UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 20-20766-CIV-COOKE/GOODMAN

DELIVERY.COM
FRANCHISING, LLC,

Plaintiff,

v.

PATRICK MOORE,

Defendant.
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REPORT AND RECOMMENDATIONS FOR DENIAL OF
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

This ruling concerns Plaintiff Delivery.com Franchising, LLC d/b/a Delivery.com's ("Delivery.com") Expedited Motion for Preliminary Injunction [ECF No. 5] (the "Motion"), which United States District Judge Marcia G. Cooke referred to the Undersigned [ECF No. 10]. The Undersigned has reviewed the Motion, Defendant Patrick Moore's response [ECF No. 21] (the "Opp."), and Delivery.com's reply [ECF No. 25], as well as the submissions that accompanied those documents. The Undersigned also held an evidentiary hearing through Zoom on May 20, 2020 (the "Hearing").

For the reasons outlined below, the Undersigned **respectfully recommends** that the District Court **deny** Delivery.com's Motion.

I. General Overview

In December 2018, Defendant Moore, on behalf of Pooler Takeout LLC ("Pooler Takeout"), a food delivery business in Pooler, Georgia, entered into an agreement with Mr. Delivery, a food delivery franchise business, to operate Pooler Takeout as a Mr. Delivery franchise. In late July 2019, Delivery.com acquired the assets of Mr. Delivery, including Moore's franchise agreement.

Before Delivery.com's acquisition of Mr. Delivery, Pooler Takeout did not join Mr. Delivery's platform. Pooler Takeout was scheduled to launch on Delivery.com's platform on February 12, 2020. That never happened. Instead, on February 4th, the day before Moore was scheduled to meet with Delivery.com's operations team to finalize the onboarding, Moore's counsel wrote to Delivery.com (1) canceling the meeting, (2) claiming the franchise agreement was not legally binding, (3) alleging that Mr. Delivery breached the agreement by failing to take any action in furtherance of the agreement for fourteen (14) months, and (4) stating that Moore considered the agreement to be "null and void." [ECF No. 43, Ex. 10].

In response, Delivery.com initiated this litigation and asserted claims for (1) breach of the franchise agreement, (2) injunctive relief, (3) unjust enrichment in the alternative to breach of contract, and (4) promissory estoppel. [ECF No. 1]. At the same time, Delivery.com moved for a preliminary injunction.

Before the termination letter was sent, however, Delivery.com had not procured any national brand restaurants onto Moore's roster; had not procured any customers or merchants in Pooler, Georgia; had not arranged any restaurant relationships for Moore's food delivery business; had no restaurant relationships of its own in Pooler; had not communicated with any restaurants in Pooler; and had not created its own Pooler restaurant list or customer list.

Similarly, Delivery.com had not developed any customer goodwill or reputation with customers or restaurants in Pooler, never provided drivers to Moore's business, and did not employ its own drivers in Pooler. And it had never made or arranged for any food deliveries in Pooler.

By way of additional background, Delivery.com has not used its trade name or trademarks in Pooler, has not used its brand name on any advertising, packaging, delivery vehicles, or other marketing in Pooler, and knows of no instance where Moore or his food delivery business used Delivery.com's trademarks or tried to take advantage of its goodwill in Pooler.

II. Background

A. The Parties

Plaintiff Delivery.com is a Delaware limited liability company with its principal place of business in Austin, Texas. [ECF No. 5-1, ¶ 5 (Declaration of Jed Kleckner ("Kleckner Decl."))]. Delivery.com's business includes, among other things, operating an

e-commerce technology marketplace that enables customers to order food from local restaurants using the website www.delivery.com and a related app. *Id.*; [ECF No. 52, 18:16-21 (Hearing Transcript ("Tr."))]. Delivery.com also provides customer support and logistics software to its franchisees. *Id.* at 20:9-18. Delivery.com and its franchisees have been operating since 2004 and currently operate in 41 states and approximately 1,800 cities. *Id.* at 18:22-23. Delivery.com regularly spends a significant amount of time, money, and effort to advertise, promote, and market its technology platform. [Kleckner Decl. ¶ 7].

Defendant Patrick Moore is the owner of Pooler Takeout (or "PTO") in Pooler, Georgia, a city with a population of approximately 24,000 residents. [Tr. 153:12-13; 201:17-20].[1] Pooler Takeout has been operating a food delivery business since April 2012 and has relationships with approximately 54 restaurants and 21,606 customer accounts. [Tr. 156:1-9; 160:13-16]. PTO manages and coordinates its restaurant, customer, driver, and vendor relationships through websites, software, and apps that it licenses from a third-party provider. [ECF No. 21-1, ¶ 9 (Declaration of Patrick Moore ("Moore Decl."))]. In 2019, PTO had an annual revenue of $1.5 million, of which Pooler Takeout earned $300,000 in profit. [Tr. 223:4-19].

[1] Moore contends that this Court cannot enjoin non-party Pooler Takeout. [Opp. at 1, n.1]. Moore however signed the Agreement *on behalf of* Pooler Takeout and bound the entity to its terms. *See* Opp., Ex. 1 at pp. 20, 22.

PTO's customers can place food orders through either the phone, the website PoolerTakeout.com, or through an Android or Apple app. [Tr. 156:12-15]. PTO serves elderly and disabled citizens in Pooler, Georgia who depend on the ability to be able to order food via telephone. [Tr. 159:6-160:6]. Phone orders are answered by a dispatcher in PTO's office. [Tr. 158:11-24].

Upon receiving an order made by phone, app, or website, a dispatcher at PTO reviews the order, sends it to the restaurant, and directs a driver to pick up the order from the restaurant and deliver it to the customer. [Tr. 157:10-24]. The order then appears on the restaurant's iPad, and the dispatcher calls the restaurant to let them know they have a pending PTO order on the iPad. [Tr. 157:10-24]. The driver assigned to the order picks up the order from the restaurant and delivers it to the customer. [Tr. 157:10-24]. If there is any issue with an order, PTO's dispatcher has the ability to call the driver directly to resolve the issue in real time. [Tr. 194:21-195:16].

PTO has used and been happy with Wisdom, a commercially available software, for its online and app-based ordering platform, since 2012. [Tr. 156:12-19; 156:24-157:9]. Using Wisdom, PTO manages slightly more than 21,600 active customer accounts and 54 restaurants. [Tr. 160:13-24]. As noted above, PTO received approximately $1.5 million in revenue in 2019. [Tr. 155:19-22].

