UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AVI AVRAHAM ZINGER, *and* **AMERICAN QUALITY PRODUCTS LTD.,** *Plaintiffs* ***v.*** **BEN & JERRY'S HOMEMADE, INC.** *and* **UNILEVER UNITED STATES, INC.** *and* **CONOPCO, INC.,** *Defendants*	Civil Case No.: 2:22cv01154(ES)(JBC)

Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for a Stay

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INTRODUCTION

As in their opposition to Plaintiffs' motion for a preliminary injunction, Defendants fail to address the fact that Defendants are ending a 34-year business relationship with Plaintiffs for one reason, and one reason only: Plaintiffs refused to capitulate to Defendants' illegal demand that they violate the laws and public policies of Israel, New Jersey and New York by discriminating against residents of those parts of Israel that Defendants call "the Occupied Territories," and which we have referred to as the "Areas."

For over 34 years, plaintiffs Avi Zinger and American Quality Products Ltd. and its predecessor companies ("AQP") have been licensed by defendant Ben & Jerry's Homemade, Inc. ("B&J") to manufacture and distribute Ben & Jerry's ice cream in Israel, including in the areas acquired by Israel in 1967 (the "Areas"). The relationship continued after B&J was acquired by Unilever in 2001. In July 2021, however, the Defendants abruptly announced they were ending the relationship with AQP at the end of 2022. They acknowledge that the only reason is that Plaintiffs refused to comply with Defendants' unlawful demand that they stop selling Ben & Jerry's ice cream in the Areas, which were and had been within AQP's territory for 34 years. Defendants knew that compliance with their demand would have violated Israeli anti-discrimination and anti-boycott laws and the anti-boycott laws and public policies of the U.S. and the states of New Jersey and New

York, among others. Defendants were also aware that their demand violated the consent decree they signed in 2001 with Israel's antitrust authority as a condition of the Unilever-B&J merger. Yet Defendants pressured AQP to acquiesce, and they cut AQP loose when Plaintiffs refused.

Plaintiffs filed this action and motion for preliminary injunctive relief to stop Defendants from terminating the business relationship and to maintain the status quo pending final adjudication of the merits of the case. **All parties agree, consistent with the License Agreement and the law of the Third Circuit, that this Court should decide the motion for preliminary injunctive relief.**

Shortly after the filing of the Complaint, Defendants wrote to Plaintiffs demanding arbitration of Plaintiffs' claims pursuant to the arbitration provisions in the License Agreement, but did not question the Court's jurisdiction and duty to decide Plaintiffs' motion for a preliminary injunction. Defendants asked Plaintiffs to agree that litigation of the preliminary injunction motion in this Court did not waive the right to arbitrate. Plaintiffs agreed, and will proceed to arbitration after resolution of the request for a preliminary injunction.

Contrary to their own arbitration demand and their concession that this case will be arbitrated, Defendants have moved for FRCP 12(b)(6) dismissal of the claims in the Complaint. This Court may not, however, dismiss arbitrable claims. The United States Supreme Court has held that a district court may not decide the

merits of causes of action that the parties have agreed to arbitrate. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649-650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). Courts in this Circuit must stay proceedings pending arbitration upon request of one of the parties. *Lloyd v. Hovensa,* 369 F. 3d 263, 269 (3d Cir. 2004). We have filed such a motion to be effective after this Court rules on our motion for a preliminary injunction.

We fully briefed the factual and legal issues germane to this case in support of our motion for preliminary injunctive relief. We also filed the declaration of Avi Zinger in support of that motion. We incorporate those arguments by reference and ask that the Court grant preliminary injunctive relief to maintain the status quo, deny Defendants' motion to dismiss, and stay further proceedings in this case pending arbitration of all claims.

ARGUMENT

I.
THE CASE SHOULD PROCEED TO ARBITRATION AFTER A PRELIMINARY INJUNCTION MAINTAINS THE STATUS QUO

A. The Parties Agree that after the Motion for Preliminary Injunction Is Decided, the American Arbitration Association ("AAA") Should Resolve Issues of Liability and Damages.

Defendants have not filed a motion to compel arbitration and, indeed, there is no cause for such a motion. Plaintiffs agree that, on Defendants' request, Plaintiffs' claims are subject to arbitration under sections 32.2 and 32.3 of the

License Agreement.[1] An exception is Avi Zinger's claim for false light invasion of privacy since Mr. Zinger is not a party to the Agreement. In the interest of judicial efficiency, Plaintiffs consent to AAA arbitration of *all* of Plaintiff's claims, including Mr. Zinger's personal claim. Without waiving the right to appeal an adverse ruling, plaintiffs agree to arbitration proceedings with the AAA after plaintiffs' request for a preliminary injunction is resolved. To that end, Plaintiffs have filed a cross-motion to stay proceedings in this Court once it rules on the motion for preliminary injunctive relief.

