**IN ARBITRATION BEFORE DESIGNATED ARBITRATOR DAVID J. KAUFMANN**

**(CONDUCTED BY CONSENT PURSUANT TO THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION)**

PIRTEK USA, LLC.,

**DRAFT FINAL ARBITRATION**

**AWARD PROPOSED BY**

**PIRTEK USA ATTORNEY**

**DAVID JOBLOVE**

 Claimant

v.

james lager, TEXAS HOSE PRO

and JBL HOSE SERVICE, LLC.

 Respondents.

 /

**AWARD OF ARBITRATOR**

 I, THE UNDERSIGNED ARBITRATOR, having been duly-appointed by agreement between Claimant PIRTEK USA, LLC (“PIRTEK”) and Respondents James Lager (“Lager”), Texas Hose Pro (“Texas Hose Pro”) and JBL Hose Service, LLC (“JB Hose”) (Lager, Texas Hose Pro and JB Hose shall be referred to collectively as the “Lager Parties”) dated September 2, 2020, and having heard the proofs and allegations of PIRTEK based on the claims asserted in its Statement of Claim, and Texas Hose Pro and JB Hose having failed to appear at the January 18, 2022 hearing after due notice in accordance with the Rules of the American Arbitration Association (“AAA”), hereby AWARD as follows:

**PIRTEK’s Demand for Arbitration**

 On June 28, 2021, PIRTEK submitted its Statement of Claim, asserting claims against Lager, Texas Hose Pro and JB Hose for their breaches of the parties September 2, 2020 settlement agreement (the “Second Settlement”). PIRTEK’s Statement of Claim alleged that the Lager Parties breached the Second Settlement by making disparaging comments about PIRTEK on social media.

 As a result of the Lager Parties’ breaches, PIRTEK has sought liquidated damages in the amount of $453,000.00. Additionally, pursuant to the Second Settlement, PIRTEK requests the enforcement of the non-compete provision set forth in Section 12.c. of the Second Settlement and the entry of a permanent injunction requiring the Lager Parties to remove articles and social media posts which violate the Second Settlement and prohibiting the Lager Parties from further breaching the non-disparagement and confidentiality provisions included in the Second Settlement. Moreover, PIRTEK has requested an award of the attorneys’ fees and costs that it incurred in its efforts to enforce the Second Settlement.

**Lager’s Counterclaim**

 On August 3, 2021, Lager, represented by attorneys Ryan Cole, Esq., and Jerry Marks, Esq., submitted an Answer to PIRTEK’s Statement of Claim and Lager’s Counterclaim, alleging that PIRTEK breached the Second Settlement by failing to cause third-party websites to remove references to Lager.

**Pre-Hearing Procedures**

On August 19, 2021, a telephonic preliminary scheduling conference was held and counsel for all parties participated. With the consent of the parties’ counsel, on August 23, 2021, I entered a Scheduling Order which scheduled the final hearing to begin on January 18, 2022. The Scheduling Order was served on, and received by, the parties’ counsel.

On January 14, 2022, a video conference was held and counsel for all parties participated. During the January 14, 2022 conference, the parties discussed the logistics for the final arbitration hearing which, pursuant to the Lager Parties’ counsel’s request, was being held by video conference. The parties agreed to begin the January 18, 2022 final arbitration hearing at 10:00 a.m.

At approximately 9:30 a.m. on January 18, 2022 (thirty minutes before the final arbitration hearing was scheduled to begin), Ryan Cole, Esq. sent an e-mail to me and PIRTEK’s counsel advising that Lager, but not Texas Hose Pro or JB Hose, had filed for bankruptcy. Attached to Mr. Cole’s e-mail was a bankruptcy petition filed on behalf of Lager only. Neither Texas Hose Pro nor JB Hose are parties to that bankruptcy. In response, PIRTEK’s counsel stated their intention to proceed with the final hearing only on PIRTEK’s claims against Texas Hose Pro and JB Hose.

The undersigned informed all parties by e-mail that the final hearing would proceed, but only with respect to the claims against Texas Hose Pro and JB Hose. I further requested that Mr. Cole and Mr. Marks join the videoconference by 10:15 a.m. Despite my request, neither Texas Hose Pro, nor JB Hose, nor their counsel, appeared at the final arbitration hearing.

