STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: MAY 5, 2012)

F. SAIA RESTAURANTS, LLC	:	
	:	
vs.	:	**C.A. No. PB 12-1294**
	:	
PAT'S ITALIAN FOOD TO GO, INC., ALIAS, PASQUALE ORLANDO, ALIAS, THERESA ORLANDO, ALIAS, SERGIO'S ITALIAN RISTORANTE, INC., ALIAS, ORLANDO ENTERPRISES, INC., ALIAS	:	

DECISION

SILVERSTEIN, J. Before the Court is Defendants'[1] Motion to Dismiss the Plaintiff, F. Saia Restaurants, LLC's (Saia Restaurants), Complaint pursuant to Super. R. Civ. P. 12(b)(6). Saia Restaurants brought this action against the Defendants for injunctive relief, breach of contract, and fraudulent inducement in connection with the sale of a restaurant business. Defendants move this Court to dismiss all Counts of the Plaintiff's Amended Verified Complaint[2] (Complaint) for failure to state a claim upon which relief can be granted.

[1] Defendants are Pat's Italian Food to Go, Inc., Alias, Pasquale Orlando, Alias, Theresa Orlando, Alias, Sergio's Italian Ristorante, Inc., Alias, and Orlando Enterprises, Inc., Alias.

[2] The Amended Verified Complaint is the current and controlling pleading in this case. On May 8, 2012, Plaintiff filed a Motion for Leave to Amend its Complaint; however, Plaintiff was entitled to file an amended pleading without leave of the Court. See Super. R. Civ. P. 15(a) (permitting amendment without leave of court "once as a matter of course at any time before a responsive pleading is served"); Super. R. Civ. P. 7(a) (defining responsive pleadings separate and apart from motions); 1 Kent, R.I. Civ. Prac. § 15.2 ("The service by a defendant of a motion to dismiss the complaint for failure to state a claim upon which relief can be granted does not terminate the plaintiff's right to amend as of course, for a motion is not a 'responsive pleading,' as that term is defined in Rule 7(a)"). Regardless, at oral argument, Defendants had no objection to the amendment.

I

Facts and Travel

For the purposes of the Motion to Dismiss, the Court takes the information alleged in the Complaint as true. Accordingly, the facts recited herein are gleaned directly from the Complaint and attached documents.[3] See Bowen Court Assocs. v. Ernst & Young, LLP, 818 A.2d 721, 725-26 (R.I. 2003) (stating documents attached to complaint are incorporated therein by reference for purposes of Rule 12(b)(6) motion consideration).

On or about March 1, 2007, Saia Restaurants entered into an Asset Purchase and Sale Agreement with Pat's Italian Food to Go, Inc. (Pat's) and Theresa Orlando. (Compl. Ex. A.) Pat's was a Rhode Island corporation that operated Pat's Italian Restaurant in Johnston, Rhode Island. Theresa Orlando was the sole shareholder of Pat's. Pursuant to the Asset Purchase and Sale Agreement, Pat's and Theresa Orlando agreed to sell to Saia Restaurants a number of assets of the business. Those assets included tangible personal property located at Pat's Italian Restaurant, such as equipment, furniture, inventory, copies of the recipes, and menus. The assets also included intangible personal property and, specifically, the names "Pat's Italian Restaurant" and "Pat's Italian Food," and any good will related thereto. The agreement provides, in pertinent

[3] On a Rule 12(b)(6) motion to dismiss, the Court will properly consider only the pleadings and the documents attached thereto. Documents referred to in the complaint but not attached to the complaint as an exhibit cannot be considered on a motion to dismiss. Bowen Court Assocs., 818 A.2d at 726. The Court has the option to, but need not, convert the motion to a motion for summary judgment. See Tidewater Realty, LLC v. State, 942 A.2d 986, 992 (R.I. 2008) (stating motion converts to summary judgment when "matters outside the pleading are presented to and not excluded by the court" (citations omitted)); DiBello v. St. Jean, 106 R.I. 704, 707, 262 A.2d 824, 825 (1970) (explaining that in court's discretion whether to consider documents and convert motion to summary judgment); Warren Educ. Ass'n v. Lapan, 103 R.I. 163, 168, 235 A.2d 866, 869 (1967) (permitting trial justice to include or exclude extra pleading matters in its deliberation). Here, the Court declines to convert the motion and excludes from its consideration documents that were not attached to the Complaint as exhibits.

part:

> "Seller agrees to sell and convey to Purchaser, and Purchaser agrees to purchase from Seller, the following assets of the Seller . . . (i) Seller's tangible personal property now located at the Premises including, but not limited to, equipment, machinery, signs, office supplies, computer hardware and software, furniture, furnishings, trade fixtures, inventory, a copy of the recipes on the menu, menus, improvements, attachments, leasehold improvements, appurtenances thereto, and fixtures thereon . . . (ii) good and salable inventory located at the Premises . . . (iii) Seller's intangible personal property wherever located, including but not limited to, customer lists (to the extent that such lists exist, including but not limited to, lists of customers who purchased gift certificates which are assumed by Purchaser hereunder), supplier lists, distributor lists, telephone numbers, directory listings, and inventory control systems, if any; all of seller's business records and documentation in existence; . . . all of Seller's right, title, and interest in and to the names "Pat's Italian Restaurant" and/or "Pat's Italian Food", and any good will related thereto; all of Seller's rights in or to tradenames, patents, copyrights, trademarks, or any other form of intellectual property related to Seller's business hereunder, if any; . . . all of Seller's goodwill and the value of Seller's business as a going concern; (iv) all rights of Seller in and to agreements for the sale and purchase of goods . . . (v) all rights of Seller in and to leases concerning the Premises; (vi) the covenants of Seller and the Shareholder hereafter described in Section 15 hereof; (vii) any and all licenses or privileges of Seller which it now possesses, to conduct food and alcoholic beverage sales within the State of Rhode Island; and (ix) that certain liquor and victualing licenses . . . ." (Compl. Ex. A at ¶ 1.)