In the Third Circuit, as in most federal circuits, "'a district court can grant injunctive relief in an arbitrable dispute pending arbitration, provided the [traditional] prerequisites for injunctive relief are satisfied[.]'" *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 811 (3d Cir. 1989) (quoting *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51-52 (1st Cir. 1986); *accord Roso–Lino Beverage Distributors, Inc. v. Coca–Cola Bottling Co.*, 749 F.2d 124, 125 (2d Cir. 1984) (per curiam). New York law accords trial judges comparable authority to grant

[1] Section 32.2 provides that, "Except as otherwise provided herein, upon written demand of either party, any claim or controversy concerning the subject matter hereof shall be submitted to arbitration pursuant to the then prevailing American Arbitration Association ["AAA"] rules (the "Rules") …"

Section 32.3 provides, in pertinent part, that, "The arbitration proceeding shall be held at an office of the [AAA] in the City of New York, U.S.A. or in such other city as the parties may agree upon at the time arbitration is requested, and the parties hereby waive all questions of personal jurisdiction and venue for purpose of carrying out this Section."

injunctive relief before a dispute is arbitrated. *E.g.*, *Saferstein v. Wendy*, 137 Misc. 2d 1032, 1034, 523 N.Y.S.2d 725, 727 (Sup. Ct. 1987) (injunctive relief pending arbitration because termination of license agreement could put plaintiff out of business). A party does not waive arbitration by seeking injunctive relief in the district court. *See, e.g.*, *Nicholas v. KBR, Inc*., 565 F.3d 904, 908–09 (5th Cir. 2009).

Furthermore, section 32.5 of the License Agreement includes an express authorization of injunctive relief "to prohibit any act or omission by the other, or the directors, employees of the other, that constitutes a violation of any applicable law, or is dishonest or misleading to customers or the public." (License Agreement ("LA") § 32.5.) Hence the Agreement contemplates injunctive relief independent of any other claim that may be raised by the parties.

Finally, the parties themselves agree that this Court can and should decide the motion for preliminary injunction prior to arbitration. In a letter "demand[ing] ... arbitration of all claims and controversies in the Action that are subject to Section 32.2 [of the License Agreement]," defense counsel Gary Bornstein advised Plaintiffs' counsel that:

> Defendants are prepared to proceed in the Action, in court, by responding to Plaintiffs' motion for preliminary injunction and moving to dismiss all claims in the Action, provided that Plaintiffs agree (a) not to argue that

Defendants have waived any right to require arbitration of any claim that survives the motion to dismiss, and (b) to extend Defendants' deadline to respond to the Complaint to May 2, 2022. (Bornstein Decl., Ex. 1.)

Plaintiffs' counsel promptly agreed to extend the filing deadline and to refrain from arguing that Defendants had waived any right to arbitrate. Plaintiffs reserved "the right on behalf of plaintiffs to assert all claims, defenses, arguments and positions, substantive and procedural[.]" (*Id*., Ex. 2.) Plaintiffs' counsel did not, however, agree that arbitration would proceed as to "any claim that survives the motion to dismiss" (*see id*., Exs. 3-6), because, as explained below, this Court lacks authority to dismiss any claim subject to arbitration. This Court must deny any motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure because only the arbitration panel has the legal authority to consider and decide Plaintiffs' substantive claims.

Pending the arbitrators' consideration and decision, this Court should issue a preliminary injunction to maintain the status quo and then stay further judicial proceedings. A preliminary injunction is urgently needed to protect Plaintiffs pending the outcome of the arbitration and enforcement or other disposition of any award by this Court. AQP is suffering serious, increasing, and irreparable harm to its business, which cannot survive if the status quo is not maintained. Unless the license to sell Ben & Jerry's ice cream is continued pending resolution of this

dispute on the same terms and in the same territory that B&J has agreed to for over 34 years, AQP cannot make the advance arrangements with its suppliers, retailers, distributors, and workers that are essential to its business. Defendants have not disputed any of these facts.

B. <u>This Court May Not Dismiss Any Arbitrable Claim.</u>

The Defendants acknowledge that the arbitration provisions in the License Agreement are valid and enforceable (Defendants' Motion to Dismiss ("MTD") at 25-28). The claims set forth in Plaintiffs' Complaint are unquestionably arbitrable. Hence this Court lacks authority to dismiss Plaintiffs' claims on their merits under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Only the arbitration panel may rule on those claims.

The License Agreement plainly calls for arbitration of claims "concerning the subject matter" of the contract (Complaint (ECF #1, Ex. A) § 32.2). Consequently, an arbitrator, not a court, must rule on issues concerning the merits of Plaintiffs' claims. The U.S. Supreme Court has authoritatively declared, "The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*,

475 U.S. 643, 650 (1986) (citation omitted); *see also United Steelworkers of Am., AFL-CIO-CLC v. Rohm & Haas Co.*, 522 F.3d 324, 330-31 (3d Cir. 2008) (following *AT&T*); *Am. Graphics Inst., Inc. v. Darling*, No. CIV.A. 03-374, 2003 WL 21652246, at *8-9 (E.D. Pa. May 22, 2003) (declining to rule on the sufficiency of the pleadings and dismissing without prejudice claims to be decided in arbitration); *Nelson v. Brown*, No. 17-3232, 2019 WL 368597 (E.D. Pa. Jan. 28, 2019) at *3-4, 8 (granting motion to compel arbitration and for a stay and denying defendant's motion for judgment on the pleadings).