On or around May 23, 2018, Jason Moldoff, an owner of S2YD Franchising, LLC d/b/a Mr. Delivery ("Mr. Delivery"), met Moore and offered him the opportunity to

operate Pooler Takeout as a Mr. Delivery franchise.[2] [Tr. 77:7-8; 78:12-22; 81:19-21; 162:1-11; 163:19-23]. Mr. Delivery offered franchise opportunities to operate a business that delivers prepared food to residential and commercial customers. [ECF No. 43, Ex. 1 at Delivery00007 (the "Agreement")]. As part of the franchise relationship, Mr. Delivery provided franchisees access to a call center to provide customer service and technology support. *Id.*

According to Moore's testimony, Moldoff represented to him during their discussion that by partnering with Mr. Delivery, PTO would have access to an "exemplary" and "industry leading" platform that would allow PTO to compete with big national delivery services. [Tr. 77:7-12; 163:24-166:25; ECF No. 243, Ex. 5]. Furthermore,

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[2] Moore testified that Mr. Delivery induced him to sign the Agreement by offering $40,000 to onboard, but he turned it down because he did not need the money. [Tr. 223:10-17]. The Agreement does not include a signing bonus and Moore admits he has no other evidence of the proposed payment. [Tr. 226:2-6]. The Undersigned does not find Moore's testimony on this point to be credible. At bottom, it makes little sense for Moore to have turned down a purported unequivocal offer of a $40,000 signing bonus. His explanation -- that he did not need the money -- is difficult to believe. Even a person who had no imminent need for money would accept a $40,000 bonus if it did not require any additional effort to obtain it.

Perhaps Moore simply has an imperfect recollection of some business discussions. Moore may be referring to an offer by Mr. Delivery to pay a $75,000 bonus **conditioned** upon PTO processing 6,000 orders per month on the Mr. Delivery platform, but that never occurred. [ECF No. 43, Ex. 5.]. Either way, the Agreement contains a merger clause which states clearly that it represents the entire agreement between the parties and supersedes all prior oral and written agreements understandings. [ECF No. 43, Ex. 1 at § 22.1]. Moore testified that he did not seek out legal advice or read the franchise agreement before signing it. [Tr. 231].

Moore contends that Mr. Moldoff represented to him that PTO would have a **seamless** transition between PTO's current platform to Mr. Delivery's platform. [Tr. 163:24-164:2; 178:2-20]. Mr. Moldoff represented that PTO would be onboarded onto the new platform as soon as possible. [Tr. 163:24-164:2; 181:14-182:1].

Moore additionally contends that Mr. Moldoff represented to him that Mr. Delivery would take over the day-to-day administrative or back-end tasks associated with running PTO, including menu creation, so that Moore could focus on growing PTO. [Tr. 91:5-17; 168:15-169:10; 170:1-4]. According to Moore, Moldoff represented to Moore that Mr. Delivery would add national brands, including Chili's, to PTO's roster of restaurants. [Tr. 112:27-113:3; 178:21-179:14; ECF No. 44, Ex. 21 at DELIVERY00238-46].

Moore testified that he relied on Moldoff's representation that Mr. Delivery would take over the back-end functions and provide a call center, when he executed a Franchise Agreement, as PTO had grown quickly, and he needed help with the back-end office tasks, including menu creation. [Tr. 168:1-169:10; 170:1].[3]

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[3] The Undersigned is including a summary of this testimony to provide background. As a matter of basic contract law, however, these oral assurances, even if made, cannot bind Delivery.com because of the contractual merger clause, which provides that the written franchise agreement supersedes all earlier oral representations. Under Florida law, reliance on a prior oral representation where a jointly drafted contract includes a merger clause is unjustifiable. *See Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1315 (11th Cir. 1998) (holding as a matter of law that it was unreasonable for party to rely on oral guarantee "that it chose not to reduce to writing"); *see also Sas v. Serden Tech., Inc.*, No. 12-cv-61296, 2013 WL 12086638, at *7 (S.D. Fla. Dec. 3, 2013) ("Where the written contract contains a merger clause and both parties had an

B. The Franchise Agreement

In December 2018, Moore, as the owner of Pooler Takeout, entered into a Franchise Agreement with Mr. Delivery (the "Franchisor") to operate as a Mr. Delivery business (the "Franchised Business"). [ECF No. 43, Ex. 1; Tr. 82:4-8; 85:10-86:3].

Moore testified that he did not read the Agreement before signing it, and did not consult with an attorney or seek legal advice before signing it. [Tr. 231: 7-14]. He explained that "it is a lesson I'll never forget." [Tr. 231:14].

Moore's testimony on this point was in response to a question from the **Undersigned**; Moore has *not* argued that these factors somehow render the written and signed Agreement unenforceable. That argument would be contrary to Florida law. *See Wexler v. Rich*, 80 So. 3d 1097, 1100-01 (Fla. 4th DCA 2012) (stating it is well settled Florida law that a party has "a duty to learn and know the contents of a proposed contract before he signs it" and one who signs a contract is therefore "presumed to know its contents");[4] *Brea Sarasota, LLC v. Bickel*, 95 So. 3d 1015, 1017 (Fla. 2nd DCA 2012) (stating a party to a contract is not "permitted to avoid the consequences of a contract freely entered into simply because he or she elected not to read and understand its terms before executing it, or because, in retrospect, the bargain turns out to be disadvantageous"); *Mitleider v.*

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opportunity to participate in drafting the contract, a plaintiff's reliance on a separate oral promise is not justifiable . . .").

[4] The *Wexler* Court noted that freedom of contract "includes freedom to make a bad bargain." *Id.* at 1100.

Brier Grieves Agency, Inc., 53 So. 3d 410, 412 (Fla. 4th DCA 2011) (noting the consequences of signing any document or contract "cannot be avoided by merely testifying that the document or contract was not read").[5]

The Agreement granted Moore a Franchised Business for ten years (the "Term") in Pooler, Georgia (the "Area of Primary Responsibility" or "APR"). [Agreement, p. 1; Appendix A, § 2.1]. The Agreement requires Moore to operate the Franchised Business in accordance with the Franchisor's standards and procedures, and it granted a limited right to use the Franchisor's trademarks during the Term. *Id.* at §§ 6, 10.

The Agreement requires Moore to be operational within six months of the date of the Agreement, unless extended by the Franchisor. *Id.* at § 4. During the Term, Moore was required to pay certain fees. *Id.* at § 3. Should Moore fail to complete the Term of the Agreement, as partial damages, Moore agreed to pay an Early Termination Fee. *Id.* at § 3.10.

