IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN P. KESHOCK, MAUREEN C. KESHOCK, and FEATHERSTONE PROPERTIES, LTD,	:	CIVIL ACTION
	:	04-758
Plaintiffs,	:	
v.	:	
CAROUSEL SYSTEMS, INC. and GODDARD SYSTEMS, INC.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

JOYNER, J. **May 17, 2005**

This breach of contract action arises from a franchise agreement between Plaintiffs John P. and Maureen C. Keshock, and Defendant Carousel Systems, Inc. ("Carousel"), which owns a franchise system of pre-school and early childhood learning centers known as Goddard Schools. On August 19, 2000, Plaintiffs entered into a contract (the "Franchise Agreement") to operate a Goddard School franchise in Avon, Ohio (the "Avon School"). In their Complaint, Plaintiffs contend that Defendant Carousel breached its contractual obligations to assist Plaintiffs with site selection, construction, advertising, and training. Plaintiffs further contend that Defendant Carousel and its successor in interest, Goddard Systems, Inc. ("Goddard"), failed to enforce the franchise agreement of a competing local Goddard School, the Westlake School. Plaintiffs allege that they

incurred substantial operational losses as a direct result of these breaches and were unable to recruit a sufficient number of students to make the school profitable. As of the date of this Order, however, the Avon School has become profitable, its full time enrollment has exceeded 100%, and Plaintiffs admit to being satisfied with the school's current situation. Via the instant motion, Defendants move for summary judgment. For the reasons that follow, Defendants' motion for summary judgment must be granted in part and denied in part.

Summary Judgment Standard

The purpose of summary judgment under Federal Rule of Civil Procedure 56(c) is to avoid a trial in situations where it is unnecessary and would only cause delay and expense. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3rd Cir. 1976). A court may properly grant a motion for summary judgment only where all of the evidence before it demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A genuine issue of material fact is found to exist where "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the moving party bears the

initial burden of identifying portions of the record demonstrating the absence of issues of material fact. Celotex, 477 U.S. at 323. The party opposing the motion may not rest upon the bare allegations of the pleadings, but must set forth "specific facts" showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. However, all facts must be viewed and all reasonable inferences must be drawn in favor of the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Contract Interpretation

The documents at issue in the instant breach of contract action include a Franchise Agreement dated August 14, 2000, a Preliminary Agreement dated September 2, 1998, a Disclosure Acknowledgment Statement dated August 21, 1998, and a Uniform Franchise Offering Circular (UFOC) dated April 1, 1998. The parties agree that the Franchise and Preliminary Agreements, the primary documents at issue, must be interpreted pursuant to the laws of Pennsylvania.

Pennsylvania law binds contracting parties by the most objective manifestation of their intent: the written words of the contract. Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d. 1001, 1009 (3rd Cir. 1979). Only where a contract's terms are ambiguous will a court look to extrinsic evidence for

guidance in determining the parties' intent. Glenn Distribs. Corp. v. Carlisle Plastics, Inc., 297 F.3d 294, 300 (3rd Cir. 2002).

1. Ambiguous Contractual Terms

Ambiguity arises where a contractual term is "fairly susceptible of different constructions," "obscure in meaning through indefiniteness of expression," or has a double meaning. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3rd Cir. 1995). A contract is not, however, rendered ambiguous by the mere fact that the parties do not agree on the proper construction. Duquesne Light Co., 66 F.3d at 614.

Plaintiffs in this action have taken the position that various sections of the Franchise Agreement which impose duties on Carousel to provide assistance "as [Carousel] deems appropriate" are ambiguous because they do not describe the means by which such assistance is to be provided. Citing RESPA of Pa., Inc. v. Skillman, 768 A.2d 335 (Pa. Super. Ct. 2001), Plaintiffs contend that a franchise agreement is susceptible to multiple reasonable interpretations where it fails to "enumerate a specific or exclusive list" of how a party may satisfy or violate his obligations. In RESPA, the Pennsylvania Superior Court found that there was ambiguity in an agreement which prohibited terminated franchisees from "holding [themselves] out to the public" as franchise members, because it was unclear whether

advertising use of a telephone number qualified as a prohibited misrepresentation. RESPA, 768 A.2d at 340-41.