**Final Arbitration Hearing**

The final arbitration hearing began at 10:15 a.m. on January 18, 2022. I was present along with counsel for PIRTEK, Michael D. Joblove, Esq. and Aaron S. Blynn, Esq. Appearing on behalf of PIRTEK was its Chief Executive Officer Kim Gubera and its Director of Franchise Development Nick Ridgway. Mindful that Lager filed for bankruptcy the prior evening, only the claims against Texas Hose Pro and JB Hose were considered during the final arbitration hearing and this award is not against Lager in his individual capacity.

The following exhibits were authenticated, entered into evidence and considered by the undersigned Arbitrator:

|  |  |  |
| --- | --- | --- |
| **PIRTEK Exhibit No.** | **Date** | **Description** |
| 1 | 5/3/10 | Franchise Agreement |
| 2 | 11/12/12 | Fort Worth Franchise Agreement |
| 4 | 1/13/20 | Mutual Termination Agreement |
| 5 | 9/2/20 | Settlement Agreement |
| 12 | 6/19/21 | LinkedIn Post by Lager(Produced by Lager as 000276-77) |
| 13 | 6/26/21 | LinkedIn Post by Lager(Produced by Lager as 000275) |
| 14 | 6/27/21 | LinkedIn Post by Lager(Produced by Lager as 000279) |
| 17 | 7/20/21 | E-mail with LinkedIn Post by Lager (PIRTEK 000723) |
| 18 | 7/21/21 | LinkedIn Post by Lager (pasting settlement terms) |
| 19 | 11/22/21 | Does U.S. Army Veteran Jim Lager Recommend the Pirtek Franchise? |
| 20 | 12/7/21 | Some Franchisors & VetFran Exploit Veterans Even After They’ve Failed |
| 22 | 12/23/21 | LinkedIn Post by Lager |
| 23 | 12/24/21 | LinkedIn Post by Lager |
| 24 | 12/27/21 | LinkedIn Post by Lager |
| 27 | 12/28/21 | Lager’s Letter to the FTC |
| 28 | 12/28/21 | Lager’s Letter to NASAA |
| 29 | 12/28/21 | Lager’s ACLU Complaint  |
| 30 | 12/29/21 | LinkedIn Post by Lager |
| 31 | 12/29/21 | Franchise Attorney, Mediator David Kaufmann Ethics Accusations |
| 32 | 12/31/21 | NASAA Advisor Forbids Franchisee Participation in NASAA Public Comments |
| 34 | 1/4/22 | Is PIRTEK USA Racist? Or Just Really, Really White? |
| 35 | 1/4/22 | LinkedIn Post by Lager |
| 36 | 1/7/22 | LinkedIn Post by Lager |
| 37 | -- | Lager’s LinkedIn Experience Page (Pirtek 000566) |
| 40 | 7/1/20 | E-mail from Jerry Marks re: Declaratory Judgment Action |
| 41 | 1/13/22 | LinkedIn Post by Lager |
| 42 | 1/13/22 | King David Kaufmann Franchise Arbitration Call Leaked! |
| 43 | 1/14/22 | LinkedIn Post by Lager |
| 44 | 5/12/21 | E-Mail from Jerry Marks |
| 45 | 8/19/10 | Assignment of Franchise Agreement |

After being sworn in, Mrs. Gubera provided testimony to the Arbitrator, which the Arbitrator carefully considered and found to be credible. In addition to being questioned by PIRTEK’s counsel, the witness was also questioned by the undersigned Arbitrator. The Arbitrator listened attentively and took notes throughout the hearing and is confident that he captured and understood the positions, testimony and evidence presented to him.

After testifying regarding her education and work history, Mrs. Gubera discussed her experience with the Lager Parties. She explained that, for the most part, the Lager Parties’ performance as a PIRTEK franchisee declined since at least 2018. Mrs. Gubera traveled to Texas on two occasions to meet with Mr. Lager to discuss some of the issues he was having, including his failure to make payments to PIRTEK. Mrs. Gubera’s second meeting with Mr. Lager took place in February of 2019. On February 14, 2019, Mrs. Gubera traveled to Texas after receiving a phone call informing her that Lager had been arrested, and was incarcerated, for domestic violence or assault on a woman. By the time Mrs. Gubera arrived in Texas, Lager had been released from custody. Mrs. Gubera met with Lager and discussed his need to get his life in order. Lager was apologetic and agreed to take certain specific steps to improve his performance as a franchisee and to address certain issues in his personal life. Following the meeting, Mrs. Gubera sent Lager an e-mail memorializing the steps Lager needed to take in order to improve his company’s performance and to obtain a renewal franchise agreement. While there was an initial improvement in its performance, ultimately Lager’s company’s performance again declined.