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[5] *See also Citibank v. Dalessio*, 756 F. Supp. 2d 1361, 1367-68 (M.D. Fla. 2010), stating that:

> "As a general matter, '[a] party who signs an instrument is presumed to know its contents …. He cannot avoid his obligations thereunder by alleging that he did not read the contract, or that the terms were not explained to him, or that he did not understand the provisions.' . . . Furthermore, a party's purported reliance on oral misrepresentations, which contradict the express terms of loan documents, are unreasonable as a matter of law."

The Agreement includes two non-compete provisions, one that is applicable during the Term and one that governs a post-termination time period. During the Term, Moore agreed not to "directly or indirectly" engage in any Competitive Business, defined as "a business engaged in the provision of services that are the same as or similar to a Mr. Delivery Business." *Id.* at § 17.1. Similarly, Moore agreed not to compete with the Franchisor for two years from the expiration or termination of the Agreement. *Id.* at § 17.2.

In July 2019, Plaintiff acquired the assets of Mr. Delivery and the Agreement was therefore assigned to Plaintiff.[6] [Tr. 22:4-9; 22:15-18; 77:16-21; 180:22-24].

C. Onboarding Pooler Takeout

In May 2018, Mr. Delivery was signing up independent restaurant delivery services to partner with a national service -- which eventually turned out to be Plaintiff Delivery.com -- that would provide better technology and infrastructure to support the independent businesses. [Tr. 78:14-19; 81:3-10]. Moore knew of Mr. Delivery's plans and that the real benefit to becoming a franchisee was to gain access to the platform which the not-yet-identified national service would hopefully be developing. Documents submitted at the Hearing confirm this.[7]

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[6] Section 13 of the Agreement permits Mr. Delivery to transfer or assign its rights or obligations under the Agreement without Moore's consent.

[7] For example, on May 25, 2018, two days after meeting Moore, Moldoff emailed Moore explaining that Mr. Delivery would be "teaming up with a major player to create

Onboarding is a process that involves incorporating restaurant menus, pricing and other information, customer accounts, and driver information onto Delivery.com's platform. [Tr. 48:4-50:25]. Onboarding is a process that takes six to eight weeks. [Tr. 122:7-123:5]. After onboarding, PTO's App customers would need to download a new app. [Tr. 52:1-8]. Onboarding PTO onto Delivery.com's platform would be extremely disruptive as it would require the re-training of drivers and restaurants. [Tr. 201:6-20]. In fact, Boro Takeout, another Delivery.com Franchisee, complained to Delivery.com that it lost approximately two-thirds of its customers through the Delivery.com onboarding process. [Tr. 57:23-58:2; ECF No. 43, Ex. 9].

Upon entering the Franchise Agreement, Moore was eager to onboard PTO onto the Mr. Delivery platform and inquired repeatedly about when that would happen, because getting on that platform would trigger the use of the Mr. Delivery call center and the back-office support. [Tr. 106:5-112:11; 168:4-23; 183:15-184:8; 189:6; ECF No. 43, Ex. 20 at DELIVERY00175; ECF No. 44, Ex. 21].

At that time, two employees of PTO quit because they heard about the Franchise Agreement. [Tr. 208:20-209:7]. In signing the Franchise Agreement, Moore relied on Moldoff's representations and the terms of the contract when he let the lease to PTO's

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a network of [Restaurant Delivery Service] companies around the country to give us a wide range of distribution points . . . The issue is they do not currently have the logistics portion setup yet, so they are building out that piece . . ." [ECF No.43, Ex. 5].

office space expire in February 2019. [Tr. 174:21-175:25; 181:14-182:1; 183:15-184:5]. Running PTO out of his home was problematic and Moore complained to Moldoff and Anica Krstic about this. [Tr. 147:19-148:2; 183:15-184:10; ECF No. 43, Ex. 20, p. DELIVERY00175; ECF No. 44, Ex. 21, at DELIVERY00257]. Krstic oversaw the never-completed onboarding of Pooler Takeout to Delivery.com's platform.

Despite not having been onboarded, Moore provided Mr. Delivery and later Delivery.com with valuable information regarding PTO's business, including the number of sales made monthly and the amount of money made monthly. [Tr. 188:2-10]. Additionally, Moore provided Delivery.com with access and administrative passwords to all of Delivery.com's software and back-end. [Tr. 188:14-189:3]. Moore provided all information that Delivery.com asked him for. [Tr. 188:14-189:3].

Moore contends that PTO was supposed to onboard to Mr. Delivery's platform in January 2019. [Tr. 164:21-165:2; 167:11-22]. Moldoff testified that he never proposed that Pooler Takeout join Mr. Delivery's platform because it would not have been prudent for PTO to rebrand *twice* and transition to Mr. Delivery's platform only to then shortly thereafter switch to Delivery.com's platform. [Tr. 104:7-10]. Moore acknowledges there was no benefit to using Mr. Delivery's then-existing software compared to the software Pooler Takeout used. [Tr. 176:22-177:3]. Moore's belief that PTO would launch in January 2019 is undermined further by his text messages with Moldoff, which reflect he knew

onboarding would potentially take place in mid-2019 (not January 2019), and that he would onboard to the *new* platform (not Mr. Delivery's platform).[8]

Between February and June 2019, Delivery.com provided Moore with updates concerning the development, testing, and estimated launch of Delivery.com's new platform:

- On February 13, 2019, Moore asked Moldoff "[a]ny word on the start date?" Moldoff said he would call Moore the following week. Moldoff texted Moore on February 22nd, saying he had an update, and again on March 4th, saying he "had updates" and wanted to show Moore a "presentation." Moore responded, "I havent [sic] forgot[ten] about you. Just really busy." [ECF No. 44, Ex. 21 at Delivery00225-26].
- On March 8, 2019, Moldoff introduced Moore to a member of Mr. Delivery's operations team "to perhaps make this market transition in May/June." [ECF No. 43, Ex. 6].
- On April 1, 2019, Moore asked Moldoff, "[i]s there any word on when everything is going to start moving forward?" Moldoff responded, "[s]till June. We are making progress. We said May/June. Looks like it's June." [ECF No. 44, Ex. 21 at Delivery00232].
- On April 18, 2019, Moldoff told Moore the "[f]irst market is going live in 3 weeks." *Id.* at Delivery00247.
- On May 5, Moore asked Moldoff "[a]ny closer to getting things rolling?" Moldoff responded that "tomorrow is our first beta launch . . . we are still pushing hard. Let's see how this goes and then we will be in touch on timing." *Id.* at Delivery00248.