Because the parties agreed to arbitrate the claims set forth in Plaintiffs' Complaint, the Court may not adjudicate Defendants' substantive arguments for dismissal. We respond, in any event, to these arguments in section II, *infra.*

C. <u>After Ruling on Plaintiffs' Motion for Preliminary Injunction, this Court Should Stay Further Judicial Proceedings Pending Arbitration.</u>

"The plain language of [9 U.S.C.] § 3 affords a district court no discretion to dismiss a case where one of the parties applies for a stay pending arbitration." *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 269 (3d Cir. 2004); *accord*, *Devon Robotics, LLC v. DeViedma*, 798 F.3d 136, 143–44 (3d Cir. 2015). The applicable statute, 9 U.S.C. § 3, directs that upon the application of a party, a district court "shall" stay proceedings that are referable to arbitration. The Third Circuit Court of Appeals has explained that "the statute's directive that the Court 'shall' enter a stay simply cannot be read to say that the Court shall enter a stay in all cases except those in

which all claims are arbitrable and the Court finds dismissal to be the preferable approach." *Devon*, 798 F.3d at 143 (citing *Lloyd*, 369 F.3d at 269). "If a case were dismissed rather than stayed, the parties would have to file a new action each time the court's assistance was required, and the dispute could be assigned to different judges over the course of the arbitration. . . . Ultimately, we held that a 'literal reading of § 3' was the only reading consistent with the structure of the FAA and the strong national policy in favor of arbitration." *Ibid*. In *Edmondson v. Lilliston Ford, Inc*., 593 Fed. Appx. 108, 112 (3d Cir. 2014), the Court of Appeals ruled that a district court's "authority to manage its own docket" is "secondary to the clear Congressional intent behind the FAA 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'") (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 22 (1983)).

D. Plaintiffs' Claims against Conopco and Unilever USA Are Arbitrable and May Not Be Dismissed.

Defendants assert that because Unilever USA and Conopco (collectively, "Unilever" or the "Unilever Defendants") were not signatories to the License Agreement the claims against them "can be dismissed in favor of arbitration." (MTD at 29.) After the Complaint was filed, counsel representing the Unilever Defendants wrote a letter to Plaintiffs' counsel demanding arbitration on behalf of B&J and the Unilever Defendants.

Plaintiffs are prepared to arbitrate their claims against B&J and the Unilever Defendants. Any dispute about the arbitrability of the claims against the Unilever Defendants should be resolved by the arbitrator. Along with a stay of Plaintiffs' claims against B&J, this Court should stay the claims against the Unilever Defendants pending resolution of the arbitration.

In any event, apart from their consent to arbitrate AQP's claims, the Unilever Defendants are bound by the License Agreement. The License Agreement was signed by B&J and Unilever N.V. A filing with the Securities and Exchange Commission declares: "On November 29, 2020 (the 'Effective Time'), Unilever N.V. merged into Unilever PLC by way of a cross-border merger, pursuant to which Unilever PLC acquired all of the assets, liabilities and legal relationships of Unilever N.V. by universal succession of title, Unilever N.V. was dissolved and ceased to exist." (Harvey Decl. Ex. A.) That filing was signed, inter alia, by Unilever USA. *Id.* Unilever USA is the parent company of Conopco. Unilever USA and Conopco are bound by Unilever N.V.'s contractual obligations, thereby precluding their dismissal from this lawsuit. *See First Equity Realty v. Harmony Grp., II*, 2020 WL 5224215 (N.Y. Co. Sup. Ct. Aug. 17, 2020) ("A non-signatory may be bound by a contract under certain limited circumstances, including as a third-party beneficiary or an alter ego of a signatory or where it is a party to

another related agreement that forms part of the same transaction.") (citations omitted).

Furthermore, non-signatories may be bound by arbitration agreements, via "five different theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999). "[N]onsignatories may be held liable for breach of contract, without being 'alter egos,' if their actions show that they are in privity of contract or that they assumed obligations under the contract." *MBIA Ins. Corp. v. Royal Bank of Can.*, 706 F. Supp. 2d 380, 397 (S.D.N.Y. 2009) (applying New York law), or if they receive a "direct benefit" from the contract. *WTA Tour, Inc. v. Super Slam Ltd.*, 339 F. Supp. 3d 390, 400 (S.D.N.Y. 2018) (citing *Am. Bureau*, 170 F.3d at 353); *see also Matter of Arb. Between All. Masonry Corp. & Corning Hosp.*, 178 A.D.3d 1346, 1349, 115 N.Y.S.3d 556, 560 (3d Dep't 2019) ("a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause and receives benefits flowing directly from the agreement") (citations and quotations omitted).

