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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

T-BIRD NEVADA LLC, et al., Plaintiffs and Appellants, v. OUTBACK STEAKHOUSE, INC., et al., Defendants and Respondents.	B219861 (Los Angeles County Super. Ct. No. BC408229)

APPEAL from an order of the Superior Court of Los Angeles County, Peter D. Lichtman, Judge. Reversed.

Katten Muchin Rosenman, Douglas J. Rovens and Steven A. Lamb for Plaintiffs and Appellants.

Ropes & Gray, Thad A. Davis and Douglas Hallward-Driemeier for Defendants and Respondents.

Thomas J. Shannon, Jr. is the managing member of T-Bird Nevada, LLC, and the president and part owner of the corporate general partner of each of 56 California Outback Steakhouse restaurant franchisees.[1] In a complaint filed in Los Angeles Superior Court, T-Bird Nevada and the franchisees contend Outback Steakhouse, Inc., its founders, Chris T. Sullivan and Robert D. Basham, and its chief legal officer, Joseph J. Kadow, induced Shannon to open 46 of the Outback Steakhouse franchise restaurants in California through a series of false representations and promises.[2] The trial court dismissed the action based on the Florida forum-selection clause in an agreement between T-Bird Nevada and Outback Steakhouse, Inc. that provided funding for the California expansion. On appeal T-Bird Nevada and the franchisees contend the forum-selection clause is void under California franchise law.[3] We reverse.

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1 Each franchisee is a separate California limited partnership. The general partner of each limited partnership is a California corporation. Shannon is the president of, and has an interest in, each corporate general partner. For example, Foothill Ranch Steakhouse, L.P.'s general partner is Foothill Ranch Steakhouse, Inc. of which Shannon is president.

2 The complaint also names a number of companies affiliated with Outback Steakhouse, Inc. Outback Steakhouse, Inc. is the parent company of defendants Outback Steakhouse of Florida, Inc. (a subsidiary engaged in franchising), OS Asset, Inc. (a subsidiary that licensed intellectual property) and OSI Restaurant Partners, LLC. Because there is some confusion in the record as to which entity engaged in certain activities, but no need to distinguish among the entities for purposes of the issues on appeal, we will refer only to Outback Steakhouse, Inc.

Outback Steakhouse, Inc. is owned by defendant Kangaroo Holdings, Inc. Shareholders in Kangaroo Holdings, Inc. include defendants Bain Capital Partners, LLC, Bain Capital (OSI) IX, LP and Bain Capital Fund IX, LP (the Bain defendants) and Catterton Partners VI, LP and Catterton Partners VI, Offshore, LP (the Catterton defendants). All defendants will be collectively referred to as the Outback Steakhouse defendants.

3 Kangaroo Holdings, Inc., the Bain defendants and the Catterton defendants contend they were separately entitled to dismissal because the theories of secondary liability asserted against them are inapplicable or not supported by sufficient factual allegations. That argument, however, has been forfeited because it is raised for the first time on appeal. (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d

FACTUAL AND PROCEDURAL BACKGROUND[4]

1. *Development of the Outback Steakhouse Restaurant Chain; Expansion into the California Franchise Market*

In 1987 Sullivan and Basham founded the Outback Steakhouse restaurant chain in Florida. In 1991, after expanding into the southern and midwestern states, including the sale of franchises, Sullivan and Basham formed Outback Steakhouse, Inc., which sold common stock in an initial public offering.

In 1993 Sullivan asked his good friend and business associate, Shannon, to enter into a partnership with Outback Steakhouse, Inc. to develop the California franchise market. Shannon, who was an experienced real estate developer, agreed. By 1996 Shannon had opened 10 Outback Steakhouse franchise restaurants.

To induce him to open additional restaurants, Sullivan and Basham promised Shannon that Outback Steakhouse, Inc. would assist him in obtaining a nonrecourse loan from its lender to be used to acquire sites and construct restaurants; Shannon would never be personally responsible for repayment of the principal loan balance; Outback Steakhouse, Inc. would guarantee repayment of the loan; Outback Steakhouse, Inc. would buy Shannon's restaurants after a merger, acquisition or secondary stock offering at a price that would ensure he received a return on investment consistent with that received by Outback Steakhouse, Inc. insiders; and the loan, which would be repaid, restructured or otherwise absorbed in connection with the buyout, would remain in place until

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412, 417 [issues not raised in trial court cannot be raised for first time on appeal]; *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117 ["issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal"].) Moreover, the seventh cause of action for intentional interference with contractual relations is asserted against these defendants directly.