In this action, however, there is only one reasonable interpretation of Carousel's obligation to provide advisory assistance to the Avon School. The Franchise Agreement's use of the discretionary phrase "as it deems appropriate" unambiguously grants Carousel discretionary authority to define the terms of its assistance. Indeed, upon reviewing a similar contract, which placed key decisions "within the sole discretion of" the franchisor, the Third Circuit noted, "It is difficult (if not impossible) to read Article 4.3 as anything other than a provision making the relocation decision a matter for [the franchisor's] own discretion." GMC v. New A.C. Chevrolet, Inc., 263 F.3d 296, 334-35 (3rd Cir. 2001); see also Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1290-91 (11th Cir. 2001) (finding no ambiguity where franchise agreement reserved franchisor's right to use its "best judgment" in choosing dealership locations). As there is no ambiguity in the Franchise Agreement's requirement that Carousel provide advisory assistance "as it deems appropriate," this Court need not look beyond the four corners of the contract to determine the parties' intent.

2. Implied Covenant of Good Faith Dealing

This Court must also reject Plaintiffs' suggestion that an implied covenant of good faith should be read into the Franchise

Agreement. In Pennsylvania, the duty of good faith and fair dealing set forth in § 205 of the Restatement of Contracts (Second) has been recognized only in limited situations. Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153-54 (Pa. Super. Ct. 1989). In the franchise context, the duty of good faith dealing has been imposed upon franchisors seeking to terminate agreements with franchisees. Coxfam, Inc. v. Aamco Transmissions, No. 88-6105, 1990 U.S. Dist. LEXIS 11838 at 18 (E.D. Pa. 1990) (citing Atlantic Richfield Co. v. Razumic, 390 A.2d 736 (Pa. 1978); Loos & Dilworth v. Quaker State Oil Refining Corp., 500 A.2d 1155 (Pa. Super. Ct. 1985)). To date, however, Pennsylvania courts have never extended the franchisor's good faith duty beyond the context of termination. See Witmer v. Exxon Corp., 434 A.2d 1222, 1227 (Pa. 1981) (the duty of good faith dealing is "applicable only in the context of an attempt on the part of the franchisor to terminate its relationship with the franchisee" (emphasis in original)). This Court has consistently predicted that Pennsylvania's duty of good faith in the franchise context will continue to be limited to cases of termination. See AAMCO Transmissions, Inc. v. Marino, 1991 U.S. Dist. LEXIS 18380 at 6-10 (E.D. Pa. 1991); Coxfam, Inc., 1990 U.S. Dist. LEXIS 11838 at 18-19; Valencia v. Aloette Cosmetics, No. 94-2076, 1995 U.S. Dist. LEXIS 3021 at 7-9 (E.D. Pa. 1995); Tilli v. Aamco Transmissions, Inc., No. 91-1058, 1992

U.S. Dist. LEXIS 2298 at 8 (E.D. Pa. 1992).[1] We agree. Absent some indication from the Pennsylvania Supreme Court that the duty of good faith dealing should be imposed on franchisors in their pre-termination dealings with franchisees, this Court cannot find that such a duty exists.[2]

Discussion

Upon analyzing the terms of the Franchise Agreement, this Court finds that Plaintiffs have raised genuine issues of

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[1] In one early case addressing this issue, Judge Pollack found it "unlikely" that Pennsylvania courts would limit the implied duty of good faith to situations of franchise terminations. AAMCO Transmissions, Inc. v. Harris, 759 F. Supp. 1141, 1148 (E.D. Pa. 1991). However, later opinions from this Court have rightly questioned AAMCO v. Harris' use of precedent. For example, AAMCO v. Harris' reliance on Creeger may have been misplaced, as Creeger did not involve a franchise relationship. See AAMCO Transmissions, Inc. v. Marino, 1991 U.S. Dist. LEXIS 18380 at 7-8. Furthermore, the decision in AAMCO v. Harris made no mention of Witmer, 434 A.2d 1222, in which the Pennsylvania Supreme Court found that good faith standards are applicable only in the context of franchise termination. See Valencia, 1995 U.S. Dist. LEXIS 3021 at 6-10.

[2] Plaintiffs further suggest that this court should apply the closely related doctrine of necessary implication to imply an agreement between the parties to "do and perform those things that according to reason they should do" in order to carry out the purpose of a contract. Frickert v. Deiter Bros. Fuel Co., 347 A.2d 701, 705 (Pa. 1975). However, this doctrine only applies "in the absence of an express provision" regarding a particular obligation, which is not the case here. Frickert, 347 A.2d 705. Furthermore, Plaintiffs have cited no authority to suggest that the doctrine of necessary implication can be used to impose specific obligations on a franchisor with vested discretion.

material fact as to whether Defendants satisfied their responsibility to provide advisory assistance in construction, opening, and development, and whether Defendants breached their duty to provide Plaintiffs with a complete Confidential Operating Manual. As a matter of law, however, Plaintiffs' remaining claims must fail. Faced with the evidence presently before this Court, no reasonable juror could find that Defendants breached their obligations with respect to site selection and approval, construction specifications, advertising, training, or contract enforcement.