As of June 25, 2019, PTO was slated to launch on Delivery.com's platform in November 2019. [Tr. 127:23-128:5]. Nevertheless, as of September 9, 2019, Moore believed

[8] On January 12, 2019, Moore asked, "when is mr delivery going to debut their new platform?" Moldoff responded, "[r]emember we talked about May June. Hoping for demos to be ready in March/April." [ECF No. 44, Ex. 21 at Delivery00224].

Pooler Takeout was scheduled to launch on September 15th. [Tr. 189:17-21]. There appears to be no specific, evidence-based ground for Moore's expectation. Anica Krstic testified that PTO was never scheduled to be onboarded in September 2019. [Tr. 131:13-23]. Moldoff likewise stated he "never promised" that Pooler Takeout would onboard in September 2019. [Tr. 99:23-100:1]. When Moore asked Moldoff on September 9 whether the onboarding was proceeding on September 15, Moldoff was clear -- "[w]e have been in touch past that point. I'm working on a date." [ECF No. 44, Ex. 21 at Delivery00256]. Moore responded, "[o]h cool" and "[i]ts not the end of the world." *Id.*

On September 13, 2019, Delivery.com and Moore held a kickoff call to initiate the six to eight-week onboarding process, with a goal of launching in November. [Tr. 132:13-133:18; ECF No. 44, Ex. 13]. At the end of September 2019, **Moore requested to delay the onboarding until the beginning of 2020** to accommodate his upcoming vacations. [Tr. 138:2-11; ECF No. 44, Ex. 14]. Delivery.com accommodated Moore's request, slated Pooler Takeout to launch on February 12, 2020, and continued preparing for the launch. [Tr. 139:13-140:2]. Moore resumed the onboarding process in January 2020 and participated in two training sessions. [Tr. 192:3-6]. During those trainings, Moore learned how Delivery.com's mobile app worked and learned the back-office analytics provided by Delivery.com's website.[9]

[9] Moore contends he was "underwhelmed and completely unimpressed" with Delivery's platform, and believed it was inferior to the third-party platform PTO was using. [ECF No. 20-1, ¶ 20 (Moore Decl.)]. He admits he has no written request to

When Delivery.com finally began making efforts to initiate the onboarding of PTO in the Fall of 2019, they requested that Moore recreate all of PTO's restaurant menus to facilitate the transition to the new platform. [Tr. 190:7-191:2]. Delivery.com indicated to Moore that he would be responsible for creating menus for new restaurants after PTO was onboarded. [Tr. 190:7-191:2]. Delivery.com scheduled PTO's launch date for February 12, 2020. [Tr. 139:25-140:2].

In January 2020, Delivery.com required Moore to attend two demonstrations of its software to prepare for onboarding. [Tr. 192:3-193:11]. The software which Delivery.com demonstrated to Moore was not, according to Moore, an improvement over Wisdom, the commercially available software that he was currently using for PTO's online and app-based orders. [Tr. 192:3-193:11].

During the demonstrations, Moore realized that the transition to Delivery.com's platform would not be seamless, as PTO's customer database would not be able to be moved over and customers would have to switch apps. [Tr. 193:24-20]. Delivery.com's platform did not provide for communications between a dispatcher and driver in real time. [Tr. 194:21-195:16]. It did not allow for customers to be able to call in orders. [Tr. 195:17-196:3]. The new platform did not allow for customers to call in with customer service issues. [Tr. 196:4-7].

Delivery.com for further demonstration of, or information about the platform. [Tr. 217:25-218:7].

Although Moore asked to see the back end of the Delivery.com platform, at no point, during the demonstrations or otherwise, was Moore given an opportunity to access or interact with Delivery's software. [Tr. 149:14-150:13; 193:12-20; 217:22-24].

While PTO has maintained a steady stream of business during the COVID-19 pandemic, it has also lost drivers due to the pandemic. [Tr. 200:13-201:5]. Pooler, Georgia is currently experiencing the COVID-19 pandemic like many other areas of the country. [D.E. 21-1, ¶ 36]. Most of Pooler Takeout's restaurants rely exclusively on PTO for delivery of their food to customers. In Moore's opinion, if PTO is not available to deliver food during the COVID-19 pandemic, then the restaurants in Pooler would be forced to shut down completely. *Id*. Most of PTO's customers rely exclusively on PTO to get their food deliveries so that they do not have to risk exposing themselves to COVID-19. *Id.* at ¶ 37. Moore believes it would not be possible to complete the onboarding of PTO on Delivery's platform during the current COVID-19 pandemic. [Tr. 44:18-25].

D. Moore's Purported Termination of the Franchise Agreement

On February 4, 2020, the day before Moore was scheduled to meet Delivery.com's Market Development Manager to finalize the onboarding process, Moore's counsel emailed Delivery.com (1) canceling the meeting, (2) claiming that Mr. Delivery breached the Agreement by failing to take any action in furtherance of it for fourteen (14) months, (3) claiming the Agreement was not legally binding, and (4) stating that Moore considered the Agreement to be "null and void." [ECF No. 43, Ex. 10].

III. Analysis

To obtain a preliminary injunction, a party seeking the relief must make the following four showings: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Wreal, LLC v. Amazon.Com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc); *accord Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

A preliminary injunction is an "extraordinary and drastic remedy," and the movant bears the "burden of persuasion" to clearly establish all four of these prerequisites. *See Wreal*, 840 F.3d at 1247; *Siegel*, 234 F.3d at 1176 (citing *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)).

A. Likelihood of Success on the Merits

Delivery.com argues that Moore breached the Agreement by refusing to onboard to Delivery.com's platform, purporting to unilaterally terminate the Agreement, and violating the non-compete obligations. Delivery.com seeks to enforce the Agreement and **require Moore to onboard to Delivery's platform**.[10] Moore argues that Delivery.com

[10] For all practical purposes, Delivery.com is asking for an order of specific performance of the franchise agreement or a mandatory injunction requiring performance. But "a personal services contract cannot be enforced by injunction or

breached the Agreement first by delaying the onboarding for 18 months and providing a subpar platform.

The Agreement was effective December 5, 2018 and is governed by Florida law. [Agreement, § 24].

To establish a claim for breach of contract, Delivery.com must prove: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the

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specific performance." *Fla. Panthers Hockey Club, Ltd. By & Through Fla. Panthers Hockey Club, Inc. v. Miami Sports & Exhibition Auth.*, 939 F. Supp. 855, 858 (S.D. Fla. 1996). Franchise agreements are considered personal service contracts and therefore cannot be enforced by injunction of specific performance. *See Burger King Corp. v. Agad*, 911 F. Supp. 1499, 1506-07 (S.D. Fla. 1995) (internal citation omitted) ("[U]nder Florida law, franchise agreements are considered personal services contracts . . . And, under Florida law, personal services are not subject to a suit for specific performance . . . As such, this Court may not order parties to continue the performance of a franchise relationship.").

