No. 11-___

IN THE

Supreme Court of the United States

SAMICA ENTERPRISES, LLC, et al.,

Petitioners,

v.

MAIL BOXES ETC., INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

L. Michael Hankes
63 Commercial Wharf
Boston, MA 02110

Peter C. Lagarias
Robert S. Boulter
LAGARIAS & BOULTER, LLP
1629 Fifth Ave.
San Rafael, CA 94901

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

QUESTION PRESENTED

Petitioners, franchise owners of UPS stores, filed suit against respondents, UPS and related defendants, in state court, alleging violations of California law. Respondents removed the suit to federal court, where the district court entered summary judgment in respondents' favor based on its understanding of the governing state law. The Ninth Circuit affirmed. While this case was pending in federal court, other UPS franchise owners proceeded with materially identical claims in state court. After the Ninth Circuit affirmed the district court's decision in UPS's favor in this case, a California court of appeals issued a decision against UPS in the parallel state litigation, rejecting the interpretation of state law that was the basis of the district court's decision below.

The Question Presented is whether the Court should grant, vacate, and remand the decision below in light of the intervening state court decision?

PARTIES TO THE PROCEEDING

Petitioners are a group composed of one hundred and ninety UPS Store franchise owners, the full list of which is reproduced at Pet. App. 86a-102a.

Respondents are Mail Boxes Etc., a California corporation; Mail Boxes Etc., USA, Inc., a California corporation; Mail Boxes Etc., Inc., a Delaware corporation; United Parcel Service of America, Inc., a Delaware corporation; United Parcel Service, Inc., a Delaware corporation; United Parcel Service, Inc., an Ohio corporation; United Parcel Service, Inc., a New York corporation; and Does 1-100.

RULE 29.6 DISCLOSURE

None of the corporate entity petitioners has a parent corporation, and no publicly-traded corporation owns more than 10% of any such petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Samica Enterprises, LLC, et al., respectfully petition for a writ of certiorari to vacate and remand the judgment of the United States Court of Appeals for the Ninth Circuit for reconsideration in light of an intervening decision of the California Court of Appeals.

OPINIONS BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-7a) is unpublished but available at 2011 WL 6000718 (9th Cir. Dec. 1, 2011). The Ninth Circuit's order denying petitioners' first petition for rehearing en banc is unreported (Pet. App. 61a), as is its order denying petitioners' second petition for rehearing en banc (Pet. App. 62a). The first opinion of the district court (Pet. App. 8a-44a) adjudicating claims of certain bellwether plaintiffs is reported at 637 F. Supp. 2d 712 (C.D. Cal. 2008). The second opinion of the district court (Pet. App. 45a-60a) addressing the remaining plaintiffs' claims is unreported but available at 2010 WL 807440 (C.D. Cal. Feb. 26, 2010).

JURISDICTION

The Ninth Circuit issued its decision on December 1, 2011, and denied rehearing en banc on January 17, 2012. Pet. App. 61a. On April 4, 2012, Justice Kennedy extended the time in which to file the petition through May 1, 2012. No. 11A936. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners, individual franchisees of The UPS Store franchise system, sued respondents (their franchisors) in California state court for common law fraud, negligent misrepresentation, and violations of the California Franchise Investment Law (CFIL). Respondents removed the action to federal court, where the district court granted summary judgment in respondents' favor. The Ninth Circuit affirmed in a memorandum disposition.

Shortly after the Ninth Circuit denied petitioners' petition for rehearing en banc, the California Court of Appeal issued its decision in a case brought by similarly situated franchisee plaintiffs against the same respondent franchisors raising identical claims based on the same underlying facts. In that case, however, the state court reached the opposite conclusion, on the basis of an interpretation of state law that was irreconcilable with that adopted by the district court, and affirmed by the Ninth Circuit, in this case.

I. Factual Background

Petitioners are the owners of nearly two hundred current and former The UPS Store franchises. They brought suit against their franchisors, respondents United Parcel Service (UPS) and its subsidiary Mail Boxes Etc. based upon a series of misrepresentations made by respondents after UPS acquired the then-independent pack and ship franchisor Mail Boxes Etc. in 2001. At the time, Mail Boxes Etc. was the leading pack and ship franchisor in the nation (UPS, by contrast, had yet to establish a retail storefront presence at all). Thus, by acquiring Mail Boxes Etc.,

UPS sought to save itself the significant costs of starting up its own retail network.

In order to capitalize on its acquisition, however, UPS needed to persuade the existing Mail Boxes Etc. franchise owners to convert their individual stores into new "The UPS Store" storefronts and to amend their existing franchise agreements with Mail Boxes Etc. to incorporate new terms favorable to UPS. Respondents also entered into a smaller number of agreements with new franchise owners to open up new UPS Store locations. Petitioners are a group of roughly equal numbers of "converting franchisees" (those who had previously owned Mail Boxes Etc. stores and converted to The UPS Store model) and "new franchisees" (those who purchased new franchises after the Mail Boxes Etc. stores had converted).

A. Misrepresentations Regarding The "Gold Shield Program"

Because the pre-existing Mail Boxes Etc. stores were so important to respondents' business strategy, respondents launched the "Gold Shield" program to convince the existing franchise owners to change their stores to the new "The UPS Store" model. The Gold Shield program included a series of road show sales presentations across the country where UPS executives met with current Mail Boxes Etc. franchise owners to tout the benefits of amending their existing franchise agreements and rebranding under the new "The UPS Store" brand. Pet. App. 36a. During these road shows, executives presented PowerPoint slides, talking points, and documents such as the "Summary of New Gold Shield Program"

(Gold Shield Summary or Summary) to persuade petitioners to convert their franchises. *See, e.g.*, C.A. Excerpts of the Record 231-32, 1384-96 ("C.A. E.R.").

A central aspect of the road show sales pitch was the so-called "Gold Shield Test Program," through which respondents purported to have reliably proven that franchises branded as The UPS Store obtained higher profits than franchises operating under the old Mail Boxes Etc. brand. The Gold Shield Summary given out to petitioners at the road shows described this program as a "field test" designed to help "determine whether actual results, on a small but *reliable scale,* supported the hypothes[is]" that The UPS Store model would be more profitable. C.A. E.R. 1394 (emphasis added).

The Test Program consisted of three groups of stores: Cell 1 stores retained the Mail Boxes Etc. brand, Cell 2 stores used a Mail Boxes Etc. and The UPS Store co-brand, and Cell 3 stores rebranded entirely as The UPS Store. C.A. E.R. 1395. The Gold Shield Summary explained that participating stores reported their financial data to UPS, whose "in-house auditors" recorded the "information in the proper categories in order to maximize *the accuracy and reliability* of the information for comparative and other analytical purposes." *Id*. (emphasis added). The Summary further stated that UPS "consistently endeavored to *confirm the reliability* of the Test Center financial information." *Id*. (emphasis added). After providing these repeated assurances as to the reliability of the Test Program, the Summary described the test results in unequivocal terms: "The UPS Store brand (Cell 3) out-performed the other two brands (Cells 1 and 2) when measured by year-over-

year comparisons . . . in the areas of . . . *net profit* from all shipping, packaging, mailbox, and document services combined." C.A. E.R. 1396 (emphasis added).

Despite their repeated statements to the contrary, respondents' representations concerning the reliability of the Gold Shield Test Program were knowingly false. The Test Program was not conducted in a "reliable" manner, and respondents knew it. As testimony by Stuart Mathis, the president of UPS's Mail Boxes Etc. subsidiary demonstrated, respondents lacked any systematic means of gathering financial information from participating test stores, and many of the stores provided incomplete data for the study. C.A. E.R. 1972. In fact, Mr. Mathis testified that the supposedly "reliable" Gold Shield Test results were actually generated based on *self-reported* data from just *twenty-five percent* of all of the stores included in the study; respondents did not have necessary data (*e.g.*, concerning basic store costs) for the other seventy-five percent, nor did they have any outside consultants independently evaluate or validate the results. C.A. E.R. 1972-74.

Petitioners' CPA expert, who reviewed respondents' test design, added that its statistical reliability was further undermined by the fact that the "test period was only for a few weeks," and because of "differences in the[] geographic and demographic profiles" of the stores selected for testing. C.A. E.R. 2293.

Respondents represented to petitioners that they could rely on the reported results of the Gold Shield Test Program in deciding whether to become UPS

franchises, and encouraged them to do so. The Gold Shield Summary thus described how respondents spent "considerable time, money, and expertise" analyzing the new UPS Store franchise model, and even stated that the Summary was being provided so that petitioners would have the "*relevant information to help* [them] *decide* whether or not" to amend their existing Franchise Agreements. C.A. E.R. 1386-87 (emphasis added).

Unsurprisingly, petitioners did ultimately rely on the Test Program results in deciding to convert their franchises. *See* C.A. E.R. 108-384 (sworn declarations of twenty-nine franchise owners stating that they attended road show presentations and relied on the Gold Shield Test Program results in deciding to amend their existing franchise agreements).

B. Misstatements And Omissions In Regulatory Filings

Respondents also made false representations in a document called the "Risk Factors Acknowledgment" (RFA) that was filed with the California Commissioner of Corporations. Pet. App. 33a. In particular, respondents represented in the RFA that the success of the franchises would depend on their own efforts. *Id*. However, as discussed next, nothing could have been further from the truth.

C. Financial Collapse Of UPS Franchise Stores

In reality, the Gold Shield tests did not accurately reflect the inevitable consequences of two features of the new franchising agreement that doomed many franchises to failure.