1. Site Selection and Approval

Upon their initial application for a Goddard School franchise in 1998, John and Maureen Keshock entered into a Preliminary Agreement with Carousel which outlined the parties' responsibilities with respect to, among other things, site selection and acquisition. Pursuant to the terms of the Preliminary Agreement, the Keshocks were required to use their best efforts to select a proposed Goddard School location within the Cleveland-Lorain-Elyria area. Carousel, in turn, was obligated to "expend such time and effort and to incur such expense as may reasonably be required to inspect" the proposed sites, and to assist in negotiating the lease or purchase of an approved location. Preliminary Agreement, ¶ 2. The Preliminary Agreement included the following language about Carousel's

obligations with respect to site approval:

> Carousel shall not unreasonably withhold approval of a site that meets its standards for general location and neighborhood, traffic patterns, size, layout and other physical characteristics, rental, lease terms including duration, and general conditions for use as The Goddard School. Carousel's approval of a site shall not constitute a judgment as to the likelihood of success of The Goddard School at such location or a judgment as to the relative desirability of such location in comparison to other locations within the Designated Area. Applicant understands that Carousel may accept other applications or enter into other Franchise Agreements for The Goddard Schools within the Designated Area.
>
> Preliminary Agreement, ¶ 1

The UFOC incorporated similar language, providing that Carousel would "undertake to assist" the prospective franchisee in identifying potential locations meeting Carousel's "general standards, traffic patterns, size, layout and other physical characteristics, rental and lease terms." UFOC, p. 6.

Plaintiffs now contend that Carousel breached its obligations by approving the Avon School site in spite of what Plaintiffs consider to be a less than optimal surrounding traffic pattern. The undisputed evidence before this Court indicates that it was snowing heavily the first time Robert Skibjak, the Carousel real estate representative, saw the Avon School site, which made it difficult for him to evaluate traffic and visibility. The site was ultimately approved by Carousel after Skibjak saw it a second time and found it suitable. Plaintiffs

contend that there is a disputed issue of fact as to whether the site was initially rejected after Skibjak's first visit, but have offered no evidence to support this contention. Plaintiff John Keshock's testimony, even viewed in its most favorable light, indicates only that he was led to believe from the "general tenor" of his conversation with Skibjak that the site would not be approved, but that Skibjak "would check on it." John Keshock Deposition, p. 107-08. However, there is no evidence before this Court suggesting that Carousel actually rejected the site between Skibjak's first and second visits, let alone on the basis of inadequate visibility or traffic flow.

The Preliminary Agreement and UFOC both indicated that Carousel would grant approval to sites meeting Carousel's own standards, of which traffic flow is one. Skibjak testified that the he found the traffic pattern at the Avon School site to be suitable because "obviously we have Interstate 90 being right near there." Skibjak Deposition, p. 18. Philip Schumacher, the current president of Goddard, testified that while Carousel representatives look for "significant traffic, business traffic, fairly heavy flow," Carousel imposes no particular standard with respect to the number of passing cars per day. Schumacher Deposition, p. 47; Skibjak Declaration, ¶ 8. Beyond their pleadings, however, Plaintiffs have provided no evidence to suggest that the Avon School site in fact failed to meet

Carousel's standards for traffic flow or visibility.

While it is possible that another site, such as the one selected by the competing Westlake School, may have provided greater traffic flow, the Preliminary Agreement expressly established that Carousel's approval did not constitute a judgment as to any site's "relative desirability." Preliminary Agreement, ¶ 1. Indeed, given that the Preliminary Agreement was drafted to protect potential franchisees from Carousel's unreasonable rejection of acceptable sites, Plaintiffs' contention that Carousel was somehow obligated to withhold approval from an acceptable but less than optimal site defies logic.