Florida federal courts have adopted the same rule in other franchise agreement scenarios. *See Valpak of Cincinnati, Inc. v. Valpak Direct Mktg. Sys., Inc.*, No. 8:05-CV-2219-T-24TGW, 2006 WL 8440180, at *8 (M.D. Fla. May 26, 2006) (stating court "may not order parties to continue the performance of a franchise relationship"); *see also Dunkin' Donuts Franchised Restaurants LLC v. Rizvi, Inc.*, No. 07-61308-CIV, 2007 WL 9701084, at *1 (S.D. Fla. Dec. 13, 2007) (denying request for preliminary injunction ordering franchisee to take steps to comply with health and safety standards).

But Moore did not raise this argument, and the Undersigned does not believe it is appropriate here to deny a motion for preliminary injunction based on law which Moore did not assert, was not mentioned in the pre-hearing briefing, was not discussed during the hearing, and was not included in the proposed Reports and Recommendations. *See Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1297 (11th Cir. 2010) (emphasis added) ("[A] legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.").

breach. *Pharmerica, Inc. v. Arledge*, No. 8:07-CV-486-T-26MAP, 2007 WL 865510, at *5 (M.D. Fla. Mar. 21, 2007) (citations omitted) (granting preliminary injunction).

The Undersigned finds that Delivery.com has demonstrated a likelihood of success on its breach of contract claim.[11] The Agreement is a binding and enforceable contract between Delivery.com and Moore. The evidence shows Delivery.com performed its contractual obligations and that PTO was on schedule to launch on February 12, 2020 when Moore unilaterally announced, through his attorney, that he had terminated the Agreement. Moore breached the Agreement by refusing to onboard to Delivery's platform in February. Moreover, Moore's purported termination of the Agreement is invalid.

Moore's complaints about delays in onboarding and his professed disappointment with the platform and the onboarding process do not excuse his improper termination of the Agreement.[12]

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[11] Because the Court finds Delivery.com has established a likelihood of succeeding on its breach of contract claim (Count I), the Court need not evaluate Delivery.com's promissory estoppel claim (Count IV) for purposes of determining whether a preliminary injunction is warranted.

[12] Moore's frustrations with the onboarding process appear to be based on unfounded expectations. For example, he contends that Mr. Delivery failed on its promise to bring new restaurants to Pooler Takeout's platform immediately. [Tr. 179:12-14]. However, Moore's text to Moldoff on April 6, 2019 indicates he knew national chain restaurants would not be introduced until after onboarding. *See* ECF No. 44, Ex. 21 at Delivery00238. While Moore complains that Delivery.com did not procure a single merchant in Pooler, Moore ignores that the Agreement **prohibits** the Franchisor from directly signing up any merchants. *See* Agreement, § 6.7. Similarly, Moore's perception

Under Section 17.4 of the Agreement, any perceived first breach by Delivery.com is not a valid defense to Moore's termination. The delay was not a breach, as the Agreement permits the Franchisor to extend the 6-month launch deadline. *See* Agreement, § 4. Consistent with the Agreement, the deadline was extended in or about June 2019 to accommodate Delivery.com's acquisition of Mr. Delivery, and then again in September 2019 **at Moore's request**. Moreover, the evidence shows Moore was in regular communication with the Franchisor from January 2019 through January 2020 and was aware of the timing of the onboarding. While Moore persisted in asking for a launch date, there is no evidence of any material breach and at no point did Moore express to Delivery.com that he believed the Agreement had been breached by Delivery.com.

So Delivery.com has established a likelihood of success on the merits of its breach of contract claim.

However, that does not necessarily mean that Delivery.com is entitled to obtain the extraordinary remedy of *injunctive relief*, which is, for all intents and purposes in the instant case, tantamount to a mandatory injunction to require performance under an agreement and to compel compliance with a restrictive covenant.

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that there were difficulties loading restaurants' menu information and transferring customers' data [Tr. 190:7-191:12; 193:24-194:4] is inconsistent with Krstic's testimony that there were no issues [Tr. 141:6-11, 14-16].

In its motion for a preliminary injunction, Delivery.com is asking the Court to force Moore and/or his company PTO to onboard Plaintiff's online platform and to start delivering food in Pooler under the Agreement. Thus, Delivery.com is requesting a mandatory injunction. *See Carron Found. Of Fla., Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, 1359 (S.D. Fla. 2012).

A mandatory injunction, as compared to an ordinary injunction, is one in which the enjoined party is *required to perform an affirmative act*, rather than simply be prohibited from doing a particular act. *Id*.

Mandatory injunctions are extraordinary and drastic remedies, particularly during the preliminary stages of a case, which require a movant to show that the facts and law are clearly in favor of the movant. This burden is even higher than the burden of persuasion that a movant carries when moving for a non-mandatory preliminary injunction, which is already a drastic and extraordinary remedy in itself. *Id.*

The Eleventh Circuit standard for a mandatory injunction is a "heightened standard" where the party seeking the relief must make a "clear" showing on each of the four elements of the injunction (instead of proceeding under a preponderance of the evidence standard). *See, e.g.*, *FHR TB, LLC v. TB Isle Resort, LP.*, 865 F. Supp. 2d 1172, 1192 (S.D. Fla. 2011) ("When the moving party is seeking a *mandatory* injunction, it faces 'a particularly heavy burden of persuasion' . . . Moreover, if the requested injunction is mandatory, then [the movant's] burden is elevated to making a 'clear' showing on each

of the four elements (instead of proceeding under a preponderance of the evidence standard).").

Florida district courts often adopt this heightened burden concerning mandatory injunctions. *See, e.g.*, *OM Group, Inc. v. Mooney*, No. 2:05CV546FTM33SPC, 2006 WL 68791, at *8 (M.D. Fla. Jan. 11, 2006); *Fla. Gun Shows, Inc. v. City of Fort Lauderdale*, No. 18-62345-FAM, 2019 WL 2026496, at *6 n.1 (S.D. Fla. Feb. 19, 2019) (internal citation omitted) ("A movant seeking a mandatory injunction, i.e., an injunction which goes beyond the status quo and forces a party to act, must meet a stricter test; such injunctions are only to be granted in rare circumstances in which the facts and law are clearly in favor of the moving party.").