4 Our recitation of the facts is largely taken from the complaint. For purposes of a motion to dismiss, we assume the factual allegations in the complaint are true. (*Snyder v. Evangelical Orthodox Church* (1989) 216 Cal.App.3d 297, 306.)

Shannon's franchises were purchased. Shannon agreed to further expand into the California market.

During the first quarter of 1997 Outback Steakhouse, Inc. facilitated and guaranteed a $25 million loan from Barnett Bank—a lender with which it already had a substantial loan—to be used exclusively for the California expansion.[5] According to a declaration filed by Shannon in opposition to the motion to dismiss, he had worked closely with Kadow to structure the expansion.[6] Following Kadow's advice, Shannon formed T-Bird Nevada, a Nevada limited liability company, to sign as the borrower for the loan and to provide funds to the franchisees' corporate general partners so Outback Steakhouse, Inc. would not have to make funds directly available to the franchisees. Shannon also formed the separate California limited partnerships for each franchise restaurant and their corporate general partners. Each limited partnership signed an identical form franchise agreement with Outback Steakhouse, Inc. Each agreement contains a Florida forum selection clause and choice-of-law provision.

In October 1997, more than seven months after the $25 million loan had closed and substantial funds had been disbursed, Outback Steakhouse, Inc. sent Shannon a borrower agreement providing he and his wife, who were the sole shareholders of T-Bird Nevada, would defend, indemnify and hold Outback Steakhouse, Inc. harmless from any

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5 The loan agreement provides, "The proceeds of the Facility shall be used solely for the purpose of making loans to Restaurant Operators for use in acquiring interests in Property and constructing and equipping the Improvements constructed thereon for use as a Restaurant Location."

The guaranty states, "Guarantor desires that the development and opening of Outback Steakhouse restaurants in the State of California be accelerated for the direct financial benefit of Guarantor and, in order to accelerate the development and opening of Outback Steakhouse restaurants in the State of California, Guarantor has agreed to act as a guarantor for a loan to provide funds for the development and opening of such restaurants . . . ."

6 In his declaration Shannon explained the promise that Outback Steakhouse, Inc. would buy out any restaurants he developed was important because he "was not in the restaurant business and was unwilling to operate the California Outback Steakhouse franchises forever."

liability relating to the loan and the company's guaranty. As consideration for the loan guarantee, the borrower agreement also provided for a 5 percent reduction in the price Outback Steakhouse, Inc, would be required to pay under the terms of the franchise agreement if and when it purchased any restaurants.[7]

Shannon refused to sign the borrower agreement because he believed the indemnification obligation was inconsistent with the representations made to induce him to open additional franchise restaurants. In response to Shannon's objection, Outback Steakhouse, Inc. eliminated the indemnification provision, kept the 5 percent price reduction provision, which Shannon acknowledged the parties had agreed to, and added a provision that any default on the loan between T-Bird Nevada and Barnett would constitute a default under all franchise agreements.[8] Shannon agreed to the default provision because he did not believe it applied to payment of the loan balance and T-Bird Nevada had agreed to make monthly interest payments to service the debt. Shannon

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[7] As discussed below, the parties eventually entered into an amended and restated borrower agreement on January 31, 2005 with many of the same terms as the original borrower agreement, including the 5 percent price reduction. That provision, as included in the amended and restated borrower agreement, provides in paragraph 5, "Reduction in Purchase Price. As consideration for executing the Guaranty, Borrower, the Member [Shannon] and the Franchisees agree that in the event that any OSI Entity elects to purchase any Outback Steakhouse restaurant owned by any Franchisee whether or not as a result of the right to do so under the Franchise Agreements, the purchase price for such restaurant, as determined pursuant to the Franchise Agreement governing such restaurant or as negotiated by the parties, shall be reduced by five percent (5%)."

[8] Paragraph 3 of the agreement provides, "Default under Franchise Agreement. The parties agree that any default under the Line of Credit, Loan Agreement, or related documents shall constitute a default under all of the Franchise Agreements entered into by the Borrower, the Member, any Franchisee, and/or any Affiliate of them, with respect to the Outback Steakhouse restaurants owned or operated by the Franchises (the 'Franchise Agreements'). In such event, in addition to any other rights which OSI may have pursuant to this Agreement, the Loan Agreement, the Guarantee Agreement or applicable law, OSI shall have the right to exercise any and all of its rights upon default under the Franchise Agreements."

signed the borrower agreement individually, on behalf of T-Bird Nevada and as president of each franchisee's corporate general partner.