The Unilever Defendants assumed obligations under, and directly benefit from, the License Agreement. The first page of the License Agreement specifically refers and applies to "Affiliates," which explicitly includes the Unilever

Defendants ("an Affiliate of Unilever shall also include Unilever N.V., Unilever PLC or any entity a majority of the voting shares of which is owned directly or indirectly by Unilever N.V. or Unilever PLC or both of them together"). (ECF No. 4, Ex. A.) Unilever USA and Conopco have assumed the obligations of Unilever N.V. under the License Agreement, and they directly benefit from it. Conopco is the entity that receives AQP's royalty payments under Section 12.2 of the License Agreement, and both Unilever USA and Conopco are insured under Section 21.1 of the License Agreement. As such, Unilever USA and Conopco are proper defendants who should be deemed parties to the License Agreement. (*See* Declaration of Avi Zinger, dated March 11, 2022 ("Zinger Decl."), Ex. 3 (showing a 2000 SEC filing regarding (1) a merger between B&J and Conopco, and (2) that Unilever USA is undertaking activities relating to the social mission of B&J), Ex. 5 (the Outline of Terms, defining the Unilever Group), and Ex. 6 (the License Agreement).) Indeed, as pleaded in the Complaint, Unilever made public statements indicating that it was in control of B&J's decision to cease doing business with Plaintiffs. (*See* Complaint ¶¶ 60-61.)

In addition, AQP deals directly with the Unilever Defendants. Unilever USA appointed one of own its executives—Matthew McCarthy—to serve as B&J's CEO and to act as AQP's main point of contact in executing the License Agreement. McCarthy is the individual who assured Avi Zinger that his license

would be renewed and then, after Avi refused the illegal demand that he restrict his territory, informed him that his license would not be renewed.

Finally, Defendants assert (without citing any precedent) that even if Unilever USA and Conopco are deemed parties to the License Agreement, they should be dismissed from this lawsuit because Plaintiffs have not alleged any conduct by them separate from B&J. Under New York law, multiple defendants may be held jointly and severally liable for a breach of contract even if one is the principal actor. *See, e.g., Perez v. Masonry Servs., Inc*., 189 A.D.3d 703, 704-705, 140 N.Y.S.3d 8, 10 (1st Dep't 2020).

The Unilever Defendants demanded arbitration and must, as a matter of law, participate in arbitration concerning the License Agreement. Accordingly, this Court should stay the claims against all Defendants pending the outcome of arbitration.

II.

IF THE COURT REACHES THE MERITS OF THE MOTION TO DISMISS, IT SHOULD BE DENIED

A. Defendants Do Not Satisfy the Standard for Dismissal.

As discussed above, this Court should issue a preliminary injunction, refrain from deciding the motion to dismiss on the merits, and stay this case in favor of arbitration. Nonetheless, in an abundance of caution, we address Defendants' arguments, none of which has merit.

"When reviewing a motion to dismiss, all allegations in the complaint must be accepted as true, and the plaintiff must be given the benefit of every favorable inference to be drawn therefrom." *Hertz Corp. v. Frissora*, Civil Action No. 19-8927 (ES) (CLW) 2021 WL 2253526 at *3 (D.N.J. June 3, 2021) (quoting *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (quotations omitted). "In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Id.* (quoting *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010)). In deciding the Defendants' motion, the Court can review the documents attached to Avi Zinger's declaration including the Outline of Terms (originally filed at ECF No. 4.2, Ex. 5), incorporated in the License Agreement (Complaint Ex. A; ECF No. 4.2, Ex. 6).

B. <u>Plaintiffs Properly Pleaded a Claim for Breach of Contract.</u>

Plaintiffs have properly pleaded a breach-of-contract cause of action. Contrary to Defendants' assertions, Plaintiffs have identified multiple provisions of the License Agreement breached by the Defendants. For example, Section 15.24 of the License Agreement declares that "no party shall be required hereunder to act or omit to act in any way that it believes in good faith would violate [any of the export control laws or regulations of the United States]." (*See* Complaint, ¶ 32.) The Export Control Reform Act of 2018, 50 U.S.C. 4801-4852 ("ECRA"),

prohibits companies from, *inter alia*, refusing or agreeing to refuse to do business or taking discriminatory acts for boycott-related reasons. The Complaint alleges that Defendants breached Section 15.24 when they demanded that AQP participate in a boycott of parts of Israel.

Moreover, Plaintiffs pleaded that "Defendants materially breached the License Agreement by openly and notoriously declaring to the entire world that they would not renew the contract." (Complaint ¶¶ 82-83.) The License Agreement, section 24.10, explicitly prohibits all parties, in the event of termination or non-renewal, from "mak[ing] any public statement to the media or otherwise, except to the extent that such is legally required." (Complaint Ex. A.) Unilever's public statement announcing its intended non-renewal of AQP's license blatantly violated this provision.

