 449, 463 (App. Div. 2004). In this case, ANJ contends that Plaintiffs' purported FPA claims would conflict with the Department of Banking and Insurance Act, (NJSA 17:1-1 et seq.)

("DOBIA") and therefore, it cannot apply. In its submission, the Department of Bonding and Insurance concerns with the conclusions of ANJ.

The New Jersey Legislature passed the DOBIA, which vested the Department of Banking and Insurance ("DOBI") with the authority to "regulate and oversee the operations of the insurance industry" Id. Given that broad statutory mandate, federal and state courts have declined to engraft other statutory causes of action in the context of this heavily regulated and highly specialized area. See, e.g., Yourman v. People's Security Life Ins. Co., 992 F. Supp. 696, 703 (D.N.J. 1998) Furthermore, Chapter 22 of the New Jersey Insurance Code, entitled "Brokers and Agents" extensively governs the relationship between insurers and their agents. See, N.J.S.A. 17:22-6.14a(g). Among other things, the Act regulates the rights and remedies of terminated agents. See, e.g. N.J.S.A. 17:22-6.14a(d)(requiring 90 days written notice for termination of certain agent contracts).

According to ANJ, Plaintiffs' alleged FPA claims overlap with the comprehensive scheme in place that governs the insurer-agent relationship, specifically that ANJ employed "arbitrary and unreasonable" business objectives and that the agents were terminated without "good cause". Furthermore, if a determination as to "good cause" is necessary, ANJ argues that it should be made by the DOBI Commissioner pursuant to NJSA 17:22-6.14a(d). See, Petition of Corsaro v. Allstate New Jersey Ins. Co., State of New Jersey Department of Banking and Insurance, Order No. A03-137, aff'd, Docket No. A-46538-02T2 (N.J. App. Div. April 12, 2005), cert. denied, 186 N.J. 241 (2006) (commissioner determined propriety of agent termination based on finding of good cause).

In response, Plaintiffs characterize ANJ's argument that the laws governing the insurance industry and franchises are in conflict with each other as simply a red herring. Plaintiffs first argue that there is a presumption that one remedial statute is not preempted by another merely because both regulate the same entities. Lemelledo v. Beneficial Mgmt. Corp. of America, 150 N.J. 255, 263 (N.J. 1997). As explained by the Court:

In the modern administrative state, regulation is frequently complementary, overlapping, and

> comprehensive. Absent a nearly irreconcilable conflict, to allow one remedial statue to preempt another or to co-opt a broad field of regulatory concern simply because the two statutes regulate the same activity would defeat the purposes giving rise to the need for regulation. It is not readily to be inferred that the Legislature, by enacting multiple remedial statues designed to augment protection, actually intended that the parties be subject only to one source of regulation.

Id. at 271.

For ANJ's theory on overlapping regulatory schemes to apply, Plaintiffs contend, there must be an actual, direct, and unavoidable conflict with the insurance code. The conflict between regulatory schemes must be "patent and sharp, and must not consist of the mere possibility of incompatibility." Id. The presumption in New Jersey, as elsewhere, is that the legislature acts with knowledge of other legislation and the judicial decisions construing that legislation. See Macedo v. Dello Russo, 178 N.J. 340, 346 (N.J. 2004) According to plaintiffs, courts assume that that the legislature did not intend to repeal or limit another statute unless no way can be found for the two statutes to co-exist.. See Division of Youth and Family Services v. P.M. and G.M., 301 N.J. Super. 80, 90 (N.J. Super. Ct. Ct. 1997).

Furthermore, Plaintiffs contend, there is no overlap with the New Jersey Insurance Code, because it does not purport to dictate the criteria that can be used by franchisors/insurers in evaluating franchisees/agents. Nor does the Insurance Code, on its face, apply to claims of wrongful termination. Section 17:22-6.14a(e)(1) of the Insurance Code states explicitly that the "agency termination provisions of this act shall not apply to those contracts: (1) in which the agent…agrees to represent exclusively one company…" Here, plaintiffs represented only one company, Allstate and thus are not subject to the agency termination provisions of Insurance Law.

b. Application of the NJFPA

ANJ argues that the Court does not even need to make a determination as to whether there is a "franchise" as ANJ has not violated the FPA, having terminated plaintiffs for "good cause" with over sixty days written notice of termination and has not imposed "unreasonable standards of performance". In contrast, plaintiffs oppose that contention, claiming both that they were not terminated for "good cause" and that ANJ imposed "unreasonable standards of performance".

i. Good Cause to Terminate

The FPA provides that a franchisee may be terminated for "good cause," which is defined as the "failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise." N.J.S.A. 56:10-5.

Deluca argues that his failure to reach Expected Results is not a failure to "substantially comply" with the requirements of the franchise. For example, DeLuca's failure only involved two of four Expected Results Criteria; in areas that he makes money, profitability and retention, he is far above ANJ's requirements. Also the amount by which DeLuca missed the goals for P&C Growth and Allstate Financial are minimal - $25,000 on a book of business of nearly $8 million in premiums.