First, unlike the prior Mail Boxes Etc. franchise contracts, the new UPS Store franchise agreements placed caps on the retail price that petitioners could charge customers for UPS shipping services. C.A. E.R. 1240. At the same time, UPS simultaneously controlled petitioners' most significant operating costs, setting the wholesale price petitioners were required to pay for the shipping services they sold to their customers. *See* C.A. E.R. 2291 (petitioners' expert stating that "[f]ranchisees' profits are primarily dependent on its gross profit margin on shipping UPS packages – which is entirely controlled by UPS").

Second, to make matters worse, UPS itself actively competed against its franchisees by soliciting customers to start up accounts through which they would pay UPS directly for shipping services instead of the franchisees. *See* C.A. E.R. 234-36, 294-96. After paying UPS directly for shipping (often over the internet), customers would then drop off their packages for delivery at the franchise stores, who in turn incurred great labor costs and received only a pittance for providing this service. *Id*. The Gold Shield Test results did not reflect the devastating effect of this practice, in no small part because the tests were performed before UPS fully implemented its internet shipping strategy. *See* C.A. E.R. 2289, 1719. UPS executives knew all along that the plan was to use the converting franchise stores as a mere "physical presence" for the company's competing internet shipping initiative, C.A. E.R. 1415, yet the company failed to disclose that fact in its presentations to converting franchisees, *see* C.A. E.R. 1384-96.

As a consequence, petitioners had no real control over their margins, leaving their profitability dependent upon respondents' decisions regarding the wholesale price petitioners would be charged and the retail price they were allowed to charge their customers. UPS exercised that power in a way that dramatically undermined petitioners' businesses. Several had to close their businesses, and many ultimately lost their life's savings, pensions, and even their homes. *See, e.g.*, C.A. E.R. 278-79 (plaintiff declaration stating that Colorado franchise began losing money after converting to UPS Store model, and that plaintiff and his wife eventually lost all their savings and had to close the business as a result); C.A. E.R. 248 (same for North Carolina plaintiff and his father); C.A. E.R. 298 (New York plaintiff lost his savings, pension, and home to foreclosure after converting); C.A. E.R. 354 (Michigan plaintiff and his wife lost their savings and pension).

II. Procedural History

The massive failure of so many UPS franchises understandably led to multiple lawsuits. Two are relevant to this petition – the litigation in this case, which was removed to federal court, and parallel litigation by other franchisees that remained in California state court.

A. Federal Litigation In This Case

Petitioners filed this action in California Superior Court in March 2006, alleging, as relevant here, common law fraud and negligent misrepresentation, as well as violations of the California Franchise Investment Law (CFIL), Cal. Corp. Code §§ 31000 *et seq*. Respondents removed

the case to federal court in the Central District of California in May 2006 under the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. § 1332(d)). C.A. E.R. 1274; C.A. Supplemental Excerpts of Record 744-51 (C.A. S.E.R.).

1. District Court Proceedings

Once the case was removed to federal court, petitioners amended their complaint to remove the class action allegations. However, because the case still included a large number of individual plaintiffs, the district court ordered the parties to select eight bellwether plaintiffs for a test case. Pet. App. 9a. Four were selected from the group of converting franchisee plaintiffs, and four were selected from the other group of new franchisees who purchased UPS Store franchises later on. *Id*. After discovery, respondents moved for summary judgment against both the new and converting franchisee bellwether plaintiffs. The only claims relevant here are petitioners' claims for common law misrepresentation and fraud and parallel fraud-related claims under provisions of the California Franchise Investment Law. The district court dismissed both the converting and new members' claims for "much the same reasons." Pet. App. 41a.

a. New Franchisee Claims.

The court began with the new franchisee claims based on "misstatements or omissions in documents filed with the Commissioner of Corporations," statements representing to new franchisees that the profitability of their businesses would depend "on your own individual efforts" when, in fact, the

franchise arrangement left profitability largely in the hands of respondents. Pet. App. 28a, 33a.

The court began by holding that petitioners' common law fraud claims were preempted by the CFIL, which provides its own statutory cause of action for certain misrepresentations and omissions regarding franchising. Pet. App. 21a.

Turning to those statutory claims, the court explained that the new franchisees brought claims under Section 31200 of the CFIL, which makes it "unlawful for any person to willfully make any untrue statement of a material fact in any application, notice or report filed with the" California Commissioner of Corporations. Cal. Corp. Code § 31200. *See* Pet. App. 33a. The district court dismissed the claim, on two grounds.

First, the court held any statements "regarding profitability . . . merely concerns future events" and "such predictions are not actionable" as a matter of California law. Pet. App. 33a (citing *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells*, 86 Cal. App. 4th 303, 309 (2000)).

Second, the court held that any reliance would have been "unjustifiable as a matter of law" in light of various disclaimers also contained in the document. Pet. App. 34a.[1] Given these disclaimers, the district court held that the new franchisees' reliance on the RFAs was "patently unreasonable."

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[1] The RFA stated, for example, that respondents "CANNOT GUARANTEE THAT YOUR BUSINESS WILL EVER ACHIEVE PROFITABILITY." Pet. App. 34a.

b. Converting Franchisee Claims

The district court then turned to the converting franchisees' claims, which it explained, "largely replicate those" of the new franchisees. Pet. App. 40a. As relevant here, the converting franchisees' alleged that respondents had violated Section 31201 of the CFIL[2] by making misrepresentations concerning the reliability and accuracy of the Gold Shield Test results. *See* Pet. App. 42a-43a. The district court dismissed those claims "for much the same reasons" as the new franchisee claims. Pet. App. 41a.

Thus, by incorporating its ruling on the new franchisee claims, the court accepted respondents' assertion that the alleged misrepresentations regarding the Gold Shield Test were "all forward-looking statements, which cannot support fraud." C.A. E.R. 2782. Moreover, the court also apparently found that disclaimers in the Gold Shield Summary made any reliance by petitioners unreasonable as a

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[2] Unlike Cal. Corp. Code § 31200, Section 31201 applies to false statements other than those made to the California Commissioner of Corporations (*e.g.*, statements made to converting franchise owners) in connection with the offer or sale of a franchise. Cal. Corp. Code § 31201 ("It is unlawful for any person to offer or sell a franchise in this state by means of any written or oral communication not enumerated in Section 31200 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 the light of the circumstances under which they were made, not misleading.").

matter of law, as it had held with respect to similar disclaimers in the RFA.[3]

Although these grounds were sufficient to support dismissal, the district court was also critical of petitioners' evidence showing that the Gold Shield Test statements were fraudulent. It implied that one of the documents showing that "conversion to The UPS Store would be unprofitable" was "inadmissible" because it was "co-written by a former UPS employee and five other students, purely to satisfy an academic requirement," although the court cited to no authority holding that those facts rendered the report inadmissible under the Rules of Evidence. Pet. App. 42a. The court also stated that petitioners "offer no evidence that the test results were poor – aside from their misplaced reliance on" that paper, Pet. App. 43a, failing to acknowledge the other evidence cited by petitioners such as the UPS executives' deposition testimony and emails acknowledging the various shortcomings in the reliability of the Gold Shield Test Program. *See supra* 3-8.[4]

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[3] *See* C.A. E.R. 1394-95 (Gold Shield Summary stating, "THERE IS NO ASSURANCE THAT YOU WILL DO AS WELL AS THE CENTERS THAT PARTICIPATED IN THE GOLD SHIELD TEST.").

[4] The district court did refer to a list of 60 factual assertions petitioners had collected in support of their claims, cursorily describing them as "unsupported, immaterial, and/or otherwise inadmissible," with no further explanation. Pet. App. 43a. Petitioners disputed these characterizations on appeal, but as discussed next, the Ninth Circuit did not reach the issue.

2. Ninth Circuit Appeal

After the district court subsequently extended its bellwether holdings to the remaining plaintiffs, Pet. App. 49a, petitioners appealed. The Ninth Circuit affirmed in a brief memorandum disposition.

On appeal, petitioners argued among other things that the district court erred in construing California law to render respondents' alleged misrepresentations not actionable or their disclaimers a complete defense. C.A. Br. 42-45, 49-50; C.A. Reply 12-13. Petitioners further contested the district court's holding that the CFIL preempted their common law fraud claims and showed at length that the district court was wrong to the extent it had suggested or found that their fraud and misrepresentation claims lacked evidentiary support in the record. C.A. Br. 10-21, 51-52.

The Ninth Circuit did not reach those latter questions because it affirmed the dismissal of petitioners fraud-related claims on a single ground, adopting the district court's reliance holding. The court of appeals explained that reasonable reliance is a necessary element for both the CFIL and common law claims. Pet. App. 2a-3a. The court then affirmed the district court's reliance holding, agreeing that petitioners' had "presented no evidence showing that they reasonably relied on any alleged untrue or misleading statement." Pet. App. 3a.

Petitioners timely filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied. Pet. App. 61a.

B. Parallel State Court Franchisee Litigation Against Respondents

While this case was working its way through the federal system, other converting franchisees pursued materially identical claims against respondents in the state courts. *See* Pet. App. 63a-85a (reproducing *D.T. Woodard, Inc. v. Mail Boxes Etc., Inc.*, No. B228990, 2012 WL 90084 (Cal. Ct. App. Jan. 12, 2012) (unpublished)).