The Asset Purchase and Sale Agreement also included non-solicitation and non-competition provisions. (Compl. Ex. A at ¶¶ 15.3, 15.4.) Essentially, the non-solicitation clause of the Asset Purchase and Sale Agreement provides that Pat's and Theresa Orlando may not solicit or attempt to solicit employees or customers of Saia Restaurants to leave their business relationship with Saia Restaurants.[4] (Compl. Ex. A at ¶ 15.3.) The non-competition clause in

[4] The non-solicitation clause provides:

the Asset Purchase and Sale Agreement similarly applies to Pat's and to Theresa Orlando, limiting them from certain involvement in a full-service Italian restaurant of the same seating capacity and using the same menus and recipes as Pat's Italian Restaurant.[5] (Compl. Ex. A at ¶

> "[Pat's] and [Theresa Orlando], jointly and severally, agree that they shall not, whether directly or indirectly, solicit or attempt to solicit or otherwise induce any employees, managers, customers, suppliers, vendors, or the like of Purchaser to leave their respective business relationship with Purchaser. Further, [Pat's] and [Theresa Orlando] shall not, whether directly or indirectly, solicit or attempt to solicit or otherwise induce the chef and dining area manager employed by [Pat's] as of the date hereof, and/or suppliers, vendors, or the like that currently provide services and/or products to [Pat's], to refuse to form a business relationship with Purchaser should Purchaser elect to pursue such relationships. This covenant shall survive the Closing and nothing herein shall be inconsistent with nor interpreted in a manner inconsistent with the Non compete/ Non solicitation executed at the time of Closing. To whatever degree it is inconsistent with said Noncompete executed at time of Closing those provisions shall be deemed waived." (Compl. Ex. A at ¶ 15.3.)

[5] The non-competition clause provides:

> "[Pat's] and [Theresa Orlando], jointly and severally, agree that for a period of Four (4) years after the Closing, it/she shall not, within the Town of Johnston or within a fifteen (15) mile radius of the borders of the Town of Johnston, engage in the business of a full service Italian restaurant of the same seating capacity as the capacity applicable to the Premises, and menu items and recipes that make up part of the Assets hereunder. The foregoing specifically includes, owning, managing, operating, controlling, being employed by, being connected in any manner with any enterprise, business, or business entity with the same or similar seating capacity as the capacity applicable to the Premises, and menu items and recipes that make up part of the Assets hereunder. Nothing found herein shall prohibit [Pat's] and/or [Theresa Orlando] from operating, owning, managing or being employed by a brick-oven style pizza parlor provided said pizza parlor shall not be of the same or similar seating capacity as the Premises, and menu items and recipes that make up part of the Assets hereunder, and that [Pat's] and/or [Theresa Orlando] shall not use the names included as part of the Assets hereunder. In the event that a court

15.4.) Of note, the first sentence appears to limit the non-competition clause to a period of four years after the closing and an area of fifteen miles from the Town of Johnston, but the last sentence of the clause suggests that the clause will remain in effect in perpetuity. See id.

The closing on the sale of the restaurant business took place on or about July 1, 2007. In addition to the Asset Purchase and Sale Agreement, the parties to the transaction executed a number of other documents.[6] One of documents was a Bill of Sale detailing the assets to be sold from Pat's to Saia Restaurants. (Compl. Ex. B.) The language in the Bill of Sale listing the assets sold exactly mirrors that of Paragraph 1 of the Asset Purchase and Sale Agreement. (Compl. Exs. A, B.) Pat's and Saia Restaurants also executed an Assignment and Assumption Agreement on or about July 2, 2007. (Compl. ¶ 9.) The Assignment and Assumption

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> of competent jurisdiction should determine that either the duration, nature, or the geographic territory of this restrictive covenant are unenforceable, then the duration, nature, or geographic territory, as the case may be, shall be deemed modified to that maximum duration, nature, or geographic territory deemed acceptable by such court. This covenant shall survive the Closing, any termination of this Agreement, and shall remain in effect in perpetuity." (Compl. Ex. A at ¶ 15.4.)

The "Assets hereunder" are the assets defined in Paragraph 1 of the Asset Purchase and Sale Agreement. See Compl. Ex. A. at ¶ 1.

[6] The copious documentation of the sale includes, but is likely not limited to, the following written agreements, all of which were attached to the Complaint:

1. "Asset Purchase and Sale Agreement," between Pat's, Theresa Orlando, and Saia Restaurants, dated March 1, 2007. (Compl. Ex. A.)
2. "Bill of Sale," between Pat's and Saia Restaurants, dated July 1, 2007. (Compl. Ex. B.)
3. "Assignment and Assumption of Gift Certificate Liabilities," between Pat's and Saia Restaurants, dated July 1, 2007. (Compl. Ex. C.)
4. "Agreement Concerning Non-Competition," between Theresa Orlando and Saia Restaurants, dated July 2, 2007. (Compl. Ex. D.)
5. "Agreement Concerning Non-Solicitation," between Pasquale Orlando and Saia Restaurants, dated July 2, 2007. (Compl. Ex. E.)

Agreement transferred all right, title, and interest in and to the names "Pat's Italian Food" and "Pat's Italian Restaurant" to Saia Restaurants. Id.

Theresa Orlando and Saia Restaurants entered into a separate Agreement Concerning Non-Competition on or about July 2, 2007.[7] (Compl. Ex. D.) Theresa Orlando's Agreement Concerning Non-Competition contains essentially the same language as used in the non-competition clause of the Asset Purchase and Sale Agreement.[8] Id. However, the Agreement Concerning Non-Competition does not contain the last sentence, which in the Asset Purchase

[7] At oral argument, Plaintiff (and Defendants) proffered that Pasquale Orlando and Saia Restaurants also entered into an Agreement Concerning Non-Competition. Because the Complaint does not specifically state that such an agreement was entered and because such a document was not attached to the Complaint as an exhibit, this Court cannot consider that fact on the instant motion to dismiss. This Court would freely grant Plaintiff leave to amend its Complaint, adding any Agreement Concerning Non-Competition between Pasquale Orlando and Saia Restaurants; however, in light of the forthcoming findings herein, Plaintiff may find it improvident to accept the Court's offer.