Sorge and Auburn also note that any argument by ANJ that Mitchell, the FSL for DeLuca, Auburn and Sorge and others, offered "successful" strategies in penetrating over-saturated markets is rebutted by the fact that she is incapable of identify in any such specific successful strategies giving to Auburn and Sorge, instead giving general, and to plaintiffs' mind rehearsed, answers at her deposition. (D'Aloia Cert. at Exh. I, Mitchell Tr. 82:13-86:7 and 87:2-11). In fact, plaintiffs observe that Mitchell has scant experience in what it takes to operate an insurance agency, having never owned one and having only worked in an agency for approximately eight months, during which she did not sell insurance or receive a commission. (D'Aloia Cert. at Exh. I, Mitchell Tr. 68:20-69:13. 69:25-70:15, and 72:17-22). Plaintiffs argue that this shows that they did not receive adequate support from ANJ.

In response, ANJ argues, plaintiffs received specific notice that they were failing to meet Expected Results goals and this weighs in favor of a finding of "good cause" for termination under the FPA. See, General Motors Corp. v. New A.C. Chevrolet, 91 F. Supp. 2d 733, 740 (D.N.J.2000)(company's "continual attempts to support and assist [the franchisee] in complying with the Agreement" is evidence that the performance standards were not unreasonable.). Plaintiffs were sent letters advising them that their agencies were not meeting minimum Expected Results, were informed by their FSL that they needed to improve performance to meet Expected Results and they were given until year end 2010 to do so. Then in 2011, when they failed to meet those goals, Plaintiffs were given another 90 days to show that they were on "pace", which they failed to do.

ANJ argues that plaintiffs misguidedly state that they did not meet the Expected Goals because they did not receive adequate support from ANJ and that plaintiffs are essentially arguing that ANJ must be on site and sell new business. However, that purported obligation is no where in the EA agreement, as plaintiffs have acknowledged in their depositions. Furthermore, it is not the responsibility of the EFS to find sales leads; that is the responsibility of the agent.

ii. Unreasonableness of Standards of Performance

The NJFPA prohibits a franchisor from imposing upon a franchise "unreasonable standards of performance." N.J.S.A. 56:10-7(e)

Plaintiffs argue that when a party sets performance standards, it must account for a variety of factors, including past performance of the franchisee, market penetration and socioeconomic level of a given area, local conditions and comparable marketing areas. See, James M. McCunn & Co. v.. Fleming & McCaig, Inc., 84 N.J. Super. 24, 29 (N.J. Super. Ct. App. Div. 1964). Plaintiffs state that there is no dispute that ANJ's Expected Results did not conform to any of these standards as admitted by its witnesses. (PSUMF 23). Plaintiffs also argue that ANJ's standards are "unreasonable" due to differences in ANJ's commission structure from the commission structure for Allstate agents nationwide.

ANJ points out that all ANJ agents are paid the same 6.5% commission on new and renewal P&C business and are eligible for bonus compensation up to 13.2% annually. ANJ argues that courts that have found an unreasonable standard of performance under the FPA have done so when the franchisee provided compelling evidence that the franchisor's requirements have imposed significant and unreasonable financial burdens upon the franchisee, See, e.g., Beilowitz v. General Motors Corp. 233 F.Supp.2d 631 (D.N.J. 2002)(holding that franchisor's standards were unreasonable where they required the franchisee to sacrifice $11 million in sales and incur approximately $1.5 million in operating losses).

ANJ argues that its standards are not "unreasonable" as demonstrated by the fact that aside from plaintiffs only 8 of 216 EAs were given notice of termination for failing to meet the Expected Results for three consecutive years in a row or to be on pace to meet them in 2011. Further, other agencies with books of business of a similar or larger size than plaintiffs' have been able to regularly meet and exceed goals. (Schueller Cert., ¶88). ANJ's agent force on average had a standard auto IIF increase of 0.2% and grew by 6,000 standard auto IF from year end 2005 -2010. By contrast, DeLuca's standard auto IIF declined by an average 4.9% and he lost over 1, 400 standard auto IIF during that time. Sorge's standard auto IIF declined by an average 7.9% and he lost over 1379 standard auto IIF during that time and Auburn's standard auto IIF declined by an average 6% and he lost over 439 standard auto IIF during that time.

ANJ relies on a 2005 decision, which was affirmed by the Appellate Division, in which the DOBI Commissioner conducted a review of ANJ's Expected Results standards and found that they were not inconsistent with the legal or regulatory requirements of the Fair Automobile Insurance Reform Act. Petition of Corsaro v. Allstate New Jersey Ins. Co., State of New Jersey Department of Banking and Insurance, Order No. A03-137, p. 23, aff'd, Docket No. A-6538-02T2 (N.J. App. Div. April 12, 2005), cert. denied, 186 N.J. 241 (2006).