1. The plaintiff in *D.T. Woodard* represented "a class of . . . franchisees of Mail Boxes Etc. USA, Inc." who were franchisees when it was "acquired by United Parcel Service" and who subsequently converted their stores. Pet. App. 64a. The plaintiff sued the same UPS and Mail Boxes Etc. defendants that are the respondents in this case. *Id*. The *D.T. Woodard* plaintiff also raised the same claims at issue here: "causes of action for negligent and intentional misrepresentation, and for violations of the California Franchise Investment Law." *Id*. The class plaintiff in *D.T. Woodard* based those claims on the very misrepresentations that are also at issue in this action: statements concerning the reliability of the Gold Shield Test Program results that respondents made at road show presentations throughout the country. Pet. App. 73a-74a.

As in this case, the trial court in *D.T. Woodard* granted summary judgment to the defendants, finding, among other things, that the franchisees failed to show actionable "false statements of material fact or justifiable reliance." Pet. App. 70a. But after the Ninth Circuit reached its decision in this case, the California Court of Appeal reversed the grant of summary judgment in UPS's favor,

specifically rejecting the understanding of California law that formed the premise of the federal courts' disposition of petitioners' claims. Pet. App. 64a.

First, the California appellate court rejected respondents' assertion that their representations concerning the Gold Shield Test results were immune from claims of fraud under California law because they predicted future profitability. Instead, the state court held that misrepresentations regarding "*past* Gold Shield test results and their validity and reliability," are distinguishable, as a matter of state law, from statements "about *future* profitability and success of The UPS Store franchises." Pet. App. 80a. Accordingly, the court clarified that the state bar against fraud claims premised on statements about the future does not apply to protect fraudulent statements regarding past events (including test results) simply because the defendant then urges the victim to make his own prediction about the future based on those false statements about the past.

Second, the California court rejected the respondents' argument that disclaimers contained in the Gold Shield Summary precluded plaintiff from reasonably relying on the test results. Pet. App. 81a-82a. The court instead held that a party to a contract who is charged with fraud in its inducement "cannot absolve itself from the effects of its fraud" through a disclaimer stating that "no representations have been made." Pet. App. 82a. Moreover, the court held that "under Civil Code section 1668, a party cannot contract away liability for his fraudulent or intentional acts or for his negligent violations of statutory law." Pet. App. 81a. Accordingly, respondents' argument that their disclaimers

prevented the converting franchisees from reasonably relying on the representations in the Gold Shield Summary "as a matter of law" was "inconsistent with California law." Pet. App. 82a (internal quotation marks omitted).

In addition, the court found that there was abundant evidence creating a triable issue on liability. The court noted that respondents had made multiple representations "about the reliability of the field testing results." Pet. App. 73a. And it identified ample evidence showing that those representations were false: the existence of flaws in the test design (based on a non-representative selection of test stores and insufficient length test period); the absence of any systematic means of collecting financial data from test stores; the reliance on self-reported data from only twenty-five percent of participating stores; and the refusal to use outside consultants to ensure that the results would be statistically reliable. Pet. App. 74a-78a. The court further held there were triable issues on whether the plaintiff had actually relied on respondents' misrepresentations, Pet. App. 78a, whether the plaintiff class had suffered damages, Pet. App. 83a, and whether those damages stemmed from reliance on respondents' misrepresentations, Pet. App. 85a.

C. Petitioners' Attempt To File An Untimely Second Petition For Rehearing En Banc To The Ninth Circuit.

Immediately after learning of the state court decision in *D.T. Woodard*, petitioners filed a second petition for panel rehearing and rehearing en banc

calling the intervening state court decision to the Ninth Circuit's attention. However, the Court of Appeals construed the petition as "an untimely and second petition," and denied it on those grounds. Pet. App. 62a. This petition followed.

REASONS FOR GRANTING THE WRIT

Because an intervening state court decision has made clear that the federal courts dismissed petitioners' case on an incorrect premise of state law, this Court should grant this petition, vacate the judgment, and remand to permit the Ninth Circuit an opportunity to reconsider its holding in light of the intervening state decision. Although the Court most commonly issues such "GVR" orders to allow reconsideration in light of a decision of this Court, GVRing in light of intervening state court decisions falls "squarely within" the "historical use of the GVR mechanism." *Thomas v. Am. Home Products, Inc.*, 519 U.S. 913, 914 (1996) (Scalia, J., concurring).[5] This includes occasions on which a state intermediate appellate court issues a decision clarifying the

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[5] *See, e.g.*, *Lords Landing Vill. Condo. Council v. Cont'l Ins. Co.*, 520 U.S. 893, 894 (1997) (GVR in light of intervening state court decision); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Am. Med. Int'l, Inc.*, 516 U.S. 984 (1995) (same); *Chew-Villasana v. INS,* 506 U.S. 910 (1992) (same); *Mullaney v. Wilbur,* 414 U.S. 1139 (1974) (same); *Blabon v. Nelson*, 393 U.S. 20 (1968) (same); *Collins v. Comm'r,* 393 U.S. 215 (1968) (same); *Conner v. Simler,* 367 U.S. 486 (1961) (same); *Downey v. Beck,* 343 U.S. 912 (1952) (same); *Huddleston v. Dwyer*, 322 U.S. 232 (1944) (same).

governing state law principles.[6] Such an order is particularly appropriate in this case because the intervening state decision was issued in a case against the same respondents by similarly situated plaintiffs making materially identical claims based on the same underlying facts and misrepresentations.

I. A GVR Order Is Warranted In Light Of The Intervening State Court Decision In *D.T. Woodard*.

A GVR order may be appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). This is such a case.

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[6] *See, e.g.*, *Exxon Co., U.S.A. v. Banque de Paris Et Des Pays-Bas*, 488 U.S. 920 (1988) (GVR in light of Texas Court of Appeals decision in *Kerr Const. Co. v. Plains National Bank of Lubbock*, 753 S.W.2d 181 (Tex. App. 1987)); *Blaauw v. Grand Trunk W. R.R. Co.*, 380 U.S. 127 (1965) (GVR in light of decision by Illinois Court of Appeals in *American National Bank & Trust Co. v. Pennsylvania Railroad Co.*, 202 N.E.2d 79 (Ill. App. Ct. 1964)); *see also Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 n.21 (1941) (federal courts are to apply state law as determined by state intermediate appellate courts).

A. There Is A Reasonable Probability The Ninth Circuit Would Reconsider Its State Law Holding In Light Of The Intervening State Court Decision.

The Ninth Circuit affirmed respondents' summary judgment motion with respect to both petitioners' CFIL and common law claims on the sole basis that petitioners had failed to present evidence that they "reasonably relied on any alleged untrue or misleading statement." Pet. App. 3a. Although it did not elaborate on the reasoning behind this conclusion, the only plausible explanation for the decision is that the court of appeals adopted the reasoning of the district court. That court, in turn, had explained that both sets of plaintiffs' fraud-based claims "largely replicate" each other and it dismissed all of the claims "for much the same reasons." Pet. App. 40a. Specifically, the court held that respondents' "representation[s] regarding profitability . . . merely concern[ed] future events," and, as such, were "not actionable." Pet. App. 33a.[7] And it held that petitioners' claimed reliance was "unjustifiable as a matter of law" in light of various disclaimers found in the respondents documents. Pet. App. 34a.

In *D.T. Woodard*, the California Court of Appeals considered those exact same propositions of law, made by the exact same respondents against

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[7] *See also* C.A. E.R. 2782 (respondents' memorandum in support of summary judgment arguing that converting franchisees' "alleged misrepresentations are all forward-looking statements, which cannot support fraud").

identically situated plaintiffs, in a case involving the exact same misrepresentations and disclaimers. As in this case, the trial court had granted summary judgment to respondents on the grounds that the plaintiffs had failed to show actionable "false statements of material fact or justifiable reliance," given that the plaintiffs were challenging statements regarding tests suggesting future franchise profitability and accompanied by the same disclaimers issued to petitioners in this case. Pet. App. 70a, 80a. While the Ninth Circuit affirmed the district court's holding here, the California Court of Appeals reversed and remanded for trial the materially identical claims in the parallel state suit. The California appellate court explained that although California law does preclude suits based on false predications about the future, that principle does not insulate from challenge false statements about the past, including past tests like the Gold Shield tests in this case, simply because those statements are designed to induce beliefs about future profitability. Pet. App. 80a-82a. Likewise, the state court explained that the kinds of disclaimers at issue in this case – in fact, *exactly* the disclaimers at issue in this case – do not render "reliance . . . unjustifiable as a matter of law," Pet. App. 34a. *See* Pet. App. 81a-82a.

There is therefore far more than a "reasonable probability" that the Ninth Circuit would revise its interpretation of California law in light of intervening precedent if provided the opportunity.

Lawrence, 516 U.S. at 167.[8] Although the decision in *D.T. Woodard* was issued by an intermediate state appellate court, this Court has long required that in the absence of a dispositive opinion from the state supreme court, "[a]n intermediate state court [decision] declaring and applying the state law . . . in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940); *see also Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988) (same).