Finally, this Court recognizes that the Avon School is now profitable and operating at over 100% capacity. In fact, Plaintiffs themselves admit that they are no longer dissatisfied with the school's location. John Keshock Deposition, p. 132. Even if the traffic flow and visibility at the Avon School site may be sub-optimal as compared to the sites of competing schools, the present situation directly contradicts Plaintiffs' contention that "[t]he inadequate traffic pattern has directly resulted in the Keshocks' inability to recruit a sufficient number of students to make the school profitable." Complaint, ¶ 11. In sum, Plaintiffs have failed to set forth any specific facts demonstrating that there is a genuine issue for trial with

respect to Carousel's obligations of site selection and approval.

2. Continuing Advisory Assistance

Paragraph 3A of the Franchise Agreement entered into by the Keshocks and Carousel imposes a duty on Carousel to "provide such initial and continuing advisory assistance in the operation of the school as [Carousel] deems appropriate." Plaintiffs now contend that Carousel breached its obligation to provide ongoing advisory assistance with respect to the construction, opening, and operation of the Avon School, and that any assistance actually provided was too limited to ensure the school's profitability. The discretionary language of the Franchise Agreement, however, clearly establishes that the adequacy of Carousel's efforts must be judged by Carousel's own standards, rather than by Plaintiffs' subjective preferences or unjustified expectations. See Ernie Haire Ford, Inc., 260 F.3d at 1290-91 (where contract obligated franchisor to use its "best judgment," neither franchisee's judgment nor court's judgment were controlling); America's Favorite Chicken Co. v. Cajun Enter., Inc., 130 F.3d 180, 181-2 (5th Cir. 1997) (affirming dismissal of breach of contract claim where franchise agreement vested complete discretion in franchisor to provide assistance in operations). Thus, unless Plaintiffs can set forth specific facts demonstrating that the assistance provided to them fell short of Carousel's own standards, Defendants' motion for summary

judgment must be granted.

This Court finds that Plaintiffs have identified sufficient evidence of Carousel's customary standards to withstand summary judgment on the issue of continuing advisory assistance.[3] Plaintiffs have enumerated specific facts within the record which suggest that the support provided to the Avon School fell below Carousel's standards for comprehensive assistance in construction, opening, and operations.

A. Construction

Plaintiffs' complaints with respect to construction assistance appear to be two-fold. First, Plaintiffs fault Carousel for failing to provide on-site supervision of the construction site and generally failing to respond to Plaintiffs' requests for assistance. Second, Plaintiffs fault Carousel for failing to provide the final specifications for the Avon School building in a timely fashion, and taking no steps to prevent Plaintiffs' builder from beginning construction on the basis of preliminary plans.

While the Franchise Agreement itself imposes no duty on

[3] This Court recognizes that Carousel's customary procedures in dealing with other Goddard Schools by no means establish that Carousel deemed a similar level of assistance to be "appropriate" with respect to the Avon School. However, in producing evidence that the assistance requested by Plaintiffs was typically made available to other franchisees, Plaintiffs have raised issues of fact that may be relevant to the instant motion.

Carousel to provide construction supervision, there is a genuine issue of fact as to whether Carousel deemed such supervision appropriate for the Avon School. Plaintiff's builder, Steve Schaefer, testified that he was informed by Robert Skibjak, Carousel's real estate representative, that Schaefer "would be seeing someone visually on-site on a regular basis, like every two weeks." Schaefer Deposition, p. 89. While Carousel assigned Steve Henderson to serve as the liaison for the school's construction process, it appears that he visited the site only once, and the extent of his contacts with Schaefer is unclear. Based on this evidence, a reasonable juror could find that Carousel deemed on-site construction supervision to be appropriate but failed to provide such supervision to the Avon School.

Carousel was also obligated under the terms of the Franchise Agreement to provide Plaintiffs "with a set of specifications as to the types and quantities of supplies and equipment necessary for operation of the School." Franchise Agreement, ¶ 3D. Plaintiffs contend that the preliminary construction plans provided by Carousel were missing specifications for several pieces of "equipment," including a sprinkler system, waste lines, and a playground fence.[4] While Plaintiffs admit that Carousel

[4] It is unclear whether these items qualify as "equipment" under the terms of the Franchise Agreement. However, for the purposes of this summary judgment motion, this Court will

ultimately provided final specifications for these elements, they fault Carousel for doing so only after construction had already begun on the Avon School site.