V. Common Law Claims

a. Implied Covenant of Good Faith and Fair Dealing

The implied covenant of good faith and fair dealing mandates that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract". Palisades Properties Inc. v. Brunetti, 44 N.J. 117, 130 (1965). This covenant is implied in all New Jersey contracts. Sons of Thunder v. Borden Inc., 148 N.J, 396, 420 (1997).

DeLuca argues that a plaintiff's limited bargaining power, like his own, will bring the implied covenant to the forefront even if the defendant acted in conformity with the express terms of the contract. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 254 (N.J. Super. Ct. App. Div. 2002) According to plaintiffs, ANJ has breached the implied covenant of good faith and fair dealing in two respects: (1) concealing the actual standards for "Expected Results" and (2) to the extent that the decision to terminate DeLuca was an "exercise of discretion", it was unreasonable and arbitrary.

i. Expected Results

For support of its first point, DeLuca relies on the Supreme Court's decision in Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center, which held that "as a general rule, '[s]ubterfuges and evasions' 'in the performance of a contract violate the covenant of good faith and fair dealing' even though the actor believes his conduct to be justified." Brunswick Hills Racquet Club, Inc. 182 N.J. 210, 225 (2005) (quoting Restatement (Second) of Contracts, Section 205, comment d). In the instant matter, plaintiffs allege that ANJ has engaged in gamesmanship by concealing from plaintiffs the consequences of failing to meet Expected Results and the conditions under which termination would ensue. This statement is premised on the fact that ANJ failed to tell plaintiffs in 2008 or 2009 that they would be subject to termination for failing to reach Expected Results, that ANJ failed to tell them the actual standard that would be applied, that 39 of 50 agents who failed to achieve Expected Results for 3 consecutive years were not terminated and ANJ failed to disclose how plaintiffs could avoid termination.

In response, ANJ states that plaintiffs were told multiple times that they could be terminating for falling to meet the goals (D'Aloia Cert. Exh. B, DeLuca Tr. at 53:21-54:13). Also, Plaintiffs were given monthly score cards of their performance and Expected Results scores (Schueller Cert., Exhs. L, P, and S) and were informed via telephone, e-mail and in person innumerable times that they needed to improve to meet Expected Results. (Schueller Cert., ¶ 49, 99, Exhs. D, W, X, and Y).

ii. Unreasonable and Arbitrary Termination

In Wilson v. Amerada Hess Corp, 168 N.J. 236, 251 (N.J. 2001), the NJ Supreme Court held that a party using discretion breaches the duty of good faith and fair dealing if it exercises that discretionary authority, arbitrarily, unreasonably or capriciously with the objective of preventing the other party from receiving its reasonably expected fruits of the contract. In measuring the reasonableness of the exercise of discretion, a central premise is the party's reasonable expectations. Wilson, 168 N.J. at 257.

Plaintiffs argue that their reasonable expectations were generated in 2008 through 2010 by the letters ANJ provided, stating that they had missed Expected Results but that ANJ was there to assist them. Plaintiffs state that nothing was said to them about the possibility of being terminated for missing those results; it was only after failing to meet the hidden standards that they were terminated.

In his initial papers, DeLuca also argued that ANJ's behavior is evidenced to be in bad faith given that ANJ will gain nothing from terminating DeLuca and DeLuca could lose something. If there is no business purpose served by termination then the termination by its nature is arbitrary. This principle was recognized by the Ninth Circuit Court of Appeals in In re Vylene Enterprises, Inc, 90 F.3d 1472, 1477 (9th Cir. 1996)(finding bad faith when a party acts contrary to its own self-interest).

Plaintiffs as a whole have also made the claim that ANJ has failed to establish performance criteria which reflect the current market conditions and demographic realities, making it impossible to meet Expected Results.

ANJ states that is not the case that ANJ applies stricter criteria to EAs than employee agents. They are expected to meet the same minimum Expected Results, though ANJ acknowledges that they are subject to a different review process than employees.

Plaintiffs also argue that the performance criteria appear to be a means to accomplish ANJ's ulterior motive of terminating a pre-determined number of agents in order to transfer their business books to less-experienced agents who will cost Allstate less in commissions. ANJ argues that this allegation is unfounded because if plaintiffs sell the economic interest in their EA Agreements to an approved buyer, the same compensation will be paid to the new buyer. In any event, ANJ argues that this allegation has no bearing on the EA Agreements between ANJ and plaintiffs.

Plaintiffs, however, argue that it is hard to believe that ANJ would terminate any agency without expecting to be even more profitable after a certain period of time to recoup its termination pay out to the terminated agencies, notwithstanding the claims of Schueller that he has never spoken with anyone or reviewed any document to the effect that, after a certain period of time, ANJ would turn a profit after terminating an agency.