Soon thereafter, upon learning that his franchise agreement would not be renewed, Lager, on behalf of his company, expressed an interest in selling his business. Mrs. Gubera testified that PIRTEK attempted to facilitate a sale by sending Lager approved buyers. The prospective buyers, however, lost interest in purchasing the business based on the fact that Lager’s company’s financials were in disarray.

Mrs. Gubera testified that after Lager’s sale of his business fell through, attorneys representing his company sent PIRTEK a demand letter warning PIRTEK that the company did not have a legal right to refrain from renewing JB Hose’s franchise agreement. PIRTEK did not believe there was any merit to Lager’s counsel’s position, but in lieu of litigating, PIRTEK entered into a settlement with JB Hose on January 13, 2020, which resulted in the termination of its franchise agreements. In exchange, Lager and JB Hose agreed to make certain payments to PIRTEK and to refrain from disparaging PIRTEK.

The evidence showed that after the first settlement agreement was entered in January of 2020, on July 1, 2020, Jerry Marks sent PIRTEK’s counsel an e-mail in which he stated that Lager would publish a book entitled “HOSED! A Franchise Insider’s Expose by Former PIRTEK USA Franchisee Jim Lager” if PIRTEK did not pay Lager $9,000,000.00. Following PIRTEK’s receipt of Mr. Marks’s threatening e-mail, it agreed to mediate with Lager.

Mrs. Gubera testified that despite knowing that all of Respondents’ allegations of discrimination and other wrongdoing were entirely false, PIRTEK decided to enter a second settlement agreement with Respondents to avoid the bad publicity and litigation costs that would be generated by a lawsuit in which Respondents made scandalous and untrue allegations. The evidence showed that the mediation took place in August of 2020 and negotiations continued thereafter. Counsel for all parties participated in the preparation of the second settlement, which was signed by the parties on September 2, 2020 (the “Second Settlement”). I did not participate in the drafting of the Second Settlement.

According to Mrs. Gubera, the provisions of the Second Settlement which were most important to PIRTEK were the provisions prohibiting Respondents from discussing PIRTEK or its officers, with limited exceptions, and prohibiting Respondents from not only disclosing the terms of the Second Settlement, but even the existence of the Second Settlement. Mrs. Gubera further explained that, given Lager’s character, including his growing and use of marijuana, and his arrest for domestic abuse or battery, PIRTEK did not want there to be any association between PIRTEK and Respondents.

Mrs. Gubera next testified about PIRTEK’s post-settlement discovery of various LinkedIn posts, posted by Lager on behalf of Texas Hose Pro, in which he made disparaging remarks about PIRTEK and disclosed both the existence of the Second Settlement and what purported to be some of its terms. Included in some of those posts were express allegations that PIRTEK terminated Lager’s franchise agreements because he was in an interracial relationship and disparaging and false accusations of racism against PIRTEK and its officers. Mrs. Gubera made clear that there was absolutely no truth to those allegations. Mrs. Gubera further explained why PIRTEK believed the posts constituted breaches of the Second Settlement.

Mrs. Gubera also testified about correspondence and complaints, sent on behalf of Texas Hose Pro, to the North American Securities Administrators Association, Inc., the Federal Trade Commission and the ACLU of Texas and why those correspondence constituted breaches of the Second Settlement.

The witness further testified that various posts on [www.unhappyfranchisee.com](http://www.unhappyfranchisee.com/) also accusing PIRTEK and its officers of racism, among other charges, were clearly created with input from Lager, on behalf of Texas Hose Pro, which constitute a breach of the Second Settlement’s prohibition on discussing PIRTEK (with limited exceptions) and the agreement’s non-disparagement and confidentiality provisions.