[8] The Agreement Concerning Non-Competition provides:

> "Shareholder agrees that for a period of four (4) years after the Closing, he/she shall not, within the Town of Johnston or within a fifteen (15) mile radius of the borders of the Town of Johnston, engage in the business of a full service Italian restaurant of the same seating capacity applicable to the Premises as defined in that certain Asset Purchase Agreement of even date herewith (the "APA"), and menu items and recipes that make up part of the Assets described in the APA. The foregoing specifically includes, but is not limited to, owning, managing, operating, controlling, being employed by or being connected in any manner with any enterprise, business, or business entity with the same seating capacity as the capacity applicable to the Premises as defined in the APA, and menu items and recipes that make up part of the Assets described in the APA other than a brick-oven style pizza parlor, which competes with the Purchaser. Nothing found herein shall prohibit Shareholder from operating, owning, managing or being employed by a brick-oven style pizza parlor provided said pizza parlor shall not be of the same or similar seating capacity as the Premises, and menu items and recipes that make up part of the Assets hereunder, and that Shareholder shall not use the names included as part of the Assets as described in the APA." (Compl. Ex. D at ¶ 1.)

and Sale Agreement stipulates that the covenant shall remain in effect in perpetuity. See Compl. Exs. A, D.)

Pasquale Orlando and Saia Restaurants entered into an Agreement Concerning Non-Solicitation on or about July 2, 2007. (Compl. Ex. E.) This Agreement sets forth that Pasquale Orlando "is the husband of the sole shareholder of the Company, is actively involved in the business and operation of the Company's business, and derives an economic benefit from the Company." Id. Pasquale Orlando's Agreement Concerning Non-Solicitation consists of language similar to that used in the non-solicitation clause of the Asset Purchase and Sale Agreement.[9] (Compl. Exs. A, E.)

Saia Restaurants executed a Consulting Agreement with the Defendants (although it is not specified which Defendants), also on or about July 2, 2007. (Compl. ¶ 12.) The Agreement purportedly obligates the Defendants to assist Saia Restaurants for three weeks after closing. Id. On or about the same date, unspecified Defendants also entered separate Agreements Concerning

[9] The Agreement Concerning Non-Solicitation provides:

> "[Pasquale Orlando] shall not, whether directly or indirectly, solicit or attempt to solicit or otherwise induce any employees, agents, managers, members, clients, customers, suppliers, vendors, or the like of Purchaser to leave their respective business relationship with Purchaser. Further, [Pasquale Orlando] shall not, whether directly or indirectly, solicit or attempt to solicit or otherwise induce the Chef and/or the Dining Manager, and/or suppliers, vendors, or the like that currently provide services and/or products to the Company to refuse to form a business relationship with Purchaser should Purchaser elect to pursue such relationships. The foregoing specifically includes, but is not limited to, owning, managing, operating, controlling, being employed by, acting as an agent for, participating in, or being connected in any manner with any enterprise, person, business, or business entity attempting such solicitation or inducement." (Compl. Ex. E at ¶ 1.)

Non-Disclosure with Saia Restaurants. (Compl. ¶ 13.) Those Agreements allegedly provided that the Defendants would refrain from disclosing confidential information. Id.

Pursuant to all of these agreements, the closing occurred, and Pat's Italian Restaurant was sold to Saia Restaurants on or about July 1, 2007. Saia Restaurants claims that Defendants—without specifying which Defendants—then opened Sergio's Italian Ristorante in North Kingstown, Rhode Island, on or about May 26, 2009. Plaintiff alleges that Sergio's Italian Ristorante uses the same or similar recipes and menu items as Pat's Italian Restaurant. See Compl. Ex. F. Further, the website for Sergio's Italian Ristorante contained a statement that Plaintiff asserts violates or evidences violations of many of the agreements made in the sale of the restaurant. The website states:

> "With deep Rhode Island roots that extend all the way to Sicily, Sergio's Italian Ristorante is being discovered by folks who appreciate truly outstanding cuisine. The restaurant is named after the son of Terry and Pat Orlando, a couple who for years owned the legendary Pat Orlando's restaurant in Johnston. Their decision to retire a few years ago was premature. After retiring for 2 years the husband and wife team decided to get back into the restaurant business, this time in southern Rhode Island. Judging by the many cars in the parking lot, it looks like the old fans of Pat Orlando's have found this new location, and new fans are discovering this phenomenal restaurant everyday." (Compl. Ex. F.)

Additionally, Plaintiff alleges that the Defendants—again without specifying which Defendants—have "taken steps" to establish a restaurant named Orlando's in Cranston, Rhode Island.

On March 9, 2012, Saia Restaurants filed its Verified Complaint in the case at bar. On April 3, 2012, Defendants filed the instant Motion to Dismiss, and Plaintiff objected on April 27, 2012.

II

Standard of Review

It is well-settled in Rhode Island that the "sole function of a motion to dismiss is to test the sufficiency of the complaint." Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011) (quoting Laurence v. Sollitto, 788 A.2d 455, 456 (R.I. 2002)). The court must "assume the allegations contained in the complaint are true, and examine the facts in the light most favorable to the nonmoving party." A.F. Lusi Constr., Inc. v. R.I. Convention Ctr. Auth., 934 A.2d 791, 795 (R.I. 2007) (citations omitted); McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) ("examine the complaint to determine if plaintiffs are entitled to relief under any conceivable set of facts"). The trial judge "must look no further than the complaint . . . and resolve any doubts in the plaintiff's favor." Pellegrino v. R.I. Ethics Comm'n, 788 A.2d 1119, 1123 (R.I. 2002) (citations omitted); see Narragansett Elec., 21 A.3d at 277 (providing court "confined to the four corners of the complaint" in deciding motion to dismiss). The pleading must give fair and adequate notice of the plaintiff's claim, but need not contain a "high degree of factual specificity." See Hyatt v. Village House Convalescent Home, Inc., 880 A.2d 821, 824 (R.I. 2005); Hendrick v. Hendrick, 755 A.2d 784, 791 (R.I. 2000) ("Although a plaintiff is not obligated to set out the precise legal theory upon which his or her claim is based, he or she must provide the opposing party fair and adequate notice of the type of claim being asserted"). A court should grant a 12(b)(6) motion only "when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim." Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008) (quoting Ellis v. R.I. Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)); McKenna, 874 A.2d

at 225 ("[i]f it appears beyond a reasonable doubt that plaintiff would not be entitled to relief, under any facts that could be established, the motion to dismiss should be granted").