On February 6, 2001 T-Bird Nevada and Bank of America, with which Barnett Bank had merged, entered into an amended and restated loan agreement, increasing the loan to $35 million and extending it through December 31, 2004. In December 2004 the loan was again extended through December 31, 2008. On January 31, 2005 Shannon executed an amended and restated borrower agreement that included a forum selection clause providing "any action relating to this Agreement, brought by either [Outback Steakhouse, Inc.], the Borrower, the Franchisees or the Member in any court, whether federal or state, shall be brought within the State of Florida . . . ."[9]

2. *The Sale of Outback Steakhouse, Inc.*; *the Lawsuits*

In June 2007 Outback Steakhouse, Inc. was sold to Bain Capital and the Catterton Partners for in excess of $3.2 billion; Shannon's franchise restaurants were not purchased from him.[10] When the $35 million loan became due on December 31, 2008, T-Bird Nevada did not repay it; and it was not extended. After Bank of America informed Outback Steakhouse, Inc. it would enforce its guaranty, the company repaid the loan and was assigned the loan agreement.

On February 19, 2009, seeking to collect the balance due on the loan, Outback Steakhouse, Inc. filed a complaint in Florida state court against T-Bird Nevada and the California franchisees for breach of contract and for a declaratory judgment that T-Bird Nevada's default under the loan agreement constituted a default under the franchise agreements.

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9 Neither the loan agreement nor the note contains a forum selection clause. However, the borrower agreement provides Outback Steakhouse, Inc. has the right to succeed to any and all rights of the lender in the event of default under the loan agreement.

10 Because it is not clear from the record which corporate entities acquired Outback Steakhouse, Inc., we refer to the acquiring companies generally as Bain Capital and Catterton Partners.

On February 20, 2009 T-Bird Nevada and the California franchisees filed the instant action in Los Angeles County alleging Sullivan and Basham had induced Shannon to develop the California franchise market by falsely promising to buy his restaurants and ensure nonrecourse financing until a buy-out was completed; Outback Steakhouse, Inc. never disclosed these promises in their public filings because they did not want the liability reflected on their financial statements; in order to avoid difficulty obtaining shareholder approval for the sale of the company, the Outback Steakhouse defendants, in conspiracy with each other, agreed to renege on these promises; and by reneging on the promises the defendants were also seeking to force T-Bird and the franchisees into default so they could acquire the franchises at a liquidation price well below what Shannon had been promised. Based on these allegations, T-Bird Nevada and the franchisees assert claims including breach of fiduciary duty, breach of contract, fraud, negligent misrepresentation and violation of California franchise laws, which prohibit the offer and sale of franchises by means of written and oral communications that include untrue statements of material fact and omit material facts necessary to make statements made not misleading. They seek damages in excess of $100 million, restitution and injunctive relief preventing, among other things, the Outback Steakhouse defendants from foreclosing on any of the franchisees.

3. *The Trial Court's Dismissal of the Action Pursuant to the Florida Forum Selection Clause in the Borrower Agreement*

On May 27, 2009 Outback Steakhouse, Inc., Kangaroo Holdings, Inc. and the Bain defendants filed a motion to dismiss, joined by the Catterton defendants, on the ground the complaint asserts only defenses to Outback Steakhouse, Inc.'s Florida collection action and the borrower agreement requires any such action to be brought in Florida.[11] Rejecting T-Bird Nevada and the franchisees' argument the out-of-state forum selection clause was void under California franchise law, the trial court granted the motion: "First,

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11 "The procedure for enforcing a forum selection clause is a motion to stay or dismiss for forum non conveniens." (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1294.)

[T-Bird Nevada's] ability to assert standing is questionable at best. California's franchise laws are meant to govern the relationship between franchisor and franchisee. [T-Bird Nevada], in this case, is a company that provided funding to franchisees but is not a franchisee itself, evidenced by the fact that it is not a party to any of the franchise agreements. [¶] Even if T-Bird had standing to sue, its agreement that the claims implicate the Franchise Agreements is not persuasive. By its plain terms, the Borrower Agreement clearly does not fall into the definition of a 'Franchise' agreement."

DISCUSSION

1. *Overview of California Franchise Law*

"Franchising is a heavily regulated form of business in California" (*Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1288) governed by two statutory schemes. The California Franchise Investment Law (Corp. Code, § 31000 et seq.) (CFIL) regulates the offer and sale of franchises (Corp. Code, § 31110), as well as the material modification of existing franchise agreements (Corp. Code, § 31125). In enacting the CFIL, the Legislature declared, "It is the intent of this law to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered. Further, it is the intent of this law to prohibit the sale of franchises where the sale would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled, and to protect the franchisor and franchisee by providing a better understanding of the relationship between the franchisor and franchisee with regard to their business relationship." (Corp. Code, § 31001.)