Finally, to the extent plaintiffs' claims are based on terminations of their agreements with ANJ, ANJ argues that New Jersey law is clear that the covenant of good faith and fair dealing cannot override an express termination clause. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396 (1997).

b. DeLuca's Common Law Claim for Wrongful Termination

ANJ argues that this claim must fail as DeLuca has failed to provide a single case that establishes that New Jersey recognizes a common law claim for alleged wrongful termination of a contract between commercial properties. What DeLuca is really trying to do, ANJ asserts, is arguing a breach of contract claim in disguise, which must fail in light of the express termination clause.

c. DeLuca's Common Law Claim for Breach of Contract- Segmentation

DeLuca argues that ANJ improperly segmented its agents into high producers and under-performers and that that it is not permitted under the EA Agreement.

In its opposition, ANJ agrees that every year it realigns its agents and field sales support, but states that there is nothing either in the law or the EA Agreement which prevents ANJ from doing so. Furthermore, there is nothing in the record to support DeLuca's claim that Mitchell's market received less support. In plaintiffs' cases, Mitchell had much more frequent contact, because she was able to do so by phone.

VI. DECISION OF THE COURT

1. Summary Judgment

All parties agree that the issue of the applicability of the New Jersey Franchise Practices Act (N.J.S.A. 56:10-1, et seq.), is ripe for determination by the court via summary judgment, i.e., that no further discovery on the issue is required, and that there are no disputed issues of material fact precluding such relief. The parties also agree that all issues raised in the pleadings can be conclusively resolved on the papers submitted.

2. On the Applicability of the NJFPA

It is undisputed that the relationship between Allstate and the plaintiff-agents has never, prior to this lawsuit, been characterized by either party as a "franchise". There has never been any written agreement between them acknowledging or referring to the existence of a "franchise". The agents are agents of Allstate, and agency is how the parties have viewed the relationship and, presumably, how the public views the relationship: Allstate agents are agents of Allstate.

A document or understanding acknowledging the existence of a "franchise" is not a prerequisite to a franchise relationship. The very purpose of the NJFPA is grounded in the legislative recognition that it is "…necessary in the public interest to define the relationship and responsibilities of franchises and franchisees in connection with franchise agreements." N.J.S.A. 56:10-2. (Emphasis added).

Here the plaintiff-agents claim a franchise relationship with ANJ, dating back to the 2000 EA Agreements entered into by them with the company. ANJ disagrees, characterizing the relationship as a pure agency between a principal (ANJ) and independent contractors (plaintiffs).

The issue is of significance to the parties because once a franchise relationship adheres, and the NJFPA is deemed applicable, it is a violation of the Act to cancel or fail to renew it without "good cause", which the Act defines as being "…limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise". N.J.S.A. 56:10-5. The cases speak of "infinite" franchises: "…once a franchise relationship begins [under the NJFPA], all that a franchisee must do is comply substantially with the terms of the agreement, in return for which he receives the benefit of an "infinite" franchise – he cannot be terminated or refused renewal". Dunkin' Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 177, 185 (1985).

The legislation is remedial, designed to "…protect franchisees from unreasonable termination by franchisors that may result from a disparity of bargaining power between national and regional franchisors and small franchisees." N.J.S.A. 56:10-2. Cramped readings of the full extent and parameters of this remedial legislation are to be avoided: "Further, the Legislature declares that the courts have in some cases more narrowly construed the Franchise Practices Act than was intended by the Legislature". N.J.S.A. 56:10-2. The statute is to be interpreted liberally. See, Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co., 86 N.J. 453, 462-64 (1981).

The NJFPA applies

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

N.J.S.A. 56:10-4(a).

Under the NJFPA, a "franchise" is defined as:

> A written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of good or services at wholesale, retail, by lease, agreement or otherwise.

N.J.S.A 56:10-3(a).

The threshold issue for the court to determine is whether the insurer-agent relationship between these litigants falls within the definition of franchise for purposes of the NJFPA. For the reasons that follow, I find that no franchise relationship exists, and that the NJFPA has no applicability to the cases at hand.

a. Place of Business

The NJFPA applies only to a franchise "the performance of which contemplates or requires the franchisee to establish or maintain a place of business within the State of New Jersey". N.J.S.A. 56:10-4. Plaintiffs DeLuca, Sorge and Auburn each maintain their separate offices here in New Jersey. But the NJFPA has a specific definition of "place of business" for purposes, I find, of ascertaining whether or not a franchise relationship exists: a "place of business" is "a fixed geographical location at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services". N.J.S.A. 56:10-3(f). (Emphasis added).

The NJFPA provides that a "place of business shall not mean an office, a warehouse, a place of storage, a residence or a vehicle…" Id.

ANJ argues that an insurance agent does not satisfy the NJFPA's "place of business" requirement as courts interpreting the definition of "place of business" have held that it "excludes geographic locations utilized for solicitation only". Greco Steam Cleaning Inc. v. Associated Dry Goods Corp., 257 N.J. Super. 594, 598 (Law Div. 1992). The Greco court found that a franchisee's "place of business" must offer for sale "and sell the franchisor's services" to satisfy the place of business requirement of the FPA. Id. Therefore, according to ANJ, as an insurance agency does not "sell" the insurer's goods or services, it does not satisfy this test.