**Award**

WHEREFORE, after carefully considering the Statement of Claim, the parties’ pre-hearing briefs, the testimony and the evidence presented at the final arbitration hearing, giving all relevant evidence the weight it should be accorded, I FIND, HOLD, DECLARE, STATE AND AWARD as follows:

1. PIRTEK’s Claims and Monetary Damages:

I find for PIRTEK and against Respondents Texas Hose Pro and JB Hose. As a result, pursuant to Section 12 of the Second Settlement, I award $453,000.00 in favor of PIRTEK against Respondents Texas Hose Pro and JB Hose, jointly and severally.

1. Legal Fees and Cost Award:

Pursuant to section 18 of the Second Settlement, PIRTEK, as the prevailing party in this arbitration, is entitled to recover the attorneys’ fees and costs it incurred in connection with this action. As a result, I award $196,037.25 in attorneys’ fees and costs in favor of PIRTEK against Respondents Texas Hose Pro and JB Hose, jointly and severally.

1. Arbitration Cost Award:

Respondents Texas Hose Pro and JB Hose are jointly and severally liable and shall reimburse PIRTEK the arbitrator’s fees paid by PIRTEK, which amount to $ [insert total amount received from PIRTEK for arbitrator’s fees and half of what is incurred since the last invoice].

1. Total Award:

Based on the foregoing, I award a total of $[insert $649,037.25 plus the total arbitration cost from paragraph 3] (the “Total Award”) in favor of PIRTEK against Respondents Texas Hose Pro and JB Hose, jointly and severally. As expressly provided in Section 12.a. of the Second Settlement, Respondents Texas Hose Pro and JB Hose shall pay to PIRTEK the Total Award no later than ten (10) days from the date of this Award (the “Payment Due Date”), time being of the essence. Payment shall be made via wire transfer. In the event that Respondents Texas Hose Pro and JB Hose do not satisfy the Total Award by the Payment Due Date, Texas Hose Pro and JB Hose shall, jointly and severally, pay interest at the statutory interest rate of 9% per annum until said amounts are paid in full.

1. Enforcement of Texas Hose Pro and JB Hose’s Non-Compete Obligations

Pursuant to Section 12.c. of the Second Settlement, having found that Texas Hose Pro and JB Hose materially breached the Second Settlement, including prior to June 28, 2021, I find that PIRTEK is entitled to the enforcement of the non-competition provisions set forth in the franchise agreements. As a result, within 60 days of this Award, Texas Hose Pro and JB Hose shall terminate operations of any business that competes with PIRTEK. Texas Hose Pro and JB Hose may not engage as an owner, partner, franchisee, consultant, agent or in any other capacity in any business that sells products and services similar to the products and services sold by a PIRTEK business within the two territories reflected on Exhibits “A” and “B,” hereto, which were the Territories identified in the Franchise Agreements, or 15 miles of the Territories, or the territory or promotional zone of any other PIRTEK center for a period of two years after expiration or termination of the Franchise Agreements (January 13, 2020), with those two years having been tolled since PIRTEK filed its Statement of Claim on June 28, 2021, as provided for in the tolling provision in Section 12.c. of the Second Settlement. As a result, the period during which Texas Hose Pro and JB Hose must observe the non-compete will be 6 months and 16 days (i.e. 199 days) from the date that Texas Hose Pro and JB Hose begin complying with this non-compete provision (the “Non-Compete Period”). In addition, through the end of the Non-Compete Period, Texas Hose Pro and JB Hose shall not employ or seek to employ any person who is employed by any other PIRTEK franchise or center or otherwise directly or indirectly induce such person to leave his or her employment.

1. Injunction Requiring the Removal of Posts About PIRTEK and Prohibiting Further Comments About PIRTEK That are not Expressly Permitted by the Second Settlement

In the Statement of Claim, PIRTEK requested all further relief that I believed to be appropriate, and during the course of the hearing, PIRTEK requested the entry of both a preliminary injunction and a permanent injunction requiring the Lager Parties to remove all existing posts and articles which violate the non-disparagement and confidentiality provisions of the Second Settlement, and which prohibits the Lager Parties to refrain from further violating those provisions. Having found that PIRTEK is entitled to the relief sought, and being mindful that Lager has filed for bankruptcy, I find that PIRTEK is entitled to injunctive relief against Respondents Texas Hose Pro and JB Hose as follows:

Respondents Texas Hose Pro and JB Hose, their shareholders, directors, officers, agents, servants, employees, successors, assigns and affiliates, and any and all other persons in active concert, in privity with them[[1]](#footnote-2) are hereby PERMANENTLY ENJOINED from:

1. Communicating directly about or in reference to Glenn Duncan or Peter Duncan, Dan Perry, Kim Gubera and any other current or future employee of PIRTEK, any franchisee, or any of their predecessors, successors, assigns, affiliates, members, managers, directors, officers, owners, shareholders, employees, agents, attorneys and representatives, and their family members (collectively the “PIRTEK Parties” and individually a “PIRTEK Party”) except for to engage in communications in the ordinary course of business of serving existing or potential customers that fairly compare PIRTEK’s products and services with the products and services offered by Texas Hose Pro and JB Hose, in the manner in which a reasonable person would expect any other third-party competitor to compare its products or services to PIRTEK’s products and services. *See* Second Settlement, at ¶ 5;
2. Communicating directly or indirectly about or in reference to any PIRTEK Party’s relationship with, sponsorship of, or affiliation with NASCAR or Roger Penske or any affiliates of same. *Id*. at ¶ 5.c;
3. Referring to PIRTEK or any PIRTEK Party on any webpage, promotional materials or in any social media post (including but not limited to on Texas Hose Pro’s website, on LinkedIn, Facebook, twitter, or any other online media, including unhappyfranchisee.com), or in print media. *Id*. at ¶ 5.e;
4. Referring to PIRTEK’s Franchise Disclosure Documents, or its disclosures to potential franchisees. *Id*. at ¶ 5.g;
5. Engaging in any disparaging communications or statements (whether verbal, written, online (including on unhappyfranchisee.com) or through any social media platform), or acting in concert with or directing or suggesting to any third-party, including their employees and attorneys, to engage in any disparaging communication or statement, regarding any PIRTEK Party, including but not limited to any PIRTEK employee, franchisee, customer and supplier. This prohibition shall include, but not be limited to, a prohibition on Texas Hose Pro and JB Hose and any such third-party acting on their behalf or at their direction or suggestion, from tagging, liking, forwarding, commenting on, retweeting or taking similar actions as to internet and social media posts that disparagingly refer to, relate, or mention (implicitly or explicitly) any PIRTEK Party. Texas Hose Pro and JB Hose must instruct their employees that they are prohibited from disparaging all PIRTEK Parties. *Id*. at ¶ 6.a;
6. Engaging in any communication or making any statement regarding, describing, commenting upon or referencing any of the PIRTEK Parties; any past, present or future suppliers of any PIRTEK Party; any past, present or future franchisee of any PIRTEK Party; or any past, present or future business affiliates (including but not limited NASCAR and Roger Penske) of any PIRTEK Party regardless of whether the communication or statement is verbal, written, photographic, or videographic, made online or submitted through any social media platform, regardless of whether the communication or statement identifies any PIRTEK Party expressly by name or whether a PIRTEK Party could be identified from the context of the statement or by inference or suggestion. *Id*. at ¶ 7.a; and
7. Revealing, discussing, publishing or in any way communicating or in any way allowing or directing others to disclose any of the terms or fact of the Second Settlement, the content of the Parties’ mediation statements and their discussions in the course of the mediation to any person, organization, or other entity, except to their respective officers, employees or professional representatives to the extent necessary in connection with the entering into and performance of the Second Settlement, or to the extent required by law or pursuant to lawful subpoena or to an order of a court of competent jurisdiction. *Id*. at ¶ 7.a.
8. This award shall be enforceable in any court of competent jurisdiction.
9. This Award shall be binding upon, and inure to the benefit of, PIRTEK, Texas Hose Pro and JB Hose, and their respective administrators, representatives, heirs, successors and assigns.[[2]](#footnote-3)

I, David J. Kaufmann, do hereby affirm upon my oath as the Arbitrator that I am the individual described herein and who executed this instrument which is my AWARD.

SO AWARDED AND ORDERED in New York, New York, this \_\_\_ day of January, 2022.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 David J. Kaufmann, Arbitrator

 767 Third Avenue, 30th Floor

 New York, NY 10017

1. In light of Lager’s personal bankruptcy, this injunction is not to be construed as to bind Lager in his capacity as an individual. [↑](#footnote-ref-2)
2. In light of Lager’s personal bankruptcy, this award is not entered against Lager in his capacity as an individual. [↑](#footnote-ref-3)