"The legislative history of [Corporations Code] section 31005 reveals great care was taken in defining a 'franchise' because of the countless and varied relationships that could qualify as such." (*Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1299 (*Gentis*).) Corporations Code section 31005, subdivision (a), provides, "'Franchise' means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which: [¶] (1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

and [¶] (2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and [¶] (3) The franchisee is required to pay, directly or indirectly, a franchise fee." (See also Bus. & Prof., § 20001, subds. (a)-(c) [same definition of franchise].)

In contrast to the CFIL, the California Franchise Relations Act (Bus. & Prof. Code, § 20000 et seq.) (CFRA) governs certain events after the franchise relationship has been formed, including the renewal, nonrenewal and termination of franchises (see, e.g. Bus. & Prof. Code, § 20025 [franchisor must provide franchisee with 180-days notice of intention not to renew the franchise]). In order to "ensure that California franchisees are not unfairly forced to litigate claims arising out of their franchise agreement in an out-of-state court at considerable expense, inconvenience, and possible prejudice to the California franchisee" (Sen. Floor Analysis of Assem. Bill No. 1920 (1993-1994 Reg. Sess.) as amended Aug. 12, 1994), the CFRA renders void "[a] provision in a franchise agreement restricting venue to a forum outside this state . . . with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." (Bus. & Prof. Code, § 20040.5 (§ 20040.5).)

2. *The Trial Court Erred in Dismissing the Action*

a. *The gravamen of the complaint arises under and relates to the franchise agreements*

The Outback Steakhouse defendants argue section 20040.5 is inapplicable because T-Bird Nevada and the franchisees' claims are unrelated to the franchise agreements and the forum selection provision the defendants seek to enforce is in the borrower agreement, not the franchise agreements. In granting their motion to dismiss, the trial court found persuasive the Outback Steakhouse defendants' characterization of the California action as, in effect, nothing more than a defense to the Florida collection case. The trial court's analysis of the complaint and its focus on T-Bird Nevada, not the franchisees, were unduly cramped.

The gravamen of the California action is that, to induce Shannon to open additional restaurants, Outback Steakhouse, Inc., Sullivan, Basham and Kadow made misrepresentations to Shannon, the authorized representative of the later formed franchisees, that were tortious and violated the CFIL. (See Corp. Code, § 31201 ["[i]t is unlawful for any person to offer or sell a franchise . . . by means of any written or oral communication . . . which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading"].) Even if not false when made, the statements constituted promises Outback Steakhouse, Inc. failed to perform in connection with or after the sale of the company in breach of its agreement to do so. The majority of the claims based on these allegations are properly asserted by the franchisees independent of the collection action and put at issue questions relating to the enforceability of the franchise agreements themselves.[12]

To be sure, the claims in the California action can be viewed, in significant part, as defenses to the collection action because of the entangled facts, Shannon's position as a principal in both T-Bird Nevada and the franchisees and the causal relationship between the core conduct that underlies both actions: But for T-Bird Nevada's default, the Outback Steakhouse defendants would not have to file a collection action; but for the Outback Steakhouse defendants' reneging on their promises, T-Bird Nevada would not have defaulted. Nevertheless, that the claims are independently swords in California and shields in Florida does not remove this action from the protection of California franchise law. Indeed, at least some of those claims will survive even if the Outback Steakhouse defendants prevail in the Florida collection action. Moreover, as discussed below, the price of Outback Steakhouse, Inc.'s strategic decision to make a default under the borrower agreement a default under each franchise agreement is the loss of any right to keep defenses to the Florida collection action exclusively in Florida.

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12 Although the franchise agreements have a Florida forum selection clause, that provision is clearly void under section 20040.5 with respect to claims arising under or relating to the franchise agreements, which must be brought in California.

That T-Bird Nevada, which is not a franchisee, as well as the individual franchisees are asserting these claims is only superficially problematic. The central allegations are that the Outback Steakhouse defendants misrepresented their intentions to induce Shannon to create more California franchisees. The potential obstacle T-Bird Nevada faces in the lawsuit is not one of forum selection, but rather standing. Indeed, the Outback Steakhouse defendants essentially conceded the point, arguing T-Bird Nevada and the franchisees should be treated as one (although, of course, they assert they should be treated as one and all dismissed).

b. *Even if the claims arise out of the borrower agreement, because that agreement amended the terms of the franchise agreements and is properly considered part of those agreements, the out-of-state forum selection clause is void*