Because Delivery.com's request for a preliminary injunction seeks a mandatory injunction, it should be measured against that exacting and higher standard. *See Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1295-96 (M.D. Fla. 2010) (stating a party seeking a mandatory injunction "bears a heightened burden of demonstrating entitlement to preliminary injunctive relief")[13]; *Verizon Wireless Pers. Commc'n LP v. City of Jacksonville, Fla.*, 670 F. Supp. 2d 1330, 1346 (M.D. Fla. 2009) (internal citation omitted) ("Where a mandatory injunction is sought, courts apply a heightened standard of review; plaintiff

[13] The *Haddad* Court cited *Exhibitors Poster Exch. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) for the applicable principles governing mandatory injunctions.

must make a clear showing of entitlement to the relief sought or demonstrate that extreme or serious damage would result absent the relief.").

Given this perspective, courts generally *disfavor* mandatory injunctions. *See Oscar Ins. Co. of Fla. v. Blue Cross & Blue Shield of Fla., Inc.*, 360 F. Supp. 3d 1278, 1284 (M.D. Fla. 2019) (citing *Powers v. Sec'y, Fla. Dep't of Corrs.*, 691 F. App'x 581, 583 (11th Cir. 2017)) ("Mandatory preliminary relief, which goes beyond simply maintaining the status quo[,] is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party.").

The primary injunctive relief sought here is not merely asking that the status quo be maintained. The status quo is that PTO is delivering food in Pooler with its pre-existing Wisdom software, without the use of Delivery.com's platform. Therefore, an order requiring PTO to switch its current operation and begin operating under the Delivery.com banner, with its software and rules, is a mandatory injunction, which requires Delivery.com to carry the heightened burden.

a. <u>The Restrictive Covenant</u>

In order to prevail on its preliminary injunction motion, Delivery.com must prove two points. First, Delivery.com must prove that the restrictive covenants at issue are "reasonably necessary" to "protect the legitimate business interest or interests justifying the restriction." Fla. Stat. § 542.335(1)(c). Second, Delivery.com must prove that Moore

breached an enforceable restrictive covenant. Delivery.com has failed to carry its burden on both points.

Florida Statute § 542.335(1)(b) requires a party seeking to enforce a restrictive covenant to plead and prove one or more legitimate business interests. Delivery.com has not established a legitimate business interest. Legitimate business interests include trade secrets, valuable confidential business information, substantial relationships with specific customers or clients, customer goodwill, and extraordinary or specialized training. *Id.* A restrictive covenant is unlawful, void, and unenforceable if not supported by a legitimate business interest. *Id.*

In *Hapney v. Central Garage, Inc.* (reversing injunction in favor of former employer), the Court relied upon the Tennessee Supreme Court's explanation of a "legitimate business interest," which is:

> Any competition by a former employee may well injure the business of the employer. An employer, however, ***cannot by contract restrain ordinary competition.*** In order for an employer to be entitled to protection, ***there must be special facts present over and above ordinary competition.*** These special facts must be such that without the covenant not to compete the employee would gain an unfair advantage in future competition with the employer.

579 So. 2d 127, 130 (Fla. 2d DCA 1991) *abrogated on other grounds by Gupton v. Village Key and Saw Shop, Inc.*, 656 So.2d 475 (1995) (internal citations omitted; emphasis added).

Additionally, in considering the enforceability of a restrictive covenant, the Court must consider any other relevant legal and equitable defenses, as well as how enforcement effects the public health, safety, and welfare. Fla. Stat. § 542.335(1)(g).

Here, Delivery.com has not demonstrated that the covenants not to compete are lawful and enforceable because it has not established a legitimate business interest. Pick-up and delivery of food cooked at another's restaurant does not require specialized skill or training. It is a task that PTO had done many times, perhaps tens of thousands of times, before it ever heard of Delivery.com (formerly Mr. Delivery) or entered into an agreement with Mr. Delivery. *Cf. Resouluna 4840, LLC v. Palceski*, No. 6:19-cv-267-ORL-41DC1, 2019 WL 7482222, at *4 (M.D. Fla. Sept. 5, 2019) (denying medical spa's motion for preliminary injunction against former employee because spa did not prove existence of a legitimate business interest justifying the restrictive covenant, as the on-the-job training or education was not extraordinary and therefore not protectable).

Moreover, Delivery.com never provided PTO or Moore with any unique training or procedure for the business of food pick-up and delivery. While Moore did participate in demonstrations of Delivery.com's software, these demonstrations were not extraordinary or specialized. Delivery.com did not have customer/client goodwill or trademark use in Pooler, Georgia. And PTO never once used Delivery.com's platform or dispatch for pickup and delivery. *Passalasqua v. Naviant, Inc.*, 844 So.2d 792 (Fla. 4th DCA 2003) (reversing injunction against former employees who allegedly breached non-

competition provision of confidentiality agreement because former employer did not demonstrate a legitimate business interest and the court noted the lack of evidence (a) identifying customers who were purportedly solicited; (b) confirming that confidential information had actually been used; or (c) establishing that Plaintiff had a unique system or method of attracting or doing business).

PTO and Moore have never held themselves out to any customers, restaurants, or vendors as Mr. Delivery or Delivery.com, and they could not, as PTO was never on-boarded into Plaintiff's platform. Here, Delivery.com seeks to restrain PTO's ordinary competition and presents no special facts that show that PTO would gain an unfair advantage against Delivery.com. *See Hapney*, 579 So. 2d 127; *see also Pirtek USA, LLC v. Wilcox*, No. 6:06-cv-566-Orl-31KRS, 2006 WL 1722346, at *3 (M.D. Fla. June 21, 2006) (denying franchisor's motion for preliminary injunction to enforce restrictive covenant because of insufficient legitimate business interests in the plaintiff's franchise "system" to justify enjoining the defendant-franchisee's compliance with the franchise agreement's non-compete covenant); *IDMWORKS, LLC v. Pophaly*, 192 F. Supp. 3d 1335 (S.D. Fla. 2016) (declining to enjoin the defendant-employee's compliance with the restrictive covenants of the employment contract after finding insufficient business interests in need of protection).

In considering whether to enforce a non-compete agreement, the Court must consider as a defense the fact that the party seeking enforcement is not in business in the

geographic area that is the subject of the action to enforce the restrictive covenant. *See* Fla. Stat. 542.335(1)(b)4.b. Delivery.com is not, and has never been, in the food delivery business in Pooler. *See Pirtek*, 2006 WL 1722346, at *3 (noting that franchisor did not operate a franchise in the New Orleans area).