That the California Court of Appeal's opinion in *D.T. Woodard* is unpublished also does not change the result. State decisions on questions of state law are relevant in federal litigation not because they directly bind the federal courts, but rather because they assist the federal courts in discharging their duty to apply state law in the same manner as a state court would. *See, e.g.*, *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 248-50 (1998) (Kennedy, J., concurring). State decisions are relevant to that task, whether published or not. After all, the decision to leave an opinion unpublished does not

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[8] Petitioners' filing of a second petition for rehearing en banc raising the intervening state court decision with the court of appeals (which that court rejected as untimely) did not provide the Ninth Circuit that opportunity. This Court has GVR'ed despite a petitioner's abortive attempt to bring an intervening decision to a court of appeals' attention through a second or untimely petition for rehearing, *see, e.g.*, *Exxon*, 488 U.S. at 920; *Blaauw,* 380 U.S. at 127; *Huddleston*, 322 U.S. at 235, or similar procedure, *see Lords Landing*, 520 U.S. at 896-97 (motion to stay or recall mandate).

reflect the state court's belief that its ruling is incorrect or ill-considered. *See* Cal. R. Ct. 8.1105(c) (listing reasons for publishing decisions). Accordingly, the Ninth Circuit has held that panels "may not summarily disregard the Appellate Department's construction of [state law] merely on the basis that its construction was rendered in an unpublished opinion." *McSherry v. Block*, 880 F.2d 1049, 1053 n.2 (9th Cir. 1989); *see also, e.g.*, *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1167 & n.6 (9th Cir. 2011) (relying on unpublished state opinion); *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 & n.8 (9th Cir. 2003) (same).

The unpublished decision in this case is particularly relevant to the question of how the state law questions would have been resolved in state court because the state decision arises from the materially identical claims of other franchisees against the same defendants as in this case, based on the exact same misrepresentations at issue here. The decision thus not only demonstrates how the state's second highest court understands the basic state law principles at issue in this case, but makes incontestably clear how that court would apply those principles to the facts of this case. In such circumstances, the case for a GVR could hardly be more compelling. *See*, *e.g.*, *Collins*, 393 U.S. at 215 (GVRing federal tax case turning on question of state law in light of state decision between same taxpayers and state taxing authority resolving the same underlying state law question); *see also Downey*, 343 U.S. at 912 (GVR of Ninth Circuit decision in light of intervening California state court ruling reaching opposite conclusion with respect to the proper beneficiary of a life insurance

policy where both cases involved similarly situated plaintiffs, the same estate defendant, and the same underlying events and legal claims, *see Beck v. West Coast Life Ins. Co.*, 241 P.2d 544, 549 (Cal. 1952)).

B. Remanding The Case For Further Proceedings May Determine The Outcome Of The Litigation.

There is also a significant likelihood that a GVR would change "the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167.

The court of appeals decided to affirm summary judgment regarding petitioners' CFIL and common law misrepresentation claims on the sole basis that petitioners had not reasonably relied on respondents' misrepresentations. Pet. App. 3a. As discussed, that holding is best understood as adopting the district court's holdings that petitioners were precluded as a matter of state law from reasonably relying on respondents' statements regarding the Gold Shield program, given the attendant disclaimers and the fact that the Gold Shield representations were made to induce beliefs about the future profitability of a UPS Store franchise.

To be sure, the Ninth Circuit's explanation of its reasoning is exceedingly brief and somewhat vague. Respondents may argue that the court of appeals' statement that petitioners "presented no evidence showing that they reasonably relied on any alleged untrue or misleading statement," Pet. App. 3a, was intended as a factual finding regarding the summary judgment evidence, rather than an adoption of the district court's legal rationale. But that interpretation of the decision is untenable, for several

reasons. For one thing, as mentioned, that was not the basis of the district court's decision.[9] Additionally, even respondents did not argue to the Ninth Circuit that petitioners had failed to produce *any* evidence of *actual* reliance. To the contrary, their only argument was that petitioners had failed to show that their reliance was *reasonable*. *See* C.A. Appellee Br. 31-33. Had the Ninth Circuit nonetheless decided to resolve the case on a ground not argued by the parties or decided by the trial court, it presumably would have made that decision more transparent and offered some justification for its conclusion.

An explanation would have been expected because while one might have debated – prior to *D.T. Woodard* – whether petitioners' proof amounted to "evidence showing that they *reasonably* relied" on respondents' misrepresentations, Pet. App. 3a (emphasis added), there was and is no basis for any court to say that petitioners "presented *no* evidence" whatsoever of *actual* reliance, *id.* (emphasis added). To the contrary, petitioners presented substantial evidence that they relied on respondents' representations regarding the results of the Gold Shield tests and that this was the entire purpose of conveying the test results in the first place.[10]

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[9] The district court criticized petitioners' evidence that respondents' statements were false or misleading, Pet. App. 42a-43a, but it did not question that petitioners actually relied on those statements.

[10] *See, e.g.*, C.A. E.R. 108-384 (sworn declarations of twenty-nine franchise owners stating that they relied on the

But at any rate, any ambiguity in the Ninth Circuit's rationale can be resolved by that court on remand. Petitioners should not be deprived of an otherwise appropriate opportunity to argue their case based on a correct understanding of state law simply because the court of appeals' opinion may be less clear than it should be.

Finally, the fact that the respondents may have proposed, and the district court may have accepted, alternative grounds for dismissing petitioners' claims is no basis to deny a GVR. The Ninth Circuit dismissed petitioners' fraud-related claims solely on reasonable reliance grounds. It therefore has not yet evaluated respondents' other objections to petitioners' case, or petitioners' objections to the district court's other rulings. For example, while the district court made disparaging statements regarding the quality and adequacy of petitioners' proof that respondents' statements were false or misleading, petitioners have contested those conclusions on appeal. C.A. Br. 15-19; C.A. Reply 12-13. Moreover, the California Court of Appeal, reviewing the record in the parallel state case, found the evidence that respondents' statements were false to be more than sufficient to go to trial. Pet. App. 73a-78a. This Court need not

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Gold Shield Test Program results in deciding to convert their existing franchises); C.A. E.R. 1386-87 (respondents' Gold Shield Summary document explains that "considerable time, money, and expertise" was spent analyzing the new The UPS Store franchise model, and that the Summary and test program results were being provided so that petitioners would have the "*relevant information to help* [them] *decide* whether or not" to convert their franchise).

evaluate who was right – the district court or the California Court of Appeal – to decide that the Ninth Circuit should evaluate the competing evidentiary claims in the first instance, unfettered by its prior misconceptions of California law.

C. A GVR Would Be Appropriate In Light Of The Equities Of This Case.

The final consideration for a GVR is "the equities of the case." *Lawrence*, 516 U.S. at 168. Here, a denial of a GVR would be particularly unfair, risking diametrically opposed results for otherwise identically situated franchisees based on nothing more than an accident of timing and the fact that this case was litigated in federal court whereas *D.T. Woodard* proceeded in state court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded to the Ninth Circuit for reconsideration in light of *D.T. Woodard, Inc. v. Mail Boxes Etc., Inc.*, No. B228990, 2012 WL 90084 (Cal. Ct. App. Jan. 12, 2012) (unpublished).

Respectfully submitted,

L. Michael Hankes
63 Commercial Wharf
Boston, MA 02110

Peter C. Lagarias
Robert S. Boulter
LAGARIAS & BOULTER, LLP
1629 Fifth Ave.
San Rafael, CA 94901

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015
(202) 362-0636
tg@goldsteinrussell.com

May 1, 2012

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-55433

SAMICA ENTERPRISES LLC, an Illinois Limited Liability Company; et al.,

Plaintiffs—Appellants,

v.

MAIL BOXES ETC., INC., a Delaware corporation; et al.,

Defendants—Appellees.

Filed Dec. 1, 2011

MEMORANDUM*

Before SCROEDER, REINHARDT, and MURGUIA, Circuit Judges

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellants, approximately 200 franchisees of "The UPS Store" franchise, sued franchisor Mail Boxes Etc., Inc. ("MBE"), United Parcel Service ("UPS"), and other UPS subsidiaries (collectively "Appellees"), alleging various state law claims. The district court granted summary judgment in favor of Appellees on all of them. Appellants timely appealed. We affirm.

Appellants brought claims under the California Franchise Investment Law ("CFIL") and common law fraud and misrepresentation, alleging that MBE and UPS made untrue statements of material fact and omitted material facts from various communications made in connection with the offer and sale of the franchises and in connection with the conversion from the old franchise model to the new "The UPS Store" franchise model. Reasonable reliance is required under Cal. Corp. Code § 31300, the CFIL section imposing liability for misrepresentations made in franchise documents, as it requires that the damages to the franchisee be "caused [ ]by" the misrepresentations. *See Mirkin v. Wasserman,* 5 Cal.4th 1082, 1092, 23 Cal.Rptr.2d 101, 858 P.2d 568 (Cal. 1993); *Younan v. Equifax Inc.,* 111 Cal.App.3d 498, 169 Cal. Rptr. 478, 487 (Cal. Ct. App. 1980). Reasonable reliance is also required under Cal. Corp. Code § 31301, the CFIL section imposing liability for misrepresentations and omissions made in other communications related to the offer or sale of a franchise, as that section requires that the franchisee, "not knowing or having cause to believe that such statement was false or misleading," have "rel[ied] upon such statement." In a well-reasoned,

but unpublished, district court opinion, Judge Margaret Morrow summarized the rule: CFIL "incorporate[s] the reasonable reliance requirement of the common law." *California Bagel Co. v. American Bagel Co.,* 2000 WL 35798199, * 1, * 18–*21 (C.D. Cal. 2000) (unpublished). Finally, it is well established that reasonable reliance is an element of common law fraud and misrepresentation claims. *See City of Industry v. City of Fillmore,* 198 Cal.App.4th 191, 129 Cal.Rptr.3d 433, 450 (Cal.Ct.App.2011); *Wells Fargo Bank, N.A. v. FSI, Fin. Solutions, Inc.,* 196 Cal.App.4th 1559, 127 Cal.Rptr.3d 589, 600 (Cal.Ct.App.2011). Because Appellants have presented no evidence showing that they reasonably relied on any alleged untrue or misleading statement, Appellants' CFIL and common law claims fail.[1]

Appellants brought an additional CFIL claim under Cal. Corp. Code § 31125 for failure to register the amendment to the franchise agreement in connection with the California franchisees' conversion from the old franchise model to the new "The UPS Store" franchise model. Appellees argued before the district court that the registration claim was barred by the one-year statute of limitations pursuant to Cal. Corp. Code § 31303. Appellants failed to address the statute of limitations bar before the district court and, specifically, failed to oppose Appellees' motion for summary judgment that was

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[1] Because we find that Appellants' common law fraud and misrepresentation claims fail for lack of a showing of reasonable reliance, we need not decide whether the CFIL preempts these claims.

based on the one-year provision. Moreover, Appellants did not address this argument in their opening brief before this court. Arguments not raised in opposition to summary judgment or in the opening brief before this court are waived. *See One Indus., LLC v. Jim O'Neal Distrib., Inc.,* 578 F.3d 1154, 1158 (9th Cir. 2009) ("A party normally may not press an argument on appeal that it failed to raise in the district court."); *Dream Games of Arizona, Inc. v. PC Onsite,* 561 F.3d 983, 994–95 (9th Cir. 2009) ("We will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.") (internal quotation marks and citation omitted). Appellants therefore have waived any argument that their failure to register claim is not barred by the statute of limitations.