The Complaint also alleges violations of sections 15.20, 15.23, and 27.3 of the License Agreement, which require AQP to (a) "use its best efforts to ensure that it and all entities dealing with [it] comply with 'all applicable national, or local laws and regulations,'" (b) "promptly notify Ben & Jerry's" if it "knows or has reason to believe that any act or refrainment from acting required by or contemplated under this Agreement violates any law, rule or regulation . . . of the Territory or any political or governmental subdivision thereof," and (c) "comply

with all laws applicable to the manufacture . . . sale and distribution of the Products in the Territory." (*See, e.g.* Complaint ¶ 31.)

Contrary to Defendants' assertion (MTD at 16), compliance with the law is not just an "obligation[] on AQP, not B&J." Section 15.24, for example, expressly forbids B&J from requiring AQP to violate ECRA. (License Agreement Section 15.24 ["no party shall be required hereunder to act or omit to act in any way that it believes in good faith would violate any such law or regulation"].) By the same token, AQP's agreement that it would comply with the laws of Israel implicitly prohibits B&J from demanding that AQP violate those very laws because the demand renders AQP incapable of performing under the contract. *See, e.g., Young v. Whitney*, 111 A.D.2d 1013, 1014, 490 N.Y.S.2d 330, 332 (3d Dept. 1985) ("the law implies in every contract that one party will not prevent the other party's performance") (citations omitted); see also *Apalucci v. Agora Syndicate*, 145 F.3d 630, 634 (3d Cir. 1998) ("As a general rule, when one party to a contract unilaterally prevents the performance of a condition upon which his own liability depends, the culpable party may not then capitalize on that failure.").

Plaintiffs also allege that Defendants breached the 2001 Outline of Terms, which was entered into simultaneously with the Consent Decree, and which is incorporated by reference in the License Agreement. In their Motion to Dismiss, Defendants do not address the Outline of Terms or even acknowledge the existence

of this document. Nor do they acknowledge that the License Agreement does not contain, and expressly crossed out, a merger clause. The Outline of Terms provides that AQP has the exclusive right to distribute Ben & Jerry's products in Israel, including the Areas. Defendants' announcement that they will not renew the License Agreement and will pursue other arrangements for the distribution of Ben & Jerry's ice cream in Israel conflicts with the Outline of Terms.

The Consent Decree, which was negotiated simultaneously with the Outline of Terms, prohibits Defendants from "narrow[ing] the scope of" the license granted to AQP or "degrad[ing] the terms" of the license without the approval of the ICA, Israel's antitrust authority. It also prohibits B&J, Unilever, and Strauss (another Unilever ice cream brand) from taking any action that might "interfere with the activities of [AQP]in the field of frozen desserts generally and, particularly, in the distribution and marketing of Ben & Jerry's products." Plaintiffs have alleged that Defendants have breached most, if not all, provisions of the Consent Decree.

Plaintiffs properly pleaded that all Defendants are in breach of contract. Although Defendants demanded arbitration pursuant to the License Agreement (Bornstein Decl.; ECF No. 4-13, Ex. 1), they assert that because the Unilever Defendants are not signatories to the License Agreement they cannot breach it. As noted earlier (Pt. I.D, *supra*), the Unilever Defendants are bound by the language

of the License Agreement and by the Outline of Terms which was incorporated into the License Agreement. They are also bound by the Consent Decree.

In short, the breach of contract claim sets forth clear and valid claims against all of the Defendants.

C. Plaintiffs Properly Pleaded A Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

Plaintiffs' breach-of-contract claim rests on allegations that the Defendants violated express terms of written agreements. The implied covenant of good faith and fair dealing claim rests on allegations that the Defendants violated implied terms of those written agreements. "A covenant of good faith and fair dealing is implied in all contracts, encompassing any promises which a reasonable person in the position of the promisee would be justified in understanding were included and which are not inconsistent with the terms of the contract." *Twinkle Play Corp. v. Alimar Props., Ltd*., 186 A.D.3d 1447,1448, 128 N.Y.S.3d 848, 849 (2d Dept. 2020) (citing *Turkat v Lalezarian Developers, Inc*., 52 A.D. 3d 595,596, 860 N.Y.S.2d 153 (2d Dept. 2008)). "The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Id*. (citation omitted). "The implied covenant of good faith and fair dealing 'embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the

right of the other party to receive the fruits of the contract.'" *ABN AMRO Bank, N.V. v. MBIA Inc*., 17 N.Y.3d 208,228(2011) (citation omitted). New Jersey law is to the same effect. *See, e.g*., *Emerson Radio Corp. v. Orion Sales, Inc*., 253 F.3d 159, 170 (3d Cir. 2001) (citing *Sons of Thunder, Inc. v. Borden, Inc*., 148 N.J. 396, 420 (1997)).