Delivery.com has never had any business in Pooler, Georgia. Delivery.com has never had its own customers or restaurants in Pooler, Georgia. Delivery.com has no customer list or restaurants in Pooler, Georgia. Delivery.com is not attempting to onboard restaurants or customers in Pooler, Georgia. Delivery.com has not placed its brand name on advertising, packaging, or delivery vehicles in Pooler, Georgia. Delivery.com is not competing against PTO in Pooler, Georgia. Consequently, the Court concludes Delivery.com has not shown a substantial likelihood of success on its effort to obtain enforcement of the restrictive covenant.[14] *See 3 Natives Franchising, LLC v. 3 Natives Stuart,*

[14] Delivery.com argues that if the restrictive covenant is not enforced, other franchisees similarly might violate their agreements, lowering the value of all of Delivery.com's franchises nationwide and its enterprise. Delivery.com further contends that its discussions with other potential franchisees could be adversely affected if those possible business arrangements could be impacted. Similarly, Jed Kleckner, Delivery.com's CEO, testified that the investor community might be concerned "when the strategy of what we're trying to do is being put in question by contracts that are not being honored." [Tr., p. 37].

The Undersigned is not persuaded by these theories, which are attenuated and speculative. Delivery.com did not introduce any evidence about any negotiations with potential franchisees which were adversely affected by news surrounding this lawsuit or Moore's failure to perform. Likewise, Delivery.com did not offer any evidence that any other franchisee breached its agreement after hearing about this lawsuit or Moore's so-called termination, nor did it offer any evidence that any potential investor backed out of

LLC, No. 19-14093, 2019 WL 3804115, at *5 (S.D. Fla. Aug. 13, 2019) (denying motion for temporary restraining order and preliminary injunction in a failed franchise relationship and noting that Plaintiff did not pinpoint specific intellectual property in need of protection and observing that Plaintiff's claims about the consequences of the alleged breach of the restrictive covenants are "all conclusory").

Because Delivery.com has not established that the restrictive covenants are enforceable to protect a legitimate business interest, it has not established that Moore, who was in business for several years before entering the Agreement, breached an enforceable restrictive covenant. *See generally Lucky Cousins Trucking, Inc. v. QC Energy Resources Texas, LLC*, 223 F. Supp. 3d 1221, 1225 (M.D. Fla. 2016) (denying motion for preliminary injunction to enforce restrictive covenants and noting that party was an experienced hauling company well before its affiliation with party seeking injunction).

B. Substantial Threatened Irreparable Injury

Delivery.com bears the burden of showing there is a substantial threat of irreparable injury -- that it has no adequate remedy at law. *Reese v. J.P. Morgan Chase & Co.*, 686 F. Supp. 2d 1291, 1306 (S.D. Fla. 2009). In its Motion, Delivery.com asks the Court to shut down a business that was successful six to seven years before the parties ever

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an investment after hearing about these matters. As a result, Delivery.com's detail-free, evidence-free theory of damages is simply a hypothetical guess at what might happen. This is inadequate to generate adequate support for a mandatory injunction to compel enforcement of a restrictive covenant.

heard of each other. But, as explained below, the overwhelming majority of the damages Delivery.com alleges, even if established, would be compensable by money damages.

An irreparable injury is "neither remote nor speculative." *Papadopoulos v. Sidi*, 547 F. Supp. 2d 1262, 1269 (S.D. Fla. 2008) (quoting *SME Racks, Inc. v. Sistemas Mecanicos Para, Electronica, S.A.*, 243 F. App'x 502, 504 (11th Cir. 2007)). Instead, it is actual and imminent. *Id.* If an injury can be undone with an award of monetary remedies, then the injury is not irreparable. *Id.*

> Mere injuries, however substantial, in terms of money, time and energy . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm . . . [P]rospective harm, by itself, clearly does not meet the test of imminence.

Id.

As explained below, Plaintiff Delivery.com has not shown irreparable harm.

In its Complaint, the only contract damages Delivery.com claims it is entitled to is an "early termination fee" and "fees, lost revenue and lost profits." [ECF No. 1, ¶¶ 39, 41]. But those types of damages are easily quantifiable and reduced to an award of money damages. They are not the foundation of a claim for irreparable harm.

Another typical source of proof of irreparable harm in a case like the instant one is theft and use of customer and vendor lists. However, Kleckner acknowledged that Delivery.com did not have customers, restaurants, or other vendors in Pooler, Georgia.

He further conceded that Delivery.com did not have its own customer, restaurants and vendor lists in Pooler, Georgia.

Furthermore, the Undersigned is not convinced by Delivery.com's argument that its goodwill[15] in Pooler, Georgia would be diminished or harmed. *See* Motion, p. 7. Delivery.com does not actually compete in the pickup and delivery business, nor has it marketed itself in Pooler, Georgia. Delivery.com does not currently have goodwill in Pooler, Georgia, because the customers, restaurants, drivers, and other vendors are not familiar with Delivery.com.

As explained above, Kleckner's view that Delivery.com would be harmed by Moore's termination because it could affect Delivery.com's ability to enforce its contractual rights against other franchisees and its ability to contract with potential future

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[15] Florida Statute § 542.335(1)(b)(4), which defines "legitimate business interests" by listing specific illustrations, mentions goodwill:

> 4. Customer, patient, or client goodwill associated with:
> a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress";
> b. A specific geographic location; or
> c. A specific marketing or trade area.

While goodwill associated with a company's **franchise system** "is not specifically listed in the Florida statute's non-exclusive list of legitimate business interests, it is akin to (and somewhat overlapping with) trademark-related goodwill, [and] has been enforced by courts in other states, and is entitled to protection." *U.S. Lawns, Inc. v. Landscape Concepts of CT LLC*, No. 16-cv-929, 2016 WL 9526340, at *5 (M.D. Fla. Oct. 31, 2016).

franchisee independent operators is remote, speculative, and unsupported by evidence of specific illustrations of the theory. *See* Tr. 35:14-36:15.

[**Note:** Moore argues that Delivery.com waited too long to seek injunctive relief. He notes that Delivery.com's Complaint alleges that Moore has operated a competing business since December 2018 [ECF No. 1, ¶ 20] but that Delivery.com did not file its motion for a preliminary injunction until February 24, 2020. The Undersigned rejects this argument.

To be sure, a delay in seeking a preliminary injunction militates against a finding of irreparable harm. *Wreal, LLC*, 840 F.3d at 1247. But Moore did not purport to terminate the Agreement until his attorney's February 4, 2020 letter. Filing a motion for a preliminary injunction three weeks later is not the type of delay which would reflect the lack of urgency or speed necessary to doom a tardy motion for injunctive relief. The cases cited by Moore involve far-longer delays, and he cites no case where a motion for injunctive relief was denied because it was filed three weeks after a breach of contract. *See, e.g.*, *Sexual MD Solutions, LLC v. Wolff*, No. 20-20824, 2020 WL 2197868, at *24 (S.D. Fla. May 6, 2020) (citing *Wreal* but holding that a seven-month delay was not unreasonable under the circumstances).