III

Discussion

Defendants request the Court dismiss all counts of Plaintiff's Complaint for failure to state a claim upon which relief can be granted. This Court will address the dismissal of each Count in seriatim.

A

Injunctive Relief (Count I)

In Count I of its Complaint, Saia Restaurants alleges that all of the Defendants are causing irreparable harm to which Saia Restaurants has no other adequate remedy by "using the name, trade names, goodwill, menu, recipes it had previously assigned to Plaintiff in violation of the agreements . . . ." (Compl. ¶¶ 16-21.) Saia Restaurants requests the Court temporarily and permanently enjoin all Defendants from using the menus, pricing, and recipes of Saia Restaurants and from using the name "Pat Orlando" in any advertisements or promotions. Defendants contend Count I fails to state a claim upon which relief can be granted because injunctive relief is merely a remedy and not a substantive claim under which Plaintiff could recover.[10]

This Court has held that injunctive relief is not an independent cause of action; rather, "injunctive relief is a remedy and, can not, in itself, be recognized as a substantive claim." State v. Lead Indus. Ass'n, Inc., No. 99-5226, 2001 WL 345830, at *17 (R.I. Super. Apr. 2, 2001)

[10] Defendant makes additional arguments regarding whether Plaintiff could be entitled to injunctive relief. This Court need not and will not address the merits of injunctive relief at this time.

(Silverstein, J.). Particularly when the averments contained in a count for injunctive relief are duplicative of the relief requested in other sections of the complaint, the request for injunctive relief cannot stand as a separate cause of action and will be dismissed. See id. (noting absence of controlling case law that injunctive relief constitutes an independent cause of action and, therefore, dismissing count for injunctive relief).

Here, Saia Restaurants is seeking injunctive relief for breaches of the agreements it entered into with (some of) the Defendants. In Count II of its Complaint, Saia Restaurants also seeks injunctive relief. Particularly, in Count II, Plaintiff requests the Defendants be restrained and enjoined from using the names, menus, pricing, and recipes of Saia Restaurants. This prayer for relief is substantially the same as the Count I request for Injunctive Relief. Compare Compl. ¶¶ 16-21 with ¶¶ 22-27. Because injunctive relief is not an independent cause of action and because the claims in Count I are essentially duplicative of the relief requested in Count II, the Court finds that Count I fails to state a claim upon which relief can be granted. See Lead Indus. Ass'n, 2001 WL 345830 at *17 (dismissing count for injunctive relief). For that reason, the Court grants Defendants' Motion to Dismiss Count I.

B

Breach of Contract (Count II)

In its Complaint, Saia Restaurants claims that the Defendants have breached the July 2, 2007 Agreement Concerning Non-Competition and Agreement Concerning Non-Solicitation by using the recipes and menu items of Pat's Italian Restaurant in Sergio's Italian Ristorante, by soliciting or inducing customers and employees to leave their business relationship with Saia Restaurants, and by "tak[ing] steps to establish" Orlando's restaurant in Cranston, Rhode

Island.[11] (Compl. ¶¶ 22-27.) Although the Complaint does not specify which Defendants entered into the mentioned agreements, the exhibits to the Complaint demonstrate that the Agreement Concerning Non-Competition was between Theresa Orlando and Saia Restaurants, and the Agreement Concerning Non-Solicitation was between Pasquale Orlando and Saia Restaurants.[12] See Compl. Exs. D, E.

1

Defendants

As a preliminary matter, the July 2, 2007 Agreement Concerning Non-Competition and Agreement Concerning Non-Solicitation, on which Plaintiff bases its breach of contract claim, are between Saia Restaurants and only some of the Defendants—namely, Theresa Orlando (non-competition) and Pasquale Orlando (non-solicitation). No agreements mentioned in the Plaintiff's breach of contract Count were entered into with Pat's, Sergio's Italian Ristorante, or Orlando Enterprises, Inc. (Orlando Enterprises).

Plainly, a defendant cannot breach a contract to which it is not a party. A plaintiff claiming breach of contract must prove that "(1) an agreement existed between the parties, (2) the defendant breached the agreement, and (3) the breach caused (4) damages to the plaintiff." Barkan v. Dunkin' Donuts, Inc., 627 F.3d 34, 39 (1st Cir. 2010) (citing Petrarca v. Fid. & Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005)). Here, within the four corners of the Complaint, Plaintiff only makes claims for breaches of the Agreement Concerning Non-Competition and the Agreement Concerning Non-Solicitation. Narragansett Elec., 21 A.3d at 277 (confining court's

[11] The Orlando's restaurant has not yet opened, and the Court is not aware when or if the restaurant will open.

[12] While there may also be an Agreement Concerning Non-Competition between Saia Restaurants and Pasquale Orlando, any such agreement is not before the Court at this time. See supra n. 5.

review to the four corners of the complaint in deciding a motion to dismiss); Compl. ¶¶ 22-27. There is no indication Pat's, Sergio's Italian Ristorante, or Orlando Enterprises were parties to either of those agreements. See Compl. Exs. D, E; Barkan, 627 F.3d at 39 (providing plaintiff must prove existence of agreement between parties). Accordingly, Count II is dismissed as against those Defendants—Pat's, Sergio's Italian Ristorante, and Orlando Enterprises—for failure to state a claim.