Appellants alleged that MBE breached its duty of "best efforts" under the franchise agreement to obtain incentives for franchisees. The undisputed facts establish that MBE engaged in several efforts to obtain improvements to incentives to franchisees but did so by means of oral persuasion. Appellants' contention that attempting to obtain these same improvements by means of written requests was necessary to meet the best efforts requirement is without authority or merit. Therefore, summary judgment on this claim was proper.

Appellants alleged that UPS breached the implied covenant of good faith and fair dealing in failing to increase the prices set under the carrier agreement with the franchisees. The district court found that the implied covenant claim was

preempted by the Federal Aviation Administration Authorization Act of 1994, which prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of" carriers such as UPS. 49 U.S.C. § 14501(c)(1). Even if this claim was not preempted, however, it fails under state law. The implied covenant of good faith and fair dealing cannot be used to impose an affirmative duty to forbear enforcing the terms of the contract or to limit the ability of a party to do what is expressly authorized in the contract. *See Storek & Storek, Inc. v. Citicorp Real Estate, Inc.,* 100 Cal.App.4th 44, 122 Cal.Rptr.2d 267, 277 (Cal. Ct. App. 2002). That is what Appellants wished to do here—to impose on UPS a duty to offer better prices and incentives than those dictated by the agreement. Therefore, even if not preempted, summary judgment on the duty of good faith and fair dealing claim was proper.

Appellants brought claims under the California Unfair Competition Law ("UCL"), alleging that MBE and UPS engaged in fraudulent, unfair and unlawful business practices. "Appellants' claims under [the UCL] are governed by the 'reasonable consumer' test.... Under the reasonable consumer standard, Appellants must show that members of the public are likely to be deceived." *Williams v. Gerber Prods. Co.,* 552 F.3d 934, 938 (9th Cir. 2008) (internal quotation marks omitted). Here, Appellants presented no evidence that a reasonable consumer would be deceived by the alleged fraudulent, unfair and unlawful business practices of MBE and UPS.

Summary judgment on Appellants' UCL claims was therefore proper.

Appellants argue that the district court erred in failing to apply other states' "unwaivable" statutes, and in failing to apply Illinois law for franchisees with Illinois choice-of-law provisions in their franchise agreements. In addition, Appellants argue that the California choice-of-law provision, found in the majority of the franchise agreements, does not apply to pre-contract wrongs and that therefore the other states' statutes applied. As to the first argument, the district court found that Appellants' claims would fail even if the other states' statutes applied. Appellants have failed to show why this conclusion was erroneous. As to the second argument, the franchise agreements with California choice-of-law provisions provided that the agreements would be "governed and construed under and in accordance with" California law, which covers all contract claims, including pre-contract wrongs. *See Nedlloyd Lines B.V. v. Superior Court,* 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148, 1151–54 (1992) (holding that the phrase "governed by" in a choice of law clause compels the "logical conclusion" that the parties "intended that law to apply to *all* disputes arising out of the transaction or relationship"). Therefore, the district court did not err in applying the law of California to all of franchisees' claims.

The district court did not abuse its discretion in refusing to unseal the record. The district court found good cause to seal the record on Appellants' initial motion. Appellants then failed to provide adequate

justification for unsealing the record, and failed to follow Central District of California Local Rule 79–5:3 regarding motions to unseal. The refusal to grant the motion to unseal the record was not an abuse of discretion.

The district court considered all of Appellants' arguments in opposition to Appellees' motion for summary judgment at the time of the first and second order, and was not required to restate its findings in rejecting Appellants' request for reconsideration of prior rulings.

The district court's grant of summary judgment in favor of Appellees on all claims is therefore **AFFIRMED.**

APPENDIX B

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA,
WESTERN DIVISION

SAMICA ENTERPRISES, LLC, et al.,

Plaintiffs,

v.

MAIL BOXES ETC. USA, INC., et al.,

Defendants.

No. CV 06-2800 ODW (CT). | Dec. 22, 2008

Opinion

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

OTIS D. WRIGHT II, District Judge.

I. INTRODUCTION

On May 9, 2006, over two hundred franchisees, principals and guarantors of "The UPS Store" filed this action against various Mail Boxes Etc., Inc. ("MBE") and United Parcel Service, Inc. entities ("UPS"). Plaintiffs allege they were duped into investing in The UPS Store franchises, which are

(allegedly) economically unviable. On October 29, 2007, the court directed each side to select for trial two "Phase I Plaintiffs" (*i.e.,* those who invested in The UPS Store directly) and two Phase II Plaintiffs (those who converted from Mail Boxes Etc.). The Phase I Plaintiffs are "Rayment," Center 4605, and "Thomas," Center 5281 (selected by Plaintiffs), and "Archambault," Center 4942, and "Roat," Center 5145 (selected by Defendants).[1]

Mail Boxes Etc., Inc and United Parcel Service, Inc (DE, NY, and OH) (collectively, "Defendants") now move for summary judgment or, in the alternative, partial summary judgment against the Phase I Plaintiffs. Defendants argue there are no genuine disputes of material fact and that they are entitled to judgment as a matter of law on Plaintiffs' (1) Second Claim for breach of contract; (2) Fourth Claim for fraud by omission; (3) Sixth Claim for fraud, deceit, and negligent misrepresentation; (4) Eighth Claim for violation of the California Franchise Investment Law ("CFIL"); (5) Tenth Claim for violation of California Business & Professions Code Section 17200, *et seq.* and 17500, *et seq;* (6) Eleventh Claim for violation of non-California franchise and consumer protection statutes; (7) Thirteenth Claim for declaratory relief; and (8) Fourteenth Claim for rescission.

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[1] The Phase II Plaintiffs are the subject of a separate motion for summary judgment, discussed below.

II. FACTS

In 2001, MBE, a wholly-owned subsidiary of UPS, became the franchisor of Mail Boxes Etc. centers. (UF 13.) MBE subsequently offered "The UPS Store" franchises to existing MBE franchisees through a "Gold Shield Amendment" to their existing franchise agreements, and to new franchisees through new franchise agreements. (UF 14.) The Phase I Plaintiffs received Franchise Offering Circulars ("FOCs") and entered into Franchise Agreements ("FAs") with MBE for The UPS Store. (UF 1-12.) Each Plaintiff also entered into a "Contract Carrier Agreement" ("Carrier Agreement") with UPS for UPS shipping services. (UF 2-11.)

The relevant contracts contain various provisions which underlie Plaintiffs' several claims. Pursuant to the "best efforts" provision in the FA, for example, "MBE agree[d] to use best efforts to ensure that its affiliate [UPS] gives Franchisee discounts and incentives on Franchisee's wholesale cost of UPS services." (Joint Stip., ¶¶ 8, 9, Exhs. H, I.) MBE sought and procured "incentives off the retail rate," but it is disputed whether any of the incentives went to the "wholesale cost." (UF 15.)

This provision interplays with another in the Carrier Agreement, which obligates Plaintiffs to accept UPS drop-off packages and prohibits them from "charg[ing] their customers more than the maximum price set by UPS for UPS shipping services." (UF 27.) That agreement also set forth the incentives that UPS would give Plaintiffs and disclosed that "UPS may, in its sole and absolute

discretion, modify ... the wholesale discounts and incentives provided to Participating Franchisee's The UPS Store." (UF 28; Jt. Stip., Ex. G at § 13.B.) Other provisions and facts, including Plaintiffs' fraud allegations, will be discussed as necessary.

III. LEGAL STANDARD

Rule 56 requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Tarin v. County of Los Angeles,* 123 F.3d 1259, 1263 (9th Cir. 1997). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). That burden is met by " 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party meets its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 323-34, 106 S. Ct. 2548; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu v. Fred Meyer,* 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes-where the evidence is such that a reasonable jury could return a verdict for the nonmoving party-

over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson,* 477 U.S. at 248, 106 S. Ct. 2505.

IV. DISCUSSION

Phase I

1. Second Claim: Breach of Contract and Good Faith

Defendants argue they did not breach their contracts by (1) "failing to use their best efforts to secure from UPS adequate discounts," (2) "failing to provide reasonable consultation and advice regarding operation of the center [s]," or (3) otherwise failing to fulfill certain alleged obligations. (4th Compl. ¶¶ 96, 97.)