Having discussed the irreparable harm factor, the Undersigned will now address the next factor (of balancing the harms).

C. Balancing the Harms

Delivery.com argues that, without a preliminary injunction, it will not be able to be made whole legally or equitably. Delivery.com's threatened injuries, as discussed above, can be compensated by money damages. To the extent that they cannot be adequately redressed by a money judgment, the alleged damages are speculative -- but the harm to Moore and PTO from injunctive relief would be substantial.

Delivery.com is a non-factor in the food pickup and delivery business in Pooler, Georgia. It has never picked up one meal from one Pooler restaurant and delivered that meal to a Pooler customer. Delivery.com has never employed a driver in Pooler.

On the other hand, since 2012, PTO has developed a customer base of 21,606 unique customer accounts in Pooler and delivers to those customers from fifty plus restaurants located in Pooler. PTO has approximately 20 drivers. If the Court were to enjoin PTO from its operations, the Court would shut down a $1.5 million dollar a year family-run business in favor of a business which has not yet entered the Pooler food pickup and delivery market.

Furthermore, the other harms mentioned by Delivery.com are speculative and conclusory.

The Undersigned therefore concludes that the harm to Moore and PTO from a preliminary injunction outweighs the alleged threatened injury to Delivery.com if injunctive relief were not provided.

D. The Public Interest

The Undersigned concludes that the public interest factor is a wash, with neither side earning this factor in its column.

Delivery.com argues that a preliminary injunction would promote the public interest in the enforcement of contracts and the protection of proprietary business interests.

Moore and PTO argue the public interest would be harmed by a preliminary injunction because it would be issued in the midst of the COVID-19 pandemic. They contend that most of PTO's restaurants rely exclusively on PTO for delivery of their food to their shared customers and that requiring restaurants that rely on PTO to train on a new platform and transition would be fatal to many of those businesses (and would also harm the customers, many of whom are elderly and/or disabled). They further argue that a preliminary injunction (forcing PTO to onboard with Delivery.com and use a new Delivery.com-provided software platform) would cause their customers, who they say would otherwise stay at home, to leave their homes to pick-up from these restaurants or dine-in, which is contrary to the best interests of the public health, safety, and welfare.

Many of the factors urged by Moore and PTO are unduly speculative. To say that PTO's food delivery customers in Pooler would confront a greater COVID-19 health risk because they would not switch to a new software platform and would travel on their own to pick up food (thereby increasing the health risk) is to urge an unduly speculative

theory. And predicting the failure of Pooler restaurants because food delivery customers would no longer use PTO is also a forecast based upon speculation.

So Moore's public interest argument is largely based on conjecture, unsupported by evidence (such as testimony from a PTO customer about not wanting to switch platforms).

On the other hand, there is not a public interest in enforcing a restrictive covenant not supported by adequate evidence of a legitimate business interest.

On balance, the public interest factor does not help either side.

IV. Attorney's Fees

The Agreement contains a one-way-only provision concerning costs and attorney's fees. Specifically, paragraph 25.10 provides: "You [i.e., Moore and PTO] agree to reimburse us [i.e., the franchisor, Mr. Delivery, which later assigned the contract to Delivery.com] for all expenses we reasonably incur (including attorney's fees): (a) to enforce the terms of this Agreement or any obligation owed to us by you and/or the Owners; and (b) in the defense of any claim you and/or the Owners assert against us on which we substantially prevail in court, arbitration, meditation [sic], or other formal legal proceedings."

Paragraph 24 of the Agreement provides that Florida law "governs all claims that in any way relate to or arise out of this Agreement or any of the dealings of the parties ("Claims")." Florida Statute § 57.105(7) provides: "If a contract contains a provision

allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court **may** also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract." (emphasis added).

Although the statute authorizes this Court to award attorney's fees and costs, the Undersigned deems is prudent to wait until the end of the entire litigation (rather than during a Report and Recommendations on a pre-trial motion).

Determining who the prevailing party here is less than clear. Although the Undersigned is recommending that Judge Cooke deny the preliminary injunction motion, I am also concluding that Delivery.com demonstrated a likelihood of prevailing on the merits of its claim that Moore and PTO breached the Agreement. Given this dynamic, it is difficult to conclude with certainty that Moore is the prevailing party merely because the preliminary injunction motion will be denied if Judge Cooke adopts this Report and Recommendations.

Under Florida law, the prevailing party is "the party prevailing on the significant issues in the litigation." *Martinair Holland, N.V. v. Benihana, Inc.*, No. 18-14497, 2020 WL 2520067, at *2 (11th Cir. May 18, 2020) (citing *Moritz v. Hoyt Enters., Inc.*, 604 So.2d 807, 810 (Fla. 1992).[16]

[16] The *Martinair Holland* Court held that Florida law governed the analysis of the prevailing party issue because the contract, a sublease, has a Florida choice-of-law provision. *Id.*

Courts typically make the prevailing party determination once the litigation ends, because "that is when the significant issues in the case tend to crystalize." *Martinair Holland*, 2020 WL 2520067, at *2.

Assuming that Judge Cooke were to adopt this Report and Recommendations, both sides could claim victory yet have to shoulder a loss on significant issues in the early stages of this litigation. Because it seems prudent to avoid a scenario in which attorney's fees are awarded now but susceptible to being reversed later if the opposing party prevails, the Undersigned **respectfully recommends** that the fees and costs issue be held in abeyance until the end of the litigation. *See Sole v. Wyner*, 551 U.S. 74, 77 (2007) (reversing Eleventh Circuit Court of Appeals order affirming an attorney's fees award to party who obtained a preliminary injunction but did not prevail on efforts to obtain permanent injunction and noting that the party had "[won] a battle but los[t] the war").

V. Conclusion

The Undersigned **respectfully recommends** that Judge Cooke **deny** Delivery.com's motion for a preliminary injunction and hold in abeyance until the end of the litigation the issue of whether any attorney's fees and costs should be awarded. If this Report and Recommendations were to be adopted, then Delivery.com could still move forward on its substantive claims and seek damages, which is separate and apart from its unsuccessful injunctive relief request, which is an extraordinary remedy made more difficult to obtain because the motion seeks a mandatory injunction.

VI. Objections

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with United States District Judge Marcia G. Cooke. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on June 19, 2020.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Marcia G. Cooke
All counsel of record