2

Agreement Concerning Non-Competition

Based on this Court's review of the pleading, it appears Saia Restaurants is alleging the Theresa Orlando violated the Agreement Concerning Non-Competition by using the recipes and menu items of Pat's Italian Restaurant in a restaurant in North Kingstown and by taking steps towards opening a restaurant in Cranston. With respect to the non-competition agreement, Defendants argue that it is limited to a time period of four years after the closing and a geographic area of fifteen miles from the Town of Johnston. Accordingly, Defendants argue the non-competition agreement does not apply to prohibit any of the actions listed in Plaintiff's claim for breach of contract.

Rhode Island recognizes the enforceability of non-competition agreements or restrictive covenants that are reasonable in scope. See, e.g., Cranston Print Works Co. v. Pothier, 848 A.2d 213, 219 (R.I. 2004); Durapin, Inc. v. Am. Prods., Inc., 559 A.2d 1051, 1053 (R.I. 1989). Nonetheless, "[i]t is well settled that covenants not to compete are disfavored and subject to strict judicial scrutiny." Cranston Print Works, 848 A.2d at 219 (citing Durapin, 559 A.2d at 1053); Nestle Food Co. v. Miller, 836 F. Supp. 69, 73 (D.R.I. 1993). The party seeking to enforce a non-competition agreement must demonstrate that it was made in connection with an otherwise

valid transaction and that it "is reasonable and does not extend beyond what is apparently necessary for the protection of those in whose favor it runs." Cranston Print Works, 848 A.2d at 219. "Rhode Island law requires that a party seeking to enforce a non-competition agreement demonstrate that 'there exists a legitimate interest that the provision is designed to protect.'" Astro-Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 17 (1st Cir. 2009) (quoting Durapin, 559 A.2d at 1053); see R.J. Carbone Co. v. Regan, 582 F. Supp. 2d 220, 224 (D.R.I. 2008) (discussing requirement for protection of legitimate interest).

The "crucial issue" in considering the enforceability of a non-competition agreement is its "reasonableness." Durapin, 559 A.2d at 1053; see Oakdale Mfg. Co. v. Garst, 18 R.I. 484, 489-90, 28 A. 973, 974-75 (1894) (setting forth "test of reasonableness"). Reasonableness of non-competition agreements "turns on: (1) whether the provision is narrowly tailored to protect the legitimate interests; (2) whether it is reasonably limited in activity, geographic area, and time; (3) whether the promisee's interests are not outweighed by the hardship to the promisor; and (4) whether the restriction is likely to injure the public." R.J. Carbone, 582 F. Supp. 2d at 225 (citing Nestle Food, 836 F. Supp. at 75). While covenants not to compete that lack both temporal and geographic limitations "are not unenforceable per se, courts should uphold them only to the extent they are necessary to protect the promisee's legitimate interests." Cranston Print Works, 848 A.2d at 220 (citing Oakdale Mfg., 18 R.I. at 489, 28 A. at 974).

In the end, the reasonableness "must be decided on the facts of the case within the framework of these limitations." Nestle Food, 836 F. Supp. at 75. However, reasonableness is "ultimately a question of law to be determined by the court." Durapin, 559 A.2d at 1053. Rhode Island courts may modify or "blue-pencil" non-competition agreements to make them reasonable

and enforceable. See R.J. Carbone, 582 F. Supp. 2d at 226; Cranston Print Works, 848 A.2d at 220; Durapin, 559 A.2d at 1058-59.

Here, the Agreement Concerning Non-Competition provides that "for a period of four (4) years after the Closing, [Theresa Orlando] shall not, within the Town of Johnston or within a fifteen (15) mile radius of the borders of the Town of Johnston," operate a full service Italian restaurant of the same seating capacity, menu items, and recipes as Pat's Italian Restaurant. (Compl. Ex. D at ¶ 1.) The non-competition clause of the Asset Purchase and Sale Agreement, while including that same language, also provides that the "covenant shall survive the Closing, any termination of this Agreement, and shall remain in effect in perpetuity." (Compl. Ex. A at ¶ 15.4.) Plaintiff—though citing the July 2007 non-competition agreement in his count for breach of contract—claimed at oral argument that this sentence in the Asset Purchase and Sale Agreement provides that Theresa Orlando is restricted from using the menu items and recipes for all perpetuity.

When a contract is ambiguous or may be construed in different ways, the court is to "adopt that construction which is most equitable and which will not give to one party an unconscionable advantage over the other." DiPaola v. DiPaola, 16 A.3d 571, 578 (R.I. 2011) (citations omitted). The foundational premise is that the contract should be interpreted in the manner in which it is most fair and reasonable. See Wall & Co. v. Imperial Printing & Finishing Co., 165 A. 898, 899 (R.I. 1933). Further, the contract should also be construed to be given effect whenever possible. See Massasoit Hous. Corp. v. Town of North Kingstown, 75 R.I. 211, 216, 65 A.2d 38, 40 (1949).

Construing the non-competition agreement as lasting without end would reach an absurd and unreasonable result, either lending Saia Restaurants an unfair advantage or rendering the

non-competition agreement unenforceable under Rhode Island law. This Court will avoid such an interpretation. See DiPaola, 16 A.3d at 578 (stating construction should not give one party unconscionable advantage); Massasoit Hous., 75 R.I. at 216, 65 A.2d at 40 (suggesting construction should not render contract unenforceable). Conveniently, construing the contract in its most reasonable manner would also allow it to pass muster of the reasonableness test for enforcing non-competition agreements. See Wall & Co., 165 A. at 899 (stating contract should be construed in most reasonable manner); Oakdale Mfg. Co., 18 R.I. at 489-90, 28 A. at 974-75 (1894) (providing reasonableness test).