Best Efforts Provision-against MBE

The provision at issue is found in the Franchise Agreements. It reads: "In reliance on Franchisee's commitment to comply with the designated maximum prices, MBE agrees to use best efforts to ensure that its affiliate [UPS] gives Franchisee discounts and incentives on Franchisee's wholesale cost of UPS services." (Joint Stip., ¶¶ 8, 9, Exhs. H, I, Para. 7. 1b.) This provision is not defined in the relevant contracts, and the parties construe it differently.

Before turning to the parties' arguments, it bears noting that a "best efforts" provision "requires a party to make such efforts as are reasonable in [ ] light of that party's ability and the means at its disposal and of the other party's justifiable expectations...." 2

Farnsworth on Contracts § 7.17 at 350 (2d ed. 1998); *see also* Farnsworth, On Trying to Keep One's Promises: The Duty of Best Efforts In Contract Law, 46 U. Pitt. L.Rev. 1, 8 (1984) ("Courts [and Plaintiffs] sometimes confuse the standard of best efforts with that of good faith.... Good faith is a standard that has honesty and fairness at its core and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance. The two standards are distinct and that of best efforts is the more exacting").

Whether a defendant used best efforts under the circumstances is a factual question usually reserved for the jury. *U.S. Ecology, Inc. v. State of California,* 92 Cal.App.4th 113, 136, 111 Cal.Rptr.2d 689 (2001). Defendants may still prevail on this motion, however, if the relevant facts are undisputed and conclusive or "there is an absence of evidence to support [Plaintiffs'] case." *Celotex Corp.,* 477 U.S. at 325, 106 S. Ct. 2548. To that end, the following facts are uncontroverted: (1) MBE had several discussions with UPS about improving "incentives, pricing, and retail rates;" (2) MBE made "numerous requests to UPS to increase margins and incentives;" and (3) MBE suggested that UPS simplify the rate structure, providing for "incentives [on the] retail rate." (UF 16, 17, 20.) As a result of such efforts, and others, MBE was able to obtain for Plaintiffs the best discounts

and incentives of any UPS authorized shipping store. (UF 23.)[2]

While these facts show that MBE undertook some effort, the question remains: "How hard must one try if one has undertaken to use best efforts?" Farnsworth, 46 U. Pitt. L.Rev. 1, 1. As mentioned above, the answer depends on the terms (and nature) of the agreement, Defendants' ability, and Plaintiffs' justifiable expectations. These factors cut decisively in Defendants' favor. Critically, UPS reserved for "its sole and absolute discretion" the right to "modify" Plaintiffs' incentives. This provision, to which Plaintiffs assented, not only limits MBE's ability to obtain incentives, but it also tempers Plaintiffs' justifiable expectations. Coupled with Defendants' undisputed efforts (and the results obtained), the court cannot but conclude that Defendants fulfilled their obligation. (*See also* Mot. at 3-5.)

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[2] Plaintiffs purport to dispute "in part" some of these facts but do not in fact do so. Rather, Plaintiffs read several unfounded obligations into the best efforts provision, conflate the relevant inquiry with good faith, and offer otherwise unavailing arguments. (*See* UF 16-25.) For example, Plaintiffs contend Defendants sought and obtained incentives on the retail rate only, not the "wholesale cost"-as stated in the FA. They then argue, because "there is no such thing as 'wholesale cost'," Defendants must necessarily have breached their contracts. (Opp'n at 4.) Not so. If there is no such thing as "wholesale cost," then either Defendants' performance is excused as impossible, Defendants are liable for fraud, or the parties made a mistake. Under none of these scenarios, importantly, can Defendants be liable for breach of contract.

Alternatively, Plaintiffs may not maintain a breach of contract claim based on the "best efforts" provision because they have not raised a genuine issue that UPS would have acted any differently had Defendants exerted greater effort. *See Nat'l Data Payment Sys., Inc. v. Meridian Bank,* 212 F.3d 849, 854 (3rd Cir. 2000) ("Even if [defendant's] actions constituted a default of its best-efforts obligation, [plaintiff] has provided absolutely no evidence that, had [defendant's] behavior been any different, [the desired result would have been obtained]"); *see also* Cal. Civ Code § 3301. Here, it is undisputed that UPS retained absolute discretion to modify the incentives, and Plaintiffs offer no evidence that UPS would have extended greater incentives had Defendants not allegedly breached their obligation. (*See* UF 25.) Accordingly, Defendants' motion for summary adjudication as to this provision is GRANTED.

Consultation and Advice Provision-against MBE

Defendants argue Plaintiffs may not maintain a claim for breach of contract based on their alleged failure to provide "reasonable continuing consultation and advice regarding operation of the Center[s]." (Joint Stip., Exhs. H, I at tab FOC-1) The court agrees. Defendants argued in their moving papers that this obligation is triggered by a "Franchisee's written request" for advice, *see id.,* and that "Plaintiffs have no evidence they made any such requests." (Mot. at 6.) Plaintiffs' Opposition does not address this argument or otherwise raise a genuine issue for trial. Accordingly, Defendants' motion as to this provision is also GRANTED.

Breach of Other Provisions-against MBE

Defendants argue Plaintiffs cannot base their breach of contract claim on various representations found in the Risk Factors Acknowledgments ("RFAs"). (Mot. at 7-8.) This argument goes to Plaintiffs' contention that MBE allegedly failed to provide a system where "the success or failure of [the] business will depend primarily on [Plaintiffs'] efforts." (4th Compl. ¶ 96 b.)

Defendants argued in their moving papers that the RFAs are extracontractual and, alternatively, that the representations contained therein do not support a claim for breach of contract. *See, e.g., Traumann v. Southland Corp.,* 858 F.Supp. 979, 982 (N.D. Cal. 1994) ("A claim for breach of contract [ ] must be based on the nonperformance of express promises or legal duties contained in a contract.") (*citing* 4 A. Corbin, *Corbin on Contracts,* § 943 at 807, n. 1 (1951)). In their Opposition, Plaintiffs merely argued that the documents are indeed part of the contracts, (Opp'n at 5-7), but they nowhere addressed Defendants' argument that the RFAs do not impose on Defendants the kinds of obligations which give rise to a breach of contract claim. A cursory review of the RFAs confirms that they serve to *limit* Defendants' undertaking (and attendant liability), not expand it.

The Risk Factors Acknowledgments that Plaintiffs signed provide, among other things: "You [Plaintiffs] hereby acknowledge that you understand [ ] the success or failure of your business will depend primarily on your local marketing efforts" and "MBE

CANNOT GUARANTEE THAT YOUR BUSINESS WILL EVER ACHIEVE PROFITABILITY." (Joint Stip. ¶ 8, Exh. H at FOC 11.) Such acknowledgments by Plaintiffs cannot be perversely read as imposing on MBE a duty "to ensure that each franchisee's success [will in fact depend] on their local marketing efforts." (Reply at 5.)[3] Thus, Defendants motion as to these representations is GRANTED.

Solicitation of The UPS Store Customers-against MBE

Defendants argued in their moving papers that they did not breach their contracts by soliciting Plaintiffs' customers, pointing out that MBE retained the right to contact those customers. (*See* Mot. at 8.) Plaintiffs did not address this argument in their Opposition or otherwise raise a genuine issue for trial. *See Celotex Corp.,* 477 U.S. at 325, 106 S.Ct. 2548. Defendants' motion as to this argument is therefore GRANTED.

Implied Covenant of Good Faith

Defendants argue that Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is preempted by federal law because it relates to the allegedly unreasonable prices charged by UPS. (*See* Mot. at 8) ("Through the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Congress has expressly barred the 'enact[ment] or enforce[ment]' of any state law 'related to a price,

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[3] As discussed below, this language also negates Plaintiffs' reliance on alleged misstatements in the RFAs.

route, or service' of motor and air carriers of property, such as UPS.") (*quoting* 49 U.S.C. §§ 14501(c)(1) and 41713(b)(4)(A)). The court agrees; Plaintiffs' claim relates to UPS prices and involves the enforcement of state law.

First, Plaintiffs contend "the discounts [ ] UPS pays Plaintiffs on shipping have nothing to do with its prices and cannot be preempted by the FAAAA." (Opp'n at 9.) This untenable assertion is belied by Plaintiffs' operative complaint, which directly attacks the reasonableness of the "maximum prices franchisees can charge [UPS] customers," the "prices paid to franchisees for drop-offs," and UPS's "discounts and incentives." (4th Compl. ¶ 97.) Clearly, Plaintiffs' claim is sufficiently "related to price," and is subject to preemption. 49 U.S.C. § 14501(c)(1).

Second, Plaintiffs argue their claim is not preempted because it alleges no violation of state-imposed obligations, but seeks recovery solely for UPS's alleged breach of its own, self-imposed undertakings. (Opp'n at 8-9) (citing *American Airlines, Inc. v. Wolens,* 513 U.S. 219, 232-33, 115 S. Ct. 817, 130 L.Ed.2d 715 (1995)) ("[Preemption clause] stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, *with no*

enlargement or enhancement based on state laws or policies external to the agreement.") (emphasis added).