Plaintiffs agree that they need to meet the "place of business" requirement, but argue that they do, in fact, maintain a "sales location" in New Jersey under the specific language of the EA Agreements with ANJ, which memorializes that they "sell" insurance. (EAA II.A.) from a "sales location". (EAA V). Because the Agreements acknowledge that they "sell" insurance, from a "sales location", the agents contend that Allstate should be estopped from arguing to the contrary.

It is a fact that the relationship between Allstate and the plaintiff – agents is not characterized by any sale of any products or services between the franchisor and franchisee: Allstate sells its agents no goods or services. The agent buys from Allstate no goods or service. And, further, the agents sell no goods or services of Allstate's to the consumer.

As a matter of law, the individual plaintiff agents do not sell insurance products. They are not permitted to do so in New Jersey. In New Jersey, only an insurer authorized to do business in New Jersey may sell insurance. N.J.S.A. 17:17-1, et seq., N.J.S.A. 17:32-1, et seq. Merely using a location to solicit fails to satisfy that "place of business" requirement under the NJFPA. Greco, 257 N.J. Super. at 598.

The agents do not, because they can not, sell or issue insurance policies to the consumer. Only the insurer does that. The agents are the parties through whom the insurer's insurance products are sold. The agent is offering the products and services of the insurer for sale, but sells neither.

This is the reasoning in a decision arrived at on nearly identical facts by Essex County Chancery Judge R. Benjamin Cohen in Mazziotti Ins. Agency v. State Farm Indem., Dkt. No. C-333-98 (New Jersey Super. 2002). Both parties discuss this unreported trial case extensively, so I cite it here. But the facts are unalterable, and the facts in the three instant cases mandate the finding that no franchisee/franchisor relationship exists between the agents and the company whose agents they are, ANJ, because the NJFPA does not apply to the relationship of insurer – agent.

The mandate to liberally read this remedial legislation is not a grant to ignore the plain language of the statute, or to extend the benefits of the statute to industries or relationships the legislature has not elected to include.

Pursuant to the Exclusive Agency Agreements entered into by insurer with the plaintiff agents, the agents are “independent contractors”. (EAA I.B.). The insurer, not the agent, owns all the business generated under the Agreement. (EAA I.A.). The Agreement authorizes the agent to be the insurer’s “agent”, and to “receive and accept” insurance applications, “subject to such restrictions on binding authority as may be established by the Company”. (EAA I.B.). No agent has the right to reject or accept any application. That right resides with the insurer. No agent has the authority to issue, modify or terminate any policy. That right resides with the insurer.

The agents here are sales agents of Allstate. They are the intermediary between the company and the consumer public.

The plaintiff agents receive no compensation beyond commission and bonuses for their roles in the transactions between the company and the consumer.

Soliciting applications for insurance for review and approval by the insurer fails to satisfy the requisite “sale” component of the “Place of Business” requirement under the NJFPA. The lack of that requisite characteristic is fatal to plaintiffs’ claim to franchisee status.

The relationship between the plaintiffs and the defendant is that of agents to principal. All the hallmarks are present. At common law, “the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person". Rst. 3d Agen. §1.01 (2006). "The principal's right of control presuppose that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority." Rst. 3d Agen. §1.01 (2006), Comment F. "An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal." Rst. 3d Agen. § 8.07 (2006). In addition, "[a]n agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." Rst. 3d. Agen. §8.01 (2006).

In Bohlinger v. Ward, 34 N.J. Super. 583, 585 (App. Div. 1955), the court held that a principal-agent relationship existed where an insurance company entered into an "Agency Agreement" with an insurance agent authorizing the agent "to receive and accept proposals for insurance on behalf of the company, to collect and give receipts for the premiums and to 'retain out of premiums collected, as full compensation on business so placed with the company' the therein specified allowances." Id. The Bohlinger court determined that "the contractual relationship between the company and the defendant was that of principal and agent which in the service of the issuance and cancellation of policies, the receipt and collection of premiums, the refunds thereof and the deductions therefrom imposed upon the defendant the obligations of a fiduciary." Id. at 588.

Now, the fact that to some extent a franchisee might be an "agent" of the franchisor would not strip the relationship of its essence as a franchise. Said another way, merely because certain principles of agency may inform two parties' relationship would not, logically, serve to nullify an otherwise qualifying franchise relationship.

DeLuca points to language in the EA Agreement reciting that the agent "sells" insurance. But, as aforesaid, the facts are otherwise, and a statement reciting that the agent is the "agent of [ANJ] for the purpose of soliciting, selling and servicing insurance…" does nothing more than emphasize the agency character of the relationship. (I.B.). It does not serve to alter the fact, mandated by New Jersey Insurance law, that the agent buys nothing from the insurer and sells neither product nor services to the public.