In this case, the Court finds the Agreement Concerning Non-Competition is limited to four years after the closing and an area of fifteen miles from Johnston. Applying the agreement in this fashion (and thus interpreting the specific, July 2007 Agreement Concerning Non-Competition by its explicit terms) makes it reasonable and protects the legitimate interests the agreement was designed to cover. See Durapin, 559 A.2d at 1053 (strictly construing covenants not to compete and considering reasonableness); see also Cranston Print Works, 848 A.2d at 220 (providing court may modify agreement when necessary to make enforceable). A ban against Theresa Orlando from operating a similar restaurant or using similar recipes and menu items in all perpetuity would not be reasonable or serve to protect the legitimate interest connected to the one-time sale of the restaurant business. See R.J. Carbone, 582 F. Supp. 2d at 225 (setting forth factors for reasonableness of restrictive covenant). Furthermore, construing the non-competition agreement as restricting Theresa Orlando indefinitely would not be narrowly tailored and would not be reasonably limited. See id. (considering reasonableness factors including whether narrowly tailored and reasonably limited). Accordingly, this Court will interpret and apply the

Agreement Concerning Non-Competition as being appropriately limited, as provided in the first sentence of the agreement. (Compl. Ex. D.)

Even taking the contents of the Complaint as true and construing its facts and allegations in the light most favorable to the Plaintiff, it is clear it fails to state a claim for breach of the Agreement Concerning Non-Competition, as interpreted by this Court. The Complaint states that Sergio's Italian Ristorante was located in North Kingstown, Rhode Island. It is easily verifiable and a matter of common knowledge that North Kingstown is not "within a fifteen (15) mile radius of the borders of the Town of Johnston." See Compl. Ex. D at ¶ 1 (providing geographic limitation in non-competition agreement); see also R.I.R. Evid. 201 (providing for judicial notice of fact generally known or capable of accurate and ready determination at court's discretion at any stage of proceeding). Further, the Orlando's restaurant in Cranston has not yet opened, but the four-year period of time stated in the non-competition agreement lapsed in July 2011. See Compl. Ex. D at ¶ 1 (providing temporal limitation in non-competition agreement). It is apparent to the Court that the opening of Orlando's, if and when that were to occur, could not now violate the non-competition agreement. As such, neither the alleged use of recipes and menu items in North Kingstown nor the opening of a similar restaurant in Cranston could breach the contract under any set of facts. See Palazzo, 944 A.2d at 149-50 (providing motion to dismiss standard). Saia Restaurants' count for breach of contract is dismissed for failure to state a claim upon which relief can be granted.

3

Agreement Concerning Non-Solicitation

It appears Saia Restaurants is alleging that Pasquale Orlando violated the Agreement Concerning Non-Solicitation by soliciting unnamed customers and employees to leave their

business relationship with Saia Restaurants. In support of their Motion to Dismiss, Defendants argue primarily that any agreements between Pasquale Orlando and Saia Restaurants are void for want of consideration because Pasquale Orlando did not personally hold any ownership interest in Pat's.

Because non-competition clauses frequently include provisions not to solicit and because non-competition and non-solicitation agreements are relatable in purpose and effect, they are both restrictive covenants and analyzed as such. See Durapin, 559 A.2d at 1053-55 (analyzing covenant not to compete that included agreement not to solicit customers); see generally 54A Am. Jur. 2d Monopolies and Restraints of Trade §§ 848-971 (2009) (discussing restrictive covenants and covenants not to compete including those concerning solicitation of customers). A non-solicitation covenant is really an agreement not to compete in a certain manner. Accordingly, the reasonableness test discussed above is applicable to the Agreement Concerning Non-Solicitation. See supra part (III)(B)(2).

Defendants argue first, however, that the agreements between Saia Restaurants and Pasquale Orlando are void for want of consideration, and therefore, the breach of contract claims against Pasquale Orlando fail. "It is well established that a valid contract requires 'competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" DeAngelis v. DeAngelis, 923 A.2d 1274, 1279 (R.I. 2007) (quoting R.I. Five v. Med. Assocs. of Bristol Cnty., Inc., 668 A.2d 1250, 1253 (R.I. 1996)). Consideration is defined as "some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise." Id. (quoting Darcey v. Darcey, 29 R.I. 384, 388, 71 A. 595, 597 (1909)); see Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982) ("consideration consists either in some right, interest, or benefit accruing to one party or some

forbearance, detriment, or responsibility given, suffered, or undertaken by another"). To determine whether sufficient consideration passed, Rhode Island courts apply the bargained-for exchange test: "something is bargained for, and therefore constitutes consideration, 'if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.'" Id. (quoting Filippi v. Filippi, 818 A.2d 608, 624 (R.I. 2003)). However, it is a longstanding concept of law that "[t]he consideration for a promise need not move from the promisee. It is sufficient if given by a third party." Smith v. Pendleton, 53 R.I. 79, 163 A. 738, 740 (1933).

In the case at bar, the agreement with Pasquale Orlando states that he "is the husband of the sole shareholder of the Company, is actively involved in the business and operation of the Company's business, and derives an economic benefit from the Company." (Compl. Ex. E.) The agreement further provides that it was made for "good and valuable consideration the receipt and sufficiency of which is hereby acknowledged." (Compl. Ex. E.)

Judging from the facts alleged and the documents attached to the Complaint in the light most favorable to the Plaintiff, the Court is not prepared to rule there was insufficient consideration. Although not necessarily determinative of the fact, the agreement states that it was made for good and valuable consideration. (Compl. Ex. E.) Further, Pasquale Orlando's wife was the president and sole shareholder of Pat's, and the agreement provides that Pasquale Orlando was actively involved in the business. If Pasquale Orlando derived an economic benefit from the Company, he presumably derived—directly or indirectly—an economic benefit from the sale of the company, which was made possible by his execution of the Agreement Concerning Non-Solicitiation. See Compl. Ex. E; Smith, 163 A. at 740 (providing consideration may be sufficient even if indirect from third party). Considering only the pleading and attached

exhibits, and interpreting them in the light most favorable to the Plaintiff, it is not clear beyond a reasonable doubt that there was insufficient consideration. See Palazzo, 944 A.2d at 149-50 (requiring it be clear beyond reasonable doubt that plaintiff would not be entitled to relief under any set of facts); A.F. Lusi Constr., 934 A.2d at 795 (considering complaint in light most favorable to nonmoving party). Accordingly, the Court will not grant the motion to dismiss premised on insufficient consideration.