Accepting the Complaint's allegations as true, as the Court must, augmented by the submissions made in support of the motion for a preliminary injunction, and giving them the required benefit of every possible favorable inference, the Court should find that Plaintiffs have stated a clear viable cause of action for breach of the implied covenant of good faith and fair dealing inherent in the License Agreement and incorporated Outline of Terms.

Defendants mistakenly argue that the claim for breach of the implied covenant of good faith and fair dealing duplicates Plaintiff's breach-of-contract claim. This contention ignores the allegations that Defendants breached an implied covenant of good faith and fair dealing by making affirmative representations that led the Plaintiffs, in reliance on those statements, to expand their business at significant expense, while Defendants intended to terminate the business arrangement with Plaintiffs. (Complaint ¶¶ 50-52, 56, 95-100.)

Defendants promised Plaintiffs that the license would be extended beyond 2022, as it had been extended multiple times over more than thirty years.

Defendants abruptly reversed course and announced in July 2021 that exclusively due to Plaintiffs' refusal to break the law, the license would terminate at the end of 2022. (Complaint ¶¶ 48-52, 59-61.)

Under New York law, the implied covenant of good faith and fair dealing claim extends beyond the literal language of a contract. Defendants themselves assert that "the implied covenant is a tool for filling unforeseeable gaps in agreements." (MTD at 21.) Although the License Agreement does not explicitly provide that B&J may not force AQP to violate the law as a condition for license renewal, this duty was impliedly included in the agreement. *See Dalton v Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) ("Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included[.]") (citations omitted); *Scheer v Elam Sand & Gravel Corp.*, 177 A.D.3d 1290, 1291 (4th Dept. 2019) ("Because the lease contemplated an exercise of discretion, the implied covenant of good faith and fair dealing included a promise to exercise that discretion in good faith, not arbitrarily"); *Argonaut Ins. Co. v. City of Troy*, 2020 WL 1915009 *4 (N.D.N.Y. April 20, 2020) ("A reasonable insured would understand that implicit in a contract to provide a legal defense to a lawsuit is a promise that the defense attorney the insurer provides will operate without a conflict of interest."); *Twinkle*

Play, 128 N.Y.S.3d at 849 ("an implied understanding that the defendant would cooperate with the plaintiff's efforts to legally change the usage of the rental space") (citations omitted). New Jersey law is the same. *See Emerson Radio*, 253 F.3d at 170 ("This obligation to perform contracts in good faith has been interpreted in New Jersey to mean that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'"), quoting *Sons of Thunder*, 148 N.J. at 420.

Moreover, even if the Complaint's allegations are potentially duplicative, dismissal at this stage in the proceedings is not justified. Plaintiffs may plead in the alternative. *Shear Enters., LLC v. Cohen*, 189 A.D. 3d 423,424, 137 N.Y.S.3d 306, 309 (1st Dept. 2020); *Citi Mgmt. Grp., Ltd. v. Highbridge House Ogden, LLC, 45 A.D.3d 487*, 847 N.Y.S.2d 33, 34 (App. Div. 1st Dept. 2007) ("At this stage of the litigation, defendant is permitted to plead in the alternative … the claims for breach of the implied covenant of good faith and fair dealing, and for fraud, should not be dismissed as duplicative of the breach-of-contract cause of action at this juncture"); see also *Cartel Capital Corp. v. Fireco of N.J.*, 81 N.J. 548, 564 (1980) (New Jersey rules "permit the pleading and pursuit of alternative and even inconsistent theories.").

AQP is being terminated because it is unwilling to meet an unlawful condition imposed in bad faith. It is hard to imagine a clearer case of classic breach

of an implied covenant of good faith and fair dealing. *See Bronx Auto Mall, Inc. v. Am. Honda Motor Co.*, 113 F.3d 329, 330 (2d Cir. 1997) (franchisor could not condition renewal of franchisee's contract on conditions imposed in bad faith).

D. Plaintiffs Properly Pleaded a Claim for Wrongful Termination.

Defendants wrongly failed to renew, and thus wrongly terminated, the License Agreement because Plaintiffs refused to accede to their demand that Plaintiffs violate Israeli, U.S., New York and New Jersey law and policy in the distribution and sale of ice cream. It is axiomatic that a court may refuse to enforce a contract that violates public policy. *W.R. Grace v. Local 759*, 461 U.S. 757, 766 (1983) (citing *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948)). "A promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). Courts have declined to enforce contracts that violate statutes, promote crime, interfere with the administration of justice, encourage divorce, violate public morality, or restrain trade. *E.g.*, *Saxon Constr. & Mgmt. Corp. v. Masterclean of North Carolina, Inc.*, 273 N.J. Super. 231 (1994). Many courts recognize that even at-will employment, which is terminable for any reason or for no reason at all, "may not be terminated . . . in retaliation for . . . refusal to perform an illegal act." *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 418 (1978); *Radwan v. Beecham Labs.*, 850 F.2d 147, 151-52 (3d Cir. 1988); *Pierce v.*

Ortho Pharm. Corp., 84 N.J. 58, 69 (1980); *Fox v. Starbucks Corp*, 2021 WL 4155029, *5 (S.D.N.Y. Sept. 13, 2021) (both New York and federal law prohibit terminating an employee in retaliation for the employee's participation in protected activity); *Clark v. Thruway Fasteners, Inc*., 100 A.D.3d 1435, 954 N.Y.S. 2d 318 (4th Dept. 2012) (at will employee may be terminated for any reason other than a statutorily impermissible reason).