The evidence before this Court indicates that revision of the construction plans was ongoing between December 1999 and July 2000. Correspondence from Carousel clearly identified preliminary plans as such, and specified, "This is not a final plan and should not be used for permitting or construction. Final Plans will be stamped as such. If these plans are used for construction purposes you will be responsible for any costs incurred." See Lubbs Correspondence, March 23, 2000; July 7, 2000. Schaefer does not recall having received the March 23 letter, and denies having any conversation with Carousel regarding responsibility for the use of preliminary plans. Schaefer Deposition, p. 72, 74. However, Schaefer admits to discussing the July 7 letter, which contained identical cautionary language, with Fran Lubbs, Carousel's operations representative. Id., p. 80. He also admits to beginning construction on the basis of preliminary plans before being notified by a letter dated July 20, 2000 indicating Carousel's approval of the final plans. Id., p. 72, 80. Schaefer testified that he "thought we had been approved and done and on our way," but admits that he may have "skipped a beat in there or

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interpret "equipment" in the light most favorable to Plaintiffs.

whatever." Id., p. 91. Even viewing this testimony in the light most favorable to Plaintiff, there is no evidence to suggest that Carousel breached its obligation to provide satisfactory final specifications. At best, Plaintiffs have raised factual issues about whether ongoing supervision of the construction site by Carousel would have prevented Plaintiffs' builder from going forward with unapproved plans.

Thus, Defendants' motion for summary judgment must be granted with respect to Plaintiffs' claim that Carousel breached its obligation to provide specifications for equipment including sprinklers, fences, and waste lines. However, Defendants' motion must be denied as to the issue of whether the construction assistance actually provided to the Avon School fell short of the level of advisory assistance deemed appropriate by Carousel.

B. Opening

According to the testimony of Carousel representatives, the role of the "opener" (the Carousel employee assigned to assist franchisees with a school's opening) is multifaceted. Given that franchise owners rarely have previous experience in operating early childhood learning centers, "[t]he opener is the one that babysits the franchise owner when they open the school." Martino Deposition, p. 23. The opener's responsibilities include providing assistance with hiring teachers and directors, marketing and advertising, licensing, training, enrollment, and

operations. Id., p. 23; Schumacher Deposition, p. 25; LaValle Deposition at 44.

Plaintiffs contend that their opener, Ron Carbello, did not visit the Avon School often enough, provided inadequate assistance in advertising for and hiring teachers, failed to review the opening day touring procedure, and generally provided the Avon School with lesser assistance than was provided to the competing Westlake School. Plaintiffs have also attacked Carbello's character on various grounds. At deposition, however, Plaintiff John Keshock admitted that Carbello provided significant assistance at opening and pre-opening in terms of physical set-up, establishing procedures, training, advertising, purchasing, enrollment, and billing. Given the breadth of responsibility assigned to the openers, the question of whether Carbello actually provided all the advisory assistance that Carousel deemed appropriate for the Avon School is a factual one inappropriate for resolution at the summary judgment stage.

C. Ongoing Advisory Assistance

During approximately the same time frame that the Avon School was opening and beginning operations, Carousel developed the position of Center Development Manager. The Center Development Manager was intended to take over where the opener leaves off, providing ongoing support to new franchises until they reach 85 percent occupancy and 15 percent profitability.

Kline Deposition, p. 47. According to Carousel representatives, support is provided primarily by telephone, although on-site visits are occasionally made as well, depending on the school's progress. Id., p. 49; LaValle Deposition, p. 35-36.

Plaintiffs contend that they received no assistance from Carousel for three months after their opener departed, and that the assistance ultimately provided by their Center Development Manager, Al LaValle, and his successor, Janet Lennon, was inadequate compared to the assistance provided to the competing Westlake School. The evidence before this Court demonstrates genuine factual issues with respect to the timing and extent of LaValle's contacts with Plaintiffs. Thus, this Court is unable to determine as a matter of law whether the involvement of Center Development Manager satisfied the standards deemed by Carousel to be appropriate with respect to the Avon School.

3. Advertising

Pursuant to ¶ 3B of the Franchise Agreement, Carousel is obligated to "provide for the opening promotion and initial advertising of the School." Paragraph 5 of the Franchise Agreement outlines this obligation in greater detail, and imposes a duty on Carousel to place Yellow Page advertising in the franchisee's local market. Plaintiffs allege that Carousel did not advertise the Avon School in the local Lorain County Yellow Pages until 2003, and instead spent Plaintiffs' advertising funds

in the Cleveland area directory. While Plaintiffs have provided no evidence beyond the testimony of John Keshock to support this allegation, Defendants have introduced advertising records indicating payments to the Lorain County Yellow Pages in November 2000 (for the 2001 book) and November 2001 (for the 2002 book) on behalf of the Avon School. Defendants have also presented page 299 of the 2001 Lorain County Yellow Pages, featuring an advertisement for the Avon School. Thus, Plaintiffs' claim must fail as a matter of law.