While the Court is mindful that particularity is not required in pleading a claim for breach of contract, the Court is also conscious of the vagueness of Saia Restaurants' claim for breach of the Agreement Concerning Non-Solicitation. Compare Super. R. Civ. P. 9(b) (requiring particularity for claims of fraud) with Hendrick, 755 A.2d at 791 (requiring plaintiff only to provide fair and adequate notice of the type of claim to survive motion to dismiss). With respect to a breach of the Agreement, the Count alleges that "Defendants have solicited or otherwise induced customers and employees to leave their business relationship with Plaintiff's Restaurant in favor of Defendants' Restaurant. In [sic] violation of the Non-Solicitation Agreements entered into between the parties on July 2, 2007."[13] (Compl. ¶ 24.) Noticeably absent from the Complaint is any fact or allegation describing which Defendant did the soliciting, whom the Defendant solicited, or how the Defendant solicited or induced employees and/or customers to

[13] Judging from the Complaint and its exhibits, the only non-solicitation agreement entered into on July 2, 2007 was between Pasquale Orlando and Saia Restaurants. See Compl. ¶¶ 11, 24, Ex. E. The Court is aware that the Asset Purchase and Sale Agreement included a non-solicitation clause; however, the breach of contract count of the Complaint does not allege breach of the Asset Purchase and Sale Agreement and, in fact, specifically alleges only breach of the non-solicitation agreement that was entered into on July 2, 2007. See Compl. ¶¶ 22-27. The Asset Purchase and Sale Agreement was entered into on March 1, 2007, but Pasquale Orlando's Agreement Concerning Non-Solicitation was entered into on July 2, 2007. See Compl. Exs. A, E. The Court concludes, therefore, that the Plaintiff's claim for breach of a non-solicitation agreement relates only to Pasquale Orlando's Agreement Concerning Non-Solicitation, attached to the Complaint as Exhibit E.

leave their business relationship with Saia Restaurants.[14] Further, there is no averment that any of the allegedly solicited customers were engaged in a business relationship with Saia Restaurants, as would be necessary to establish breach of the non-solicitation agreement. In this Court's opinion, the Plaintiff's allegations are extremely vague.

When presented with a Motion to Dismiss, a court has within its inherent power and discretion the ability to treat the motion as one for a more definite statement under Super. R. Civ. P. 12(e). R.I. Res. Recovery, 2011 WL 1936012, slip op. at 17 n.8; see Carter v. Newland, 441 F. Supp. 2d 208, 214 (D. Mass. 2006) ("When a complaint pleads a viable legal theory but is so unclear that the opposing party cannot respond to the complaint or frame an answer, a court has the option of converting, sua sponte, a motion made pursuant to [Rule 12(b)(6)] to a motion for a more definite statement under [Rule 12(e)]"); Guilbeault v. R.J. Reynolds Tobacco Co., No. Civ. A. 98-035L, 1998 WL 919117, at *1-3 (D.R.I. 1998) (treating motion to dismiss as motion for more definite statement when complaint is vague and ambiguous); 2 Moore's Federal Practice § 12.36 (Bender 3d ed.) (providing courts may order more definite statement sua sponte, particularly when facts not sufficiently connected to claims). Requiring a more definite statement is often preferable to dismissal under Rule 12(b). See 2 Moore's Federal Practice § 12.36 (Bender 3d ed.) (citing Barnett v. Bailey, 956 F.2d 1036, 1043-44 (11th Cir. 1992)); see also Carter, 441 F. Supp. 2d at 214 (describing more definite statement as the more suitable remedy).

Rule 12(e) provides, in pertinent part: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a

[14] Because of the Court's determinations herein, the Plaintiff's claim for breach of a non-solicitation agreement applies only to Defendant Pasquale Orlando. See supra note 13 (explaining that based on the pleading, only Pasquale Orlando entered into an Agreement Concerning Non-Solicitation on July 2, 2007).

responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." A more definite statement is appropriate either where the pleading does not contain allegations of each element of the claim but is not so materially deficient to be dismissed under Rule 12(b)(6), or where the pleading is overly complex, consisting of myriad claims, facts, or assertions. 2 Moore's Federal Practice § 12.36 (Bender 3d ed.); see Wagner v. First Horizon Pharm. Corp., 464 F.3d 1273, 1280 (11th Cir. 2006) (applying more definite statement when pleading does not clearly link the facts to the cause of action); Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll., 77 F.3d 364, 366-67 (11th Cir. 1996) (applying more definite statement to relieve court of "cumbersome task of sifting through myriad claims"). An example of a defect in a complaint that may properly require a more definite statement is references to "Defendants" when it is not clear to which Defendant or Defendants the Plaintiff is referring. See Guilbeault, 1998 WL 919117 at * 2 ("[Defendant] cannot be expected to respond to these allegations, when it is not clear to whom [Plaintiff] is referring"). A court may use Rule 12(e) to require the plaintiff to "specifically set forth the particular facts which establish his right to recovery . . . ." Sutton v. United States, 819 F.2d 1289, 1300 (5th Cir. 1987).

At this procedural stage, the Court is not prepared to determine that the non-solicitation agreement is an unreasonable and unenforceable restrictive covenant or to grant dismissal on that basis. Particularly, the Court notes that a non-solicitation agreement is more direct and limited in its restriction of rights and actions than a general non-competition clause, and thus the analysis of reasonableness may differ from the non-competition clause. See Nestle Food, 836 F. Supp. at 75 (stating reasonableness to be decided on facts of case considering the agreement in connection with the factors of reasonableness). The fact that the Agreement Concerning Non-Solicitation is

not limited in temporal or geographical scope does not necessarily preclude it from being reasonable and enforceable. See Cranston Print Works, 848 A.2d at 220.