Similarly, Defendants may not refuse to renew AQP's license on the ground that AQP rejected the Defendants' demand that it engage in illegal acts in Israel and elsewhere. A hypothetical illustrates the point. A leading competitor of B&J's ice cream in Israel is Haagen-Dazs, which is owned by General Mills. Unilever could not ask AQP to smash a Haagen-Dazs storage facility in Israel, and then condition renewal of AQP's license on compliance with that illegal request.

Based on Defendants' publicly-stated reason for terminating the License Agreement (namely, to boycott portions of Israel), New Jersey divested $182 million in Unilever stocks and bonds in December 2021, on the ground Defendants actions were contrary to New Jersey law (N.J.S.A. § 52:18A-89.14) which provides, "[N]o assets of any pension or annuity fund under the jurisdiction of the Division of Investment in the Department of the Treasury … shall be invested in any company that boycotts the goods, products, or businesses of Israel, boycotts those doing business with Israel, or boycotts companies operating in Israel or

Israeli-controlled territory." *See also* N.J. Stat. § 52:18A-89.13 ("The State is deeply concerned about the [BDS] effort to boycott Israeli goods, products, and businesses which is contrary to federal policy articulated in numerous laws."). Similarly, in October 2021, the New York State Controller determined that Unilever had "engaged in BDS activities," violating N.Y. Executive Order No. 157 (June 5, 2016), and announced that the New York State Common Retirement Fund was divesting from $111 million in Unilever equity. Other States have taken similar action. Thus, the actions taken by the Defendants are contrary to the public policy of New Jersey, New York, and many other states.

E. Avi Zinger Properly Pleaded A Claim for False Light Invasion of Privacy.

Defendants contend that Avi Zinger's claim should be dismissed because New York does not recognize a cause of action for false light invasion of privacy. (MTD at 30) Zinger's claim, however, is not controlled by New York law because it is not based on the License Agreement that contains the choice-of-law provision. The decision to terminate the business relationship with Plaintiffs was made by the Unilever Defendants in New Jersey, and the statement informing the world of that decision was issued in New Jersey. Moreover, New Jersey choice-of-law principles apply to this claim, precisely because New York does not recognize a cause of action for false light invasion of privacy. The public policy interests of New Jersey

law control when there is a conflict. *See Sensient Colors, Inc. v. Allstate Ins. Co.*, 193 N.J. 373, 394 (2008).

"It is accepted in New Jersey that a cause of action exists for invasions of privacy involving publicity that unreasonably places the other in a false light before the public." *Romaine v. Kallinger*, 109 N.J. 282, 293 (1988) (citation and quotations omitted). A defendant is liable if he placed the plaintiff before "the public in a false light . . . [¶], (a) the false light . . . would be highly offensive to a reasonable person, and [¶] (b) the [defendant] had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed." *Id*. at 294 (quoting Restatement (Second) of Torts § 652E). "The interest protected by the duty not to place another in a false light is that of the individual's peace of mind, i.e., his or her interest "in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is." *Id*. (quoting Restatement (Second) of Torts § 652E, comment b; additional citation omitted).

"[A] fundamental requirement of the false light tort is that the disputed publicity be in fact false, or else "at least have the capacity to give rise to a false public impression as to the plaintiff." *Romaine v. Kallinger*, 109 N.J. at 294 (citations and quotations omitted). The publicized material in a false-light claim

must constitute a "major misrepresentation of [plaintiff's] character, history, activities or beliefs." *Id*. at 295 (citations and quotations omitted).

Avi Zinger bases his claim on Unilever's public statement distancing itself from Zinger and AQP because, according to Unilever, the Plaintiffs operate in a manner "inconsistent with our values" and because "[w]e … hear and recognize the concerns shared with us by our fans and trusted partners"—namely the BDS activists who urged Defendants to initiate a boycott. (Complaint ¶ 60) The Unilever Defendants try to distance themselves from this statement, asserting it was made by B&J (MTD at 8, n.5 and 32), but Defendants' own exhibit shows that the statement was attributed by Ben & Jerry's Board to "Unilever and its CEO." (Bornstein Decl., Ex. 8)

Defendants also contend that Unilever's statement does not support a false-light claim because it is not demonstrably false. (MTD at 32-34.) The New Jersey Supreme Court held, however, in *Romaine* (the lead case cited by Defendants) that an actionable statement need not be false, so long as it has "the capacity to give rise to a false public impression as to the plaintiff." *Romaine*, 109 N.J. at 294; *accord*, *G.D. v. Kenny*, 205 N.J. 275, 308 (2011).