We had colloquy at oral argument regarding real estate agencies, which can be franchises, and H&R block accounting offices, which also, apparently, exist as franchises in New Jersey. It is argued that in neither case does the "agent" sell to the consumer any product or services of the alleged "franchisor"; rather these franchises offer their services directly to the consumer, and are nonetheless franchises.

In response, I note that not every relationship which characterizes itself as franchise is a franchise within the meaning of the Act. Either a business relationship satisfies the requirements of the Act, and hence, is a qualifying franchise, or it does not. Secondly, it may be that these industries have by contract elected to be governed by the Act. No evidence on this was submitted to the court. And thirdly, it is unknown, because no facts were submitted, whether in fact real estate or H&R Block "franchises" service or sell products of the "franchisor" to the consumer.

Sorge and Auburn note that Allstate recently participated as an exhibitor at a Franchise Expo. This is unpersuasive proof that Allstate agencies are franchises for the purpose of the Act. The full title of the Expo was "Franchise and Business Opportunities Expo", and there is no evidence of Allstate holding itself out as a franchisor, or as an entity offering or engaged in franchises. And doing so would not, in and of itself, transform a non-franchise relationship into a franchise, or render the Act applicable to an otherwise unqualifying relationship.

The lack of sales by the would-be franchisee of "franchisor" goods or services is fatal to the agents' claim to NJFPA franchise status for the reasons set forth above. It fails to satisfy the 'sales' component of the "place of business" requirement of the NJFPA. And <u>see</u>, <u>Borbely v. Nationwide Mut. Ins. Co.</u>, 547 <u>F. Supp.</u> 959, 973 N. 23 (D.N.J. 1981), concluding that the NJFPA does not apply to the insurer-agent relationship.

Plaintiffs contend that the focus on sales is misbegotten, and that the language in the office requirement of the Act should not be transposed to a definitional requirement of <u>all</u> franchises, as it is merely meant to restrict the Act to New Jersey franchises whose sales volume have met the

$35,000 annual threshold, citing Boyle v. Vanguard Car Rental USA, Inc., 2009 WL 3208310 at 5 (DNJ 2009). The theory advanced by plaintiff does not bear the weight of the statutory language itself, which could not be clearer: those claiming the status of franchisee must maintain a New Jersey place of business "… at which the franchisee displays for sale and sells the franchisor's goods or offers for sale and sells the franchisor's services". N.J.S.A. 56:10-3(f). (Emphasis added).

Assuming arguendo the validity of plaintiffs' interpretation, it remains to be seen whether other requisite characteristics of a qualifying franchise are present here.

In order to qualify as a "franchise" for purposes of the NJFPA, there must exist a grant by the alleged franchisor to the alleged franchisee of a "license" permitting him or her to use the franchisor's trade name. N.J.S.A. 56:10-3(a). That element is present here. The agents have the right to use the Allstate trademark.

In addition, there must be the sharing by both parties of a "community of interest" in the marketing of goods or services at wholesale, retail, by lease agreement or otherwise. N.J.S.A. 56:10-3(a). To establish a "community of interest", there are two basic requirements: "(1) The alleged franchisee must make substantial franchise specific investments and (2) must have been required to make these investments by agreement or by the nature of the business". Atlantic City Coin & Slot Service, Inc. v. IGT, 14 F. Supp. 2d 644, 659 (D.N.J. 1998) (quoting Cassidy Podell Lynch, Inc. v. Snydergeneral Corp., et al., 944 F.2d 1131, 1143 (3d Cir. 1991). The requisite franchise – specific investments "are usually capital investments, such as a building designed to meet the style of the franchise, special equipment useful only to produce the franchise product, and franchise signs". Instructional Systems, Inc. v. Comp. Curriculum Corp., 130 N.J. 324, 356 (1992).

In the instant case, the plaintiff agents made no franchise-specific, i.e., ANJ-specific, tangible capital investments. They made no ANJ specific investments. They made no capital investment and paid no fee to become agents. They pay no monthly franchise fees or fees of any nature whatsoever to ANJ. Their office space and fixtures, as well as their equipment, are non-specific to ANJ and may be used for any other business purpose. They did not pay for the "Allstate" sign for their offices, rather the signs were furnished by ANJ. ANJ provided the plaintiffs with office furniture, paid for their computers and supplied their phone systems.

None of the franchise-specific investments typically characteristic of a franchise are here. Rather, plaintiffs emphasize the non-tangible investment of creating - in DeLuca's case, over a lifetime – a franchise specific good-will: decades of promoting the brand Allstate. It is that customer loyalty to ANJ, engendered by the efforts of the agents, that plaintiffs cite to in order to establish the requisite community of interest. However, "[t]o develop goodwill generally for a product cannot be enough to create a community of interest. Otherwise, any licensee distributing a brand-name product could claim it has a community of interest with its supplier". Instructional Systems, 130 N.J. at 358. The absence of any substantial franchise-specific tangible or capital investments, coupled with near exclusive reliance on the build-up of "franchise" specific good will, is insufficient as a matter of law to establish the requisite community of interest which must be present to invoke the status of franchise, and the protection of the NJFPA.

b. Revenue Threshold

The NJFPA applies only to otherwise qualifying business relationship where (a) gross sales of products or services between the franchisor and the franchisee covered by such franchise shall have exceeded $35,000 for the twelve (12) months next preceding the institution of suit; and (b) where more than 20% of the franchisee's gross sales are intended to be or are derived from such franchise. N.J.S.A. 56:10-4(a)(2) and (3).