Here, the Carrier Agreement between Plaintiffs and UPS required Plaintiffs to comply with UPS's designated maximum prices. That agreement also gave UPS the discretion to modify those prices as well as the incentives which Plaintiffs may receive. (UF 25-29.) UPS never undertook to provide "reasonable" prices nor did the parties bargain for such a provision. Rather, as the very nature of Plaintiffs' good faith claim suggests, such requirements are forbidden enhancements of UPS's contractual obligations, as implied under California law. *See, e.g., Freeman & Mills, Inc. v. Belcher Oil Co.,* 11 Cal.4th 85, 91, 44 Cal.Rptr.2d 420, 900 P.2d 669 (1995) ("[I]n California, the law implies in every contract a covenant of good faith and fair dealing."); *see also Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36, 44 Cal.Rptr.2d 370, 900 P.2d 619 (1995) (the covenant is extracontractual; it "is implied as a supplement to the express contractual covenants.").

As one California court succinctly explained: "Conditions implied by law are conditions imposed by law-state law; they are not negotiated by the contracting parties. Claims based on violation of the covenant [of good faith] are therefore preempted." *Power Standards Lab, Inc. v. Fed. Exp. Corp.,* 127 Cal.App.4th 1039, 1046, 26 Cal.Rptr.3d 202 (2005); *see also Hanni v. Am. Airlines, Inc.,* 2008 WL 1885794, *7 (N.D. Cal. 2008) ("Plaintiff's breach of contract claim is preempted to the extent it is based

on a breach of the implied covenant of good faith and fair dealing."). Accordingly, because all bases for breach of contract fail, Defendants' motion is GRANTED.[4]

2. Fourth and Sixth Claims: Fraud By Omission and Negligent Misrepresentation

Defendants argue "[t]he representations and omissions Plaintiffs contend are fraudulent or negligent misrepresentations are barred by the California Franchise Investment Law ("CFIL"), Cal. Corp. Code §§ 31100, *et seq.,* not false representations of fact, and/or not the type of representation[s] or omission[s] on which Plaintiffs could justifiably rely."

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[4] Plaintiffs' reliance on *Air Trans. Ass'n of Am. v. City and County of San Francisco* is unavailing. 266 F.3d 1064, 1071 (9th Cir. 2001) ("If a state law's effect on price, route or service is too tenuous, remote, or peripheral, then the state law is not preempted.") (internal quotation marks and citation omitted). That court upheld a state-imposed "requirement that airlines not discriminate in providing benefits [because the law] ha[d] no forbidden connection with prices and services." *Id.* at 1072. The court reasoned: "The Airlines are free to set whatever terms, conditions and prices they want on the travel benefits and discounts they do decide to provide, as long as they do not discriminate."

Here, by contrast, the effect of California law on the price terms at issue is neither "tenuous" nor "peripheral;" it is squarely at the heart of the matter. Plaintiffs, after all, challenge the very reasonableness of the prices and incentives that UPS had the discretion to set. Indeed, the brunt of Plaintiffs' claim-as implied under California law-is that UPS is *not* "free to set whatever ... prices [it] want[s]." *Id.*

(Mot. at 10.) The court considers Defendants' arguments in turn.

CFIL Preemption

Defendants argue section 31306 of the CFIL should be read as preempting Plaintiffs' common law claims for fraud and negligent misrepresentation. That section provides: "Except as explicitly provided in this chapter [describing the remedies available under the CFIL], no civil liability in favor of any private party shall arise against any person by implication from or as a result of the violation of any provision of this law or any rule or order hereunder." (Mot. at 11.) Plaintiffs counter with an apparent saving clause from that same section: "Nothing in this chapter shall limit any liability which may exist by virtue of any other statute or under common law if [the CFIL] were not in effect." (*See* Opp'n at 9-10.)

Although caselaw is scant, and none is directly on point, the court finds that those allegations of fraud that are based on CFIL violations are preempted, while claims independent of CFIL violations are not. Put differently, section 31306 is best understood as displacing those claims that rest on misrepresentations or omissions covered by the several provisions of the CFIL, and the saving clause merely clarifies that the CFIL does not completely preempt the field. *See, e.g., Viva! Intern. Voice For Animals v. Adidas Prom. Retail Ops., Inc.,* 41 Cal.4th 929, 944, 63 Cal.Rptr.3d 50, 162 P.3d 569 (2007) ("[I]nclusion of savings clause in a statute negates field preemption").

This straightforward interpretation gives meaning to both sections, reconciles any perceived inconsistency, and comports with fundamental principles of statutory construction. *See, e.g., Cummins, Inc. v. Superior Court,* 36 Cal.4th 478, 487, 30 Cal.Rptr.3d 823, 115 P.3d 98 (2005) ("We construe the words of a statute in context, and harmonize the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole."); *Halbert's Lumber, Inc. v. Lucky Stores, Inc.,* 6 Cal.App.4th 1233, 1239, 8 Cal.Rptr.2d 298 (1992) ("[We] apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable ... in accord with common sense and justice, and to avoid an absurd result."); *see also Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384-85, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

Here, it certainly would appear absurd to conclude, as Plaintiffs propose, that what the first clause in section 31306 gives, the second takes away. The first clause specifically provides that, other than those remedies provided under the CFIL, "no civil liability in favor of any [ ] party shall arise against any person by implication from or as a result of the violation of any provision of this law or any rule or order hereunder." This language clearly suggests that the CFIL shall be the exclusive remedy for claims alleging misrepresentations violative of "any [CFIL] provision."

For example, section 31200 of the CFIL contemplates "liability for misleading statements contained in documents filed with the Commissioner of Corporations" and "section 31201 involves misleading statements of material facts [ ] other than those matters contained in documents filed with the Commissioner." *People ex rel. Dept. of Corp. v. SpeeDee Oil Change Sys., Inc.,* 95 Cal.App.4th 709, 721-22, 116 Cal.Rptr.2d 497 (2002) (*SpeeDee Oil*). Pursuant to the first clause in section 31306, claims alleging misrepresentations falling within the scope of these two sections may be only brought under the CFIL.

The second clause merely qualifies the first by assuring "the [continuing] vitality of 'those claims that are not expressly preempted.' " *Cortez v. MTD Prod., Inc.,* 927 F.Supp. 386, 391 (N.D. Cal. 1996) (citation omitted) (construing federal statute); *see also Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 385, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992) ("A general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision."). Rather than render 31306 inconsequential by interpreting its saving clause as superseding the preemption language, the court concludes that section 31306 bars claims that may otherwise be brought under the CFIL-*i.e.,* those claims alleging misrepresentations and omissions covered by such provisions as 31200 and 31201. The saving clause is properly read as ensuring that any claims beyond the CFIL's coverage may be brought independently.

This interpretation is contextually supported by *SpeeDee Oil,* 95 Cal.App.4th at 709, 116 Cal.Rptr.2d 497. While this case does not expressly hold that section 31306 preempts fraud causes of action, as Plaintiffs point out, it is still instructive. Specifically, in the context of a fraud claim under the CFIL, that court rejected the doctrine of tolling applicable to common law fraud because it found that section 31306 limits remedies for statutory violations to those provided under the CFIL. *Id.* at 721-26, 116 Cal.Rptr.2d 497. Were this court now to hold that claims based on CFIL violations are not preempted, then plaintiffs could simply circumvent the CFIL's statutory scheme (and its statutes of limitations) by styling their CFIL claims as common law fraud. Such a result would seemingly undermine both *SpeeDee Oil* and the CFIL as a whole.[5]

Accordingly, because Plaintiffs' fraud claim appears to rest exclusively on alleged misrepresentations and omissions statutorily covered by the CFIL, and they cite no common law basis supporting the fraud recovery independent of the

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[5] Like Plaintiffs' fraud claim here, the *SpeeDee Oil* plaintiffs' CFIL claims arose "from their execution of the local franchise agreements and representations made to them prior to signing the contracts." *SpeeDee Oil,* 95 Cal.App.4th at 723, 116 Cal.Rptr.2d 497. That court went on to hold that the statute of limitations for purposes of a section 31200 claim (misrepresentations in documents filed with the Commissioner of Corporations) is an absolute four years, and that for section 31201 (other misrepresentations) is two years.

CFIL, section 31306 precludes Plaintiffs' common law claims.[6]

Bowden v. Robinson

During the hearing on these motions, Plaintiffs raised a new argument meriting discussion. Specifically, Plaintiffs argued that the interpretation of section 31306 should be governed by *Bowden v. Robinson,* 67 Cal.App.3d 705, 136 Cal.Rptr. 871 (1977). In *Bowden,* the California Court of Appeal concluded that "Sections 25510 and 25006 [of the Corporations Code] express a clear legislative intent for the Corporate Securities Law of 1968 to supplement common law causes of action, not to repudiate them." *Id.* at 716, 136 Cal.Rptr. 871. Sections 25510 and 25006 are virtually identical to CFIL sections 31306 and 31012, respectively, and the argument is that the latter should be similarly interpreted as supplementing (rather than displacing) common law fraud. Although Plaintiffs' argument is appealing, it is not dispositive.

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[6] Plaintiffs' bare citation to *Spahn v. Guild Indus. Corp.* appears misplaced. 94 Cal.App.3d 143, 156 Cal.Rptr. 375 (1979) (*Spahn*). Although that case discusses fraud under a separate heading, it merely addresses common law "respondeat superior" liability-apparently with reference to "the provision of individual liability for fraud under section 31302 of the Corporations Code." *Id.* at 157 n. 9, 156 Cal.Rptr. 375. Thus, to the extent controlling, *Spahn* addresses a CFIL-based fraud claim, and is in fact consistent with this court's holding. *Cf.* Cal. Corp. Code § 31012 ("[CFIL] 'Fraud' and 'deceit' are not limited to common law fraud or deceit.").