This is precisely the situation here. To appease the BDS activists and demonstrate that they had been "heard," Unilever's public statement endorses the BDS Movements' misrepresentations about its Israeli licensee as legitimate

"concerns" and portrays the licensee—Avi Zinger—as operating contrary to Defendants' well-publicized social-justice values.

Defendants praised Avi Zinger's social-justice efforts over the years and haled them as compatible with their own (Complaint ¶¶ 38, 45). Hence this portrayal represents a "major misrepresentation of [Avi's] character, history, activities or beliefs." *Romaine*, 109 N.J. at 295. Over the past three decades, Avi Zinger has worked passionately to promote peaceful coexistence and collaboration between Israelis and Palestinians. (*Id*., ¶¶ 36-37.) He has devoted time and substantial resources to supporting disadvantaged communities, including providing economic opportunities for Palestinian farmers and businesses. (*Id*., ¶ 37) He has also gone to extraordinary lengths to care for his diverse workforce, including those employees whose economic stability was particularly vulnerable during the pandemic. (*Id*., ¶ 102) Avi's efforts earned him an outstanding reputation as an honest, caring business owner, philanthropist, and as a force for peace. In 2018, for example, Avi Zinger received Israel's prestigious Industry Award, presented to him by the President of the State of Israel, and the President of Israel's Manufacturer's Association, in recognition of Avi's many years of significant contribution to Israel's food industry and the broader community. (*Id*., ¶ 102)

Until the July 2021 statement was published, Avi Zinger's community—including both Israelis and Palestinians—held Plaintiffs' products in high regard. As a result of the fallout caused by Defendants' conduct, however, Avi is now the target of calls on social media to boycott his business. (*Id*., ¶¶ 69, 103-104). There have been attacks on, and destruction of, AQP's equipment. Government bodies, organizations, institutions, and private companies have succumbed to public pressure and are distancing themselves from AQP, all because the Defendants have put forth a false impression of Avi Zinger. (*Id*., ¶¶ 69-76.)

The foregoing suffices to state a claim for false light invasion of privacy under New Jersey law. *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016), is illustrative. The New Jersey district court found that a public official's statement that a nurse returning from Africa during an Ebola outbreak was "obviously ill" sufficed to state a false light claim at the pleading stage even though the official did not use her name. *Id*. at 605. The District Judge said that "[t]he viability or not of this claim cannot be settled from the face of the complaint" and its "offensiveness and falsity, its "factual context," and its "recklessness" would "be explored in discovery." *Id*. (footnote omitted).

Avi Zinger has similarly stated a claim for false light invasion of privacy by alleging that Unilever publicly and falsely characterized him as someone who flouts Defendants' social-justice values and by crediting the message of BDS

activists who falsely asserted that Avi Zinger discriminated against Palestinians. This was an assertion that Defendants know full well to be false.

F. The Same Result Follows Under New York and New Jersey Law.

Defendants argue that New York law applies to all of AQP's claims, based on the choice-of-law provision in the License Agreement. (MTD at 11.) This is a legal issue that the arbitrator must decide.

Plaintiffs will prevail on their claims under both New York and New Jersey law. In the event of a conflict, the public policy interests of New Jersey law control and this Court applies the choice-of -law principles of the forum State of New Jersey. *E.g., Zydus Worldwide DMCC v. Teva API INC.,* 461 F. Supp. 3d 119 (D.N.J. 2021); *Sensient Colors, Inc. v. Allstate Ins. Co.,* 193 N.J. 373, 394 (2008); *In re Accutane Litig.*, 235 N.J. 229, 259-262 (2018).

In any event, all parties agree that all claims belong in arbitration after the Court's determination of AQP's entitlement to preliminary injunctive relief. The Court should therefore leave the question of which law applies to the arbitration panel.

CONCLUSION

For the foregoing reasons, the Court should maintain the status quo with entry of a preliminary injunction, deny Unilever's motion to dismiss, and grant Plaintiffs' cross-motion to stay pending arbitration.

Greenberg Dauber Epstein and Tucker
Attorneys for Plaintiffs

/s/Edward J. Dauber

By: _____

Edward J. Dauber, Esq.
Linda G. Harvey, Esq.

Of Counsel:

Nathan Lewin, Esq., admitted *pro hac vice*
LEWIN & LEWIN, LLP
888 17th Street, NW, Fourth Floor
Washington, DC 20006

L. Rachel Lerman, Esq., admitted *pro hac vice*
Alyza D. Lewin, Esq., admitted *pro hac vice*
The Louis D. Brandeis Center
For Human Rights Under Law
1717 Pennsylvania Avenue, NW, Suite 1025
Washington, DC 20006

L. Marc Zell, Adv., admitted *pro hac vice*
Zell, Aron & Co.
34 Ben Yehuda Street, 15th Floor
Jerusalem 9423001
ISRAEL