In the instant cases, each agent generated sales of ANJ insurance policies in excess of the $35,000 threshold, and each agent received commissions as compensation for his efforts in excess of the threshold, in the 12 months preceding suit. The agents cite to the unreported case of Boyle v. Vanguard Car Rental USA, Inc., 2009 WL 3208310 (D.N.J. 2009) for the proposition that commissions in excess of the threshold, earned for labor expended, satisfy these components, notwithstanding the absence, strictly speaking, of any sales between alleged franchisor and alleged franchisee. I cannot accept Boyle's conclusion that the word "sales" in the above-quoted statutory provision, relating to economic threshold, is essentially inoperative. Because there are no sales between ANJ and the agents, as there are no sales from the agent to the consumer, the above economic thresholds are not met, and the relationships between ANJ and DeLuca, Sorge, and Auburn, can not qualify as a franchise for purposes of the NJFPA.

c. ***NJFPA Not Applicable to Insurer/Agent Relationships, which are elsewhere extensively regulated by the State***

ANJ contends that state regulation of the insurance industry, in general, and of the insurer – agent relationship, in particular, precludes subjecting those relationships to the NJFPA. The plaintiff agents disagree. In consultation with counsel, the court solicited the input of the New Jersey Department of Banking and Insurance, which weighed in on the issue by letter dated December 19, 2011, and agreed with ANJ that the NJFPA would impermissibly interfere with the Department's exclusive jurisdiction over the regulation of the business of insurance.

A review of the statutory and code provisions demonstrates that the regulation of this industry by the Department of Banking and Insurance is primary and pervasive, and that provisions of the NJFPA conflict with provisions of this regulatory framework, both potentially and actually, leading the court to conclude that the NJFPA does not apply, and was never intended to apply, to the relationship of insurance company and insurance agent.

Where a regulatory scheme "deal(s) specifically, concretely and pervasively with [a] particular activity, implying a legislative intent not to subject parties to multiple regulations that work at cross-purposes," application of additional regulation is inappropriate. Lemelledo v. Benefit Mgmt Corp., 150 N.J. 255, 270 (1998).

The Department explicitly regulates whether and how an insurance company may contract with an insurance agent, the basic contents of any contract between an insurance company and its agent, how and on what grounds an agent may be terminated, and the outstanding responsibilities of terminated agents and their former insurance company principals. N.J.S.A. 17:22A-42a; N.J.S.A.

17:22-6-14a(c)(d).

The Department also has an expansive regulatory scheme overseeing the conduct of insurance producers. See e.g., The New Jersey Insurance Producer Licensing Act (2001), N.J.S.A. 17:22A-26 et seq.; N.J.S.A. 17B:30-1 et seq. (unfair trade practices in sale of insurance); N.J.A.C. 11:17-2.8 (regulating the branch offices of insurance agencies); N.J.A.C. 11:17-2.9 (regulating the "business relationships" between an insurance agency and its producers); N.J.A.C. 11:17A-1.1 et seq. (activities requiring licensure); N.J.A.C. 11:17A-2.1 et seq. (unfair trade practices); N.J.A.C. 11:17A-4.1 et seq. (marketing and premium collection/policy delivery requirements); N.J.A.C. 11:17B-1.1 et seq. (commissions and fees); and N.J.A.C. 11:17C-1.1 et seq. (management of funds).

The Department points to the NJFPA prohibition against franchisee termination for anything other than "good cause", which is defined in the act as being "limited to failure by the franchisee to substantially comply with those requirements imposed upon him by the franchise". N.J.S.A. 56:10-5. An insurer leaving the state of New Jersey is subject to extensive state regulation which could be frustrated and held hostage by an inability to cite to a franchisee's failure to properly perform as a franchise as mandated by the Act. In addition, franchisors are barred by the NJFPA from imposing "unreasonable standards of performance upon the franchisee". N.J.S.A. 56:10-7(a). If the NJFPA is deemed applicable to insurance company-agent relations, an insurance agent could not be terminated by the franchisor unless he or she has violated the terms of a given franchise agreement. This conflicts directly with N.J.S.A. 17:22-6.14a.e, which gives the insurance company the right to terminate – immediately – an insurance agent for, among other reasons, "insolvency, abandonment, gross and willful misconduct, or failure to pay" premiums. Agents violating their individual contracts – or not violating any specific provision of their contracts but say, having become insolvent, abandoned the agency, been guilty of gross or willful misconduct, or failed to pay premiums, could not, if the NJFPA applies, be terminated by the insurer for 60 days (N.J.S.A. 56:10-5), unless the insurer had received written notice that the agent has been convicted of an indictable offense. Ibid. This is in conflict with N.J.S.A. 17:22-6.14a, which permits immediate termination in certain circumstances and terminations upon 90 days notice in others.