Even if T-Bird Nevada and the franchisees' claims are viewed as solely arising out of the borrower agreement, its forum selection clause is nevertheless void. Contrary to the Outback Steakhouse defendants' contention, the CFRA does not define a franchise agreement as a "*specific* 'contract or agreement'" (emphasis added) in which a franchisee is granted the right to engage in the franchisor's business for a fee. Rather, Business and Professions Code section 20001, subdivisions (a) through (c), and Corporations Code section 31005, subdivision (a), specify in identical language the minimum and necessary elements for a contractual relationship to fall within the ambit of the California franchise laws. Neither code defines "franchise agreement." Thus, the question is what is the scope of "a franchise agreement" as that term is used in section 20040.5, invalidating out-of-state forum selection clauses?[13] Is it limited, as the Outback Steakhouse defendants

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13 Issues of statutory interpretation are questions of law subject to our independent or de novo review. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; see *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 546.) "[W]e must attempt to effectuate the probable intent of the Legislature, as expressed through the actual words of the statutes in question. [Citations.] '"Our first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning."'" (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17

suggest, to a single, formal document entitled "franchise agreement" in which the elements of a franchise are addressed, or does it include additional contracts or agreements that bear directly on the relationship between franchisor and franchisee?

"As a general matter, remedial or protective statutes such as the Franchise Investment law are liberally construed to effect their object and quell the mischief at which they are directed." (*Kim v. Servosnax, Inc.* (1992) 10 Cal.App.4th 1346, 1356; accord, *Gentis*, *supra*, 60 Cal.App.4th at p. 1299.) For example, "[w]ith regard to the statutory definition of 'franchise,' this means each element should be construed liberally to broaden the group of investors protected by the law and to carry out the legislative intent." (*Kim*, at. p. 1356; accord, *Gentis*, at p. 1299.) It would be inconsistent with this policy of broad interpretation, as well as the definition of a franchise as "a contract or agreement, either expressed or implied, whether oral or written" (Corp. Code, § 31005, subd. (a); Bus. & Prof. Code, § 20001), to construe "franchise agreement" narrowly. (See *People v. Kline* (1980) 110 Cal.App.3d 587, 594 [handwritten agreement for sale of "business opportunity" constituted franchise when considered in connection with, among other things, oral promise "to assist in advertising and to supply food and supplies and menu planning" and "use of identifiable and distinctive kiosks [that] at least implied a prescribed marketing plan or system"]; cf. *Thueson v. U-Haul Intern., Inc.* (2006) 144 Cal.App.4th 664, 674 [examining whether service fee for computer equipment and supplies paid pursuant to addendum to dealership contract constituted franchise fee].)

Indeed, the determination which documents and/or oral agreements comprise a franchise agreement is best decided by examining the parties' intent as reflected in the

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Cal.4th 985, 990.) "If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.'" (*People v. Toney* (2004) 32 Cal.4th 228, 232; *People v. Loeun* (1997) 17 Cal.4th 1, 9 ["'[i]n interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law'"].) Moreover, statutes are not to be read in isolation, but construed in context and "'with reference to the whole system of law of which [they are] part so that all may be harmonized and have effect.'" (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 14.)

documents themselves. In that regard, we are guided in part by the statutory directive "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (Civ. Code, § 1642.) "Whether a document is incorporated into the contract depends on the parties' intent as it existed at the time of contracting. The parties' intent must, in the first instance, be ascertained objectively from the contract language." (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 814.)

Although not expressly denominated an amendment to the franchise agreements, the borrower agreement clearly amends key terms in the franchise agreements—in writing as required by the franchise agreements' integration clause: In particular, it expands the list of events that may be deemed a default under article 13, governing default and termination, and provides Outback Steakhouse, Inc. with a discount on the purchase price it is required to pay under the franchise agreements if it elects to purchase any franchisees. Thus, for these parties the "franchise agreement" as that term is used in section 20040.5 includes the terms of the borrower agreement that amend the franchise agreements.[14] As a result, claims based on alleged misrepresentations relating to obligations to repay the loan covered by the borrower agreement and issues of the enforceability of the provision in that agreement making T-Bird Nevada's purported default on the loan a default under each franchise agreement arise from "a franchise agreement"; and any attempt to mandate trial of those claims in an out-of-state forum is prohibited by section 20040.5.

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14 Because there is no conflicting extrinsic evidence, whether the borrower agreement amended the terms of the franchise agreement is a question of law we review de novo. (See *City of Hope National Medical Center v. Genetech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866; *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.)

DISPOSITION

The order of the trial court dismissing this action is reversed. T-Bird Nevada and the franchisees are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

SEGAL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.