First, the Supreme Court of California has directed that "When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation." *Belridge Farms v. Agricultural Labor Relations Bd.,* 21 Cal.3d 551, 557, 147 Cal.Rptr. 165, 580 P.2d 665 (1978). *Bowden* raises no such presumption here because its interpretation succeeded the 1971 enactment of the CFIL. It cannot be presumed, therefore, that the legislature intended section 31306 to have the same meaning articulated in *Bowden* six years later. The court's own research reveals no such caselaw predating the CFIL.

Second, while the CFIL was modeled after securities law, the relevant statutes are sufficiently different to warrant divergent interpretations. Notably, the court in *Bowden* made much of the fact that "the Corporate Securities Law of 1968 clearly indicates a legislative intent to provide for actions and remedies for corporate securities victims *far less burdensome* than those available under common law." *Bowden,* 67 Cal.App.3d at 716, 136 Cal.Rptr. 871 (emphasis added). Aside from dispensing with the need to show causation, that statute also "conspicuously avoid[ed] the requirement of 'actual reliance.' " *Id.* That court thus rightly found that while securities laws lessen "the formidable task of proving common law fraud," plaintiffs are free to pursue such claims independently *Id.* at 714, 136 Cal.Rptr. 871. Such reasoning is inapplicable here.

A plaintiff must show both causation and actual reliance under the CFIL, *see* Cal. Corp. Code §§ 31300, 31301, and the statute reveals no appreciable disconnect between statutory and common law fraud-as that found under securities law.[7]

This court is further disinclined to adopt *Bowden*'s interpretation in light of *SpeeDee Oil* 's direction that common law tolling does not apply to CFIL fraud. As discussed above, such interpretation would thwart the CFIL's exclusive remedies provision for qualifying violations and circumvent its statutes of limitations. The court reiterates that its holding is limited to those fraud allegations raised in this case, and does not foreclose common law fraud independent of CFIL violations.[8]

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[7] Section 31301 provides: "Any person who violates Section 31201 shall be liable to any person (not knowing or having cause to believe that such statement was false or misleading) who, while relying upon such statement shall have purchased a franchise, for damages, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know, (or if he had exercised reasonable care would not have known) of the untruth or omission."

[8] This discussion regarding CFIL preemption under section 31306 does not control the outcome of Plaintiffs' claims, as Defendants' observed during the hearing. As discussed below, all fraud allegations are considered under a CFIL standard largely coextensive with common law fraud. *See, e.g., Traumann,* 858 F.Supp. at 985 (*Spahn* held that "trial court erred by failing to instruct [the] jury on every element of common law fraud for [a CFIL] misrepresentation claim under § 31301."). The decisive elements are thus the same, but, while the CFIL borrows common law respondent superior liability,

3. Eighth Claim: CFIL Violations/Fraud

Before considering the parties' arguments, it first bears setting out that part of the statutory framework underlying Plaintiffs' CFIL claims. Specifically, Plaintiffs allege violations under three different sections-Cal. Corp. Code §§ 31200, 31201 and 31202. First, section 31200 involves misstatements or omissions in documents filed with the Commissioner of Corporations (the FOCs).[9] Violation of this section is actionable under section 31300 and is governed by an absolute four-year statute of limitations found in section 31303. *See*

Spahn, 94 Cal.App.3d 143, 156 Cal.Rptr. 375, it does not recognize common law tolling principles. *SpeeDee Oil,* 95 Cal.App.4th 709, 116 Cal.Rptr.2d 497.

The court addresses the issue of preemption because it was squarely raised by Defendants and, considering the dearth of clear precedent, the question merits consideration-whether on appeal or, preferably, by California state courts. In short, *SpeeDee Oil* militates against an independent common law cause of action for fraud based on CFIL violations as such avenue would circumvent the dictates of the statutory scheme-including its absolute statutes of limitations. Whether section 31306 is read as preempting certain allegations of fraud, as this court finds, or merely limiting common law fraud by dispensing with common law tolling principles, as *SpeeDee Oil* provides, it cannot be said based on the foregoing that all allegations of fraud are independently actionable under both theories-aside from the plain redundancy of such exercise.

[9] Section 31200 provides: "It is unlawful for any person willfully to make any untrue statement of a material fact in any application, notice or report filed with the commissioner under this law, or willfully to omit to state in any such application . . . any material fact which is required to be stated therein . . ."

SpeeDee Oil, 95 Cal.App.4th at 722, 116 Cal.Rptr.2d 497.

Second, section 31201 involves "misstatements or omissions of fact other than those made to the Commissioner of Corporations" (the "road shows"); it is actionable under section 31301 and is governed by a two-year limitations period found in section 31304. *Id.*[10] Lastly, section 31202 prohibits willfully untrue statements or omissions made "in any statement required to be disclosed in writing pursuant to Section 31101 [exemption requirements]."[11] Like section 31200, this section is actionable under 31300 and is governed by the four-year statute of limitations found in section 31303.

Defendants argue because the Phase I Plaintiffs are non-California franchisees, they "can bring only the second type of claims, those arising under section 31201." (Mot at 24 n. 14.) Defendants point to section 31105 in support of this argument, which provides: "Any offer, sale, or other transfer of a franchise, or

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[10] Section 31201 provides: "It is unlawful for any person to offer or sell a franchise in this state by means of any written or oral communication not enumerated in Section 31200 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 the light of the circumstances under which they were made, not misleading."

[11] Section 31202 provides: "It is unlawful for any person willfully to make any untrue statement of a material fact in any statement required to be disclosed in writing pursuant to Section 31101, or willfully to omit to state in any such statement any material fact which is required to be stated therein."

any interest in a franchise, to a resident of another state... shall be exempted from the provisions of Chapter 2 (commencing with Section 31110) of this part, if all locations from which sales, leases or other transactions between the franchised business and its customers are made, or goods or services are distributed, are physically located outside this state." Cal. Corp. Code § 31105. It is undisputed that Plaintiffs operate franchises outside of California. (Mot. at 23) (*citing* 4th Compl., Exh. 2 ¶¶ 5, 41, 92, 98).

Plaintiffs contend "the exemption [ ] that Defendants rely on only exempts franchisors from *registering* offerings made to out of state residents and has nothing to do with the antifraud provisions of the CFIL." (Opp'n at 22) (emphasis in original). Thus, to resolve this issue, the court must assess the scope of "Chapter 2."

It is true, as Defendants point out, that Chapter 2 is titled "Disclosure." But that is neither determinative nor instructive. First, as the California Supreme Court observed, the Corporations Code expressly provides that "Title, division, part, chapter, article, and section headings contained herein do not in any manner affect the scope, meaning, or intent of the provisions of this code." *Snukal v. Flightways Mfg., Inc.,* 23 Cal.4th 754, 778 n. 7, 98 Cal.Rptr.2d 1, 3 P.3d 286 (2000) (*quoting* Cal. Corp. Code § 6.); *see also City of Berkeley v. Cukierman,* 14 Cal.App.4th 1331, 1340, 18 Cal.Rptr.2d 478 (1993) (titles and headings "do not control the provisions of a statute, nor can they be used to create ambiguity").

Second, a review of Chapter 2-Cal. Corp. Code §§ 31110-31125-reveals that it deals primarily with registration procedures and requirements. Section 31110, for example, prohibits the sale of franchises "unless the offer [ ] has been registered." Similarly, the remaining sections address the "filing of [an] application" (31111); application "signature and verification" (31112); the inclusion of "a proposed offering circular" with the registration (31114); "stop order of registration" (31115); "effective date of registration" (31116); submission of offering circulars to prospective franchisees of any franchise "subject to registration" (31119); "period of registration" (31120); and "amendment" of applications for registration. (31123).

Defendants contend, because section 31114 requires the application for registration to include a proposed offering circular-containing "the material information set forth in the application for registration"-section 31105 exempts them from complying with FOC and other "disclosure" requirements for sale of franchises to [Plaintiffs]." Although the parties have not adequately briefed the issue, and caselaw is wanting, the court rejects Defendants' argument.[12]

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[12] Section 31114 provides: "The application for registration shall be accompanied by a proposed offering circular, which shall contain the material information set forth in the application for registration, as specified by rule of the commissioner, and such additional disclosures as the commissioner may require. The offering circular shall recite in bold type of not less than 10-point type that registration does

The court finds that, while section 31105 exempts Defendants from registering applications which contain FOCs (section 31114), and from producing FOCs to out-of-state franchisees (section 31119), it does not shield them from liability for misrepresentations found in registered documents that they voluntarily produce to out-of-state franchisees-and upon which those franchisees rely to their detriment. In other words, Plaintiffs may not state a claim against Defendants for Defendants' failure to register the franchise or provide FOCs, as provided in Chapter 2. Plaintiffs may, however, state a claim for misrepresentations found in such documents as Defendants produced and Plaintiffs relied on. The court finds this reading reasonable and in keeping with the spirit of the CFIL. *See* Cal. Corp. Code 31001 (CFIL intended "to provide each prospective franchisee with the information necessary to make an intelligent decision regarding franchises being offered[,]" "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.") (Cal. Corp. Code, § 31001.)

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not constitute approval, recommendation, or endorsement by the commissioner."

Section 31200

Section 31200, which is actionable under section 31300, prohibits misleading representations and omissions found in registered documents. Plaintiffs' allegations under this section are based on certain representations found in the Risk Factors Acknowledgment, which is part of the FOC. Specifically, Plaintiffs assert that MBE deceptively represented that "