The Department points to N.J.S.A. 17:22-6.14a(d) which prohibits producers of insurance from writing new business or changes in liability or renewal or in force business after notice of termination, as conflicting with the N.J.S.A.'s 60 day notice provision, leading to the potential for agents to invoke injunctive relief under N.J.S.A. 56:10-10. While it is unclear to what extent exclusive agents –i.e. captive agents, selling for one company – are fully subject to the regulatory scheme, it is clear that the state has elected to regulate the relationship between insurer and agent through an extensive statutory and administrative framework, unencumbered by the NJFPA, which, I find, has no applicability.

SUMMARY

There is no reason to suppose that the Legislature intended to superimpose the New Jersey Franchise Practices Act upon this highly regulated aspect of the insurance industry – the relations between the insurers and the agents - including as to the termination of agents by insurers. The long extant insurance industry has never been found by any court in New Jersey, or elsewhere, to be home to an insurance company franchisor, or agent franchisee. The relationship lacks the fundamental component of exchange of product or services between insurer and agent, or the sale of product or services by the agent to the consumer. The relationship – at least with respect to the three agents here, lacks the buy-in capital or franchise – specific capital investments characteristic of franchises. And the extensive state regulation of the relationship here at issue – insurer/agent – and the sub-issue immediately implicated – agency termination – leaves no room for conflicting provisions via the NJFPA. For these reasons, the court determines that the parties' relationship is not that of franchisee/franchise, and that the NJFPA does not apply. To that extent, summary judgment is granted in favor of defendant Allstate, and against the plaintiff agents.

FOR CAUSE TERMINATION

The defendant insurer argues that it had "good cause" to terminate each plaintiff, and therefore termination was proper under N.J.S.A. 50:10-5, even if plaintiffs are franchisees and even if the NJFPA applies. The plaintiff agents disagree, and argue that the terminations lack statutory cause, and are improper, indeed predatory, as ANJ is seeking to harvest for itself the profits of decades of plaintiffs' loyal service and good will, and appropriate their hard earned books of business.

The court declines to make findings as to whether or not performance standards were effectively imposed by ANJ, whether those standards were reasonable, whether or to what extent the plaintiff agents failed to meet those standards or whether agent performance constituted sufficient statutory "good cause" for termination. The parties' relationship is not subject to the Act, and the "good cause" standard is inapplicable. The EA Agreement expressly provides that the agent can be terminated without cause or for cause. (EAA, XVII (b)(2) and (3)). ANJ terminated under both standards, and the plaintiffs – unprotected by the NJFPA – were effectively and conclusively terminated per XVII (b)(2) without cause. That suffices to render the termination effective.

The court declines to determine whether ANJ could lawfully terminate the EA Agreements of the plaintiffs under the "for cause" provisions. ANJ justifies "for cause" termination based upon the plaintiffs' respective and particularized failures to meet ANJ's "Expected Results". The agents dispute the nature and extent of nonperformance, as alleged by the company, and dispute that their performance allowed ANJ to terminate "for cause". The dispute need not be resolved, as the company properly implemented termination under the provision allowing for unilateral termination, without cause.

a. Common Law Claims

Given the express provisions of the EA Agreements authorizing unilateral termination without cause, plaintiff cannot prevail on allegations of breach of the covenant of good faith and fair dealing. Sons of Thunder v. Borden, Inc., 148 N.J. 396 (1997). Defendant did what it was entitled to do under the terms of the EA Agreement and is bound to pay the agents the termination payments mandated by the respective contracts: approximately $1,100,000.00 to DeLuca; approximately $483,000.00 to Sorge; approximately $290,000.00 to Auburn (assuming the agents have not/do not sell to third parties). An express contract provision – not shown to be unconscionable or unenforceable – can not be overridden with claims of lack of good faith or fair dealing. Glenfed Financial v. Penick Corp. 276 N.J. Super. 163, 175 (App. Div. 1994).

Finally, as to the claim of breach of contract, it is asserted that ANJ created two separate classes of agents – in house, employee-agents, and independent contractor (like plaintiffs), to whom different rules of performance and accountability are applied. Of the 225 agents in New Jersey 216 are now independent contractor agents and 9 are employee agents. I will dismiss the claim for failure to state a cause of action. No authority has been cited for the proposition that the two tier system said to be employed by ANJ is in any way unlawful.

To the extent plaintiffs allege that ANJ breached the contract by terminating them without cause, no cause was required by the contract between the parties, and ANJ effectively implemented the termination of the EA Agreements under the "no cause" provisions.

CONCLUSION

Summary judgment shall be entered in favor of the defendant, and against the plaintiffs. A form of judgment is enclosed.

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Hon. Robert P. Contillo, P.J.Ch.