4. Training and Manuals

Carousel is obligated under the Franchise Agreement to provide an initial training program for the franchisee, and to "make available such other training programs as it deems appropriate." Franchise Agreement, ¶ 3A. Plaintiffs contend that the September 2000 supplementary training received by Kathy Keshock, the Avon School director, was inadequate. Kathy Keshock testified that she remembers "being very dissatisfied with the amount of training that we got." Kathy Keshock Deposition, p. 74. Her only specific objections to the training itself were that the training leader "was gone sometimes 30 minutes at a time," and that the class did not have an opportunity to "role play responses to parent complaints" as they were promised. Id., p. 74-75. Given the discretionary language of the Franchise Agreement, Plaintiffs' complaints regarding Kathy Keshock's

training are insufficient to raise a genuine issue of material fact as to whether Carousel breached its duty to provide training as it deemed appropriate.

Franchisees are required under the terms of the Franchise Agreement to operate the school in accordance with the Confidential Operating Manual provided to them by Carousel, and any revisions thereto. Franchise Agreement, ¶ 3E, 8. Plaintiffs contend that the manuals and forms provided to Kathy Keshock at her training were outdated or incomplete. Kathy Keshock testified that Carousel replaced "maybe half" of the missing and outdated forms after a matter of months, and John Keshock testified that these missing elements put the Avon School "at a disadvantage." Kathy Keshock Deposition, p. 75, 77; John Keshock Deposition, p. 27, 51. As Plaintiffs have raised a genuine issue of material fact as to whether Carousel satisfied its obligation to provide a complete Confidential Operating Manual, Defendants' motion for summary judgment on this issue must be denied.

5. Enforcement of Franchise Agreements

The Goddard School Franchise Agreement expressly prohibits franchisees from directly or indirectly attempting to divert business from their franchise to a competitor, and from seeking to employ the employees of Carousel or other Goddard School franchises. Franchise Agreement, ¶ 16B. Plaintiffs have raised allegations that the competing Westlake School "induced" students

and at least one teacher away from the Avon School, and fault Defendants for failing to enforce Westlake's Franchise Agreement on Plaintiffs' behalf.

Plaintiffs, as competing third-party franchisees, have no right to demand enforcement of Westlake's Franchise Agreement. Generally, third-party beneficiary rights accrue under a contract "only where both parties to the contract express an intention to benefit the third party in the contract itself." Scarpitti v. Weborg, 609 A.2d 147, 150 (Pa. 1992). An exception exists where the circumstances clearly demonstrate that recognition of the third party's right is necessary to effectuate the intention of the contracting parties, and the promisee intends to benefit the third party. Scarpitti, 609 A.2d at 150-51. The Franchise Agreement between Carousel and the proprietors of the Westlake School, however, does not express an intention to benefit the Avon School. On the contrary, the Franchise Agreement expressly prohibits third party enforcement in ¶ 22C, which reads, "nothing in this Agreement is intended, nor shall be deemed, to confer upon any person or legal entity other than Carousel or Franchisee ... any rights or remedies under or by reason of the Agreement." Furthermore, the Franchise Agreements are nonexclusive and expressly provide for competition between franchisees within a designated area. Franchise Agreement, ¶ 1C. This Court does not find that these circumstances are so compelling that recognition

of Plaintiffs’ right of enforcement is appropriate or necessary as a matter of law to effectuate the intentions of Carousel and the Westlake School.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN P. KESHOCK, MAUREEN C. KESHOCK, and FEATHERSTONE PROPERTIES, LTD,	:	CIVIL ACTION
	:	04-758
Plaintiffs,	:	
v.	:	
CAROUSEL SYSTEMS, INC. and GODDARD SYSTEMS, INC.,	:	
Defendants.	:	

ORDER

AND NOW, this 17th day of May, 2005, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 23) and all responses thereto (Docs. No. 26, 27), it is hereby ORDERED that Defendants' Motion is GRANTED in part and DENIED in part, as follows:

(1) Defendants' Motion is GRANTED with respect to Plaintiffs' allegations regarding site selection, construction specifications, advertising, training, and contract enforcement;

(2) Defendants' Motion is DENIED with respect to Plaintiffs' allegations regarding advisory assistance in construction, opening and development, and provision of a complete operating manual.

BY THE COURT:

s/J. Curtis Joyner

J. CURTIS JOYNER, J.