However, while Count II as it relates to Pasquale Orlando's Agreement Concerning Non-Solicitation may not be so materially deficient as to warrant dismissal pursuant to Rule 12(b)(6), this Court is concerned with the vagueness of the facts and allegations and, accordingly, converts the Motion to Dismiss to a Motion for More Definite Statement and orders the Plaintiff to make a more definite statement. See Wagner, 464 F.3d at 1280 (ordering more definite pleading sua sponte instead of motion to dismiss when facts not connected to causes of action); Super. R. Civ. P. 12(e) (providing for more definite statement when pleading is "vague or ambiguous"). The pleading as it now stands does not reasonably permit the Defendants to frame a responsive pleading. See Super. R. Civ. P. 12(e); Carter, 441 F. Supp. 2d at 214 (enforcing sua sponte order for more definite statement when pleading unclear enough that other party would be unable to frame an answer). Saia Restaurants' Complaint does not even distinguish which Defendant solicited or induced customers or employees, and as such, Defendants cannot reasonably be expected to respond. See Compl. ¶ 24; Guilbeault, 1998 WL 919117 at * 2 (requiring more definite statement when, among other things, complaint simply states "Defendants"). Further, there are no facts tied to the allegations and no averment that any customers who were solicited were in a business relationship with Saia Restaurants. See Compl. ¶ 24; 2 Moore's Federal Practice § 12.36 (Bender 3d ed.) (suggesting use of more definite statement when facts are not tied to the cause of action or when an element of the cause of action is missing from pleading).

Plaintiff shall provide a more definite statement, setting forth the Defendant alleged to have breached the Agreement Concerning Non-Solicitation entered into on July 2, 2007, providing some facts regarding the solicitation of customers and/or employees, and stating the

business relationship between Saia Restaurants and the customers who were allegedly solicited. See Sutton, 819 F.2d at 1300 (ruling court may use more definite statement to require plaintiff to set forth facts establishing its right to recovery); R.I. Res. Recovery, 2011 WL 1936012, slip op. at 17 n.8. Accordingly, the Court converts the Motion to Dismiss Count II as to Pasquale Orlando's Agreement Concerning Non-Solicitation to a Motion for More Definite Statement and orders Saia Restaurants to make a more definite statement, pursuant to Rule 12(e), within ten (10) days of the Order entering. As discussed above, the Court grants the Motion to Dismiss Count II as to all other Defendants.

C

Fraud in the Inducement (Count III)

Count III of Saia Restaurants' Complaint alleges fraud in the inducement of the sale of the restaurant business. Plaintiff broadly claims that Defendants fraudulently induced Plaintiff to purchase the business by representing that they were retiring from the restaurant business and would not open any restaurant other than a pizzeria in southern Rhode Island. (Compl. ¶¶ 28-36.) Defendants argue, however, that Count III fails to comply with Super. R. Civ. P. 9(b), which applies to pleadings alleging fraud.

The Rhode Island Superior Court Rules of Civil Procedure provide that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Super. R. Civ. P. 9(b). The purpose of the rule is to give "fair and specific notice of the alleged fraud." Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 161 (R.I. 2001). Thus, this Court has required that where the allegations in the complaint sound in fraud, the plaintiff is held to the heightened pleading standard of particularity. See R.I. Res. Recovery Corp. v. Brien, No. PB 10-5194, 2011 WL 1936012, slip op. at 11 (R.I. Super. May

13, 2011) (Silverstein, J.). That standard of particularity has been interpreted as requiring specification of the time, place, and content of the allegedly false representations. See id. at 11-12; Feinstein v. Resolution Trust Corp., 942 F.2d 34, 42-43 (1st Cir. 1991) (stating not enough for plaintiff to file claim, "chant the statutory mantra, and leave the identification of predicate acts to the time of trial"); Powers v. Boston Cooper Corp., 926 F.2d 109, 111 (1st Cir. 1991) (explaining "rule entails specifying in the pleader's complaint the time, place, and content of the alleged false or fraudulent representations"). This level of particularity demands more than "allegations based on 'information and belief,'" and is necessary "even when the fraud relates to matters peculiarly within the knowledge of the opposing party." Wayne Inv., Inc. v. Gulf Oil Corp., 739 F.2d 11, 13-14 (1st Cir. 1984).

In this case, Saia Restaurants' count for fraudulent inducement alleges that Defendants represented to Saia Restaurants that they were retiring from the restaurant business and would refrain from opening any restaurant other than a pizzeria, which would not be of similar seating capacity to Pat's Italian Restaurant. (Compl. ¶ 29.) The Complaint states that the representation was then and is now false, the representation was made with the intention of inducing Saia Restaurants to purchase the business at an excessive price, and the representation was relied upon by Saia Restaurants in purchasing the restaurant business, with damages resulting. (Compl. ¶¶ 29-36.) However, the Complaint states only that the representation was made prior to July 1, 2007 and in the Town of Johnston. (Compl. ¶ 29.)

Examining the time, place, and content alleged in the Complaint, the Court is not satisfied that Plaintiff complied with the heightened pleading standard required under Super. R. Civ. P. 9(b). Plaintiff's time statement of "[p]rior to the closing date" and place statement of "in the Town of Johnston" are by no means particular. See Compl. ¶ 29; Super. R. Civ. P. 9(b).

Saia Restaurants fails to identify any specific statements with the particularity of when and where they were made. See Powers, 926 F.2d at 111 (requiring specific pleading of time, place, and content of representations). The Defendants do not have "fair and specific notice of the alleged fraud," and, in fact, do not even know which Defendants are alleged to have committed it. See Women's Dev. Corp., 764 A.2d at 161. Saia Restaurants fails to meet the heightened standard of pleading counts sounding in fraud with particularity; therefore, the Court hereby dismisses Count III. See R.I. Res. Recovery, 2011 WL 1936012, slip op. at 11.

IV

Conclusion

After due consideration, the Court grants Defendants' Motion to Dismiss Counts I and III in full. The Court grants Defendants' Motion to Dismiss Count II as to Theresa Orlando, Pat's, Sergio's Italian Ristorante, and Orlando Enterprises. The Court sua sponte converts the Motion to Dismiss Count II as to Pasquale Orlando to a Motion for More Definite Statement, and orders the Plaintiff to provide a more definite statement of its breach of contract claim against Pasquale Orlando as herein set forth. Following the filing of such more definite statement, Defendant Pasquale Orlando shall answer or otherwise respond. Defendants' counsel shall present an Order consistent herewith which shall be settled after due notice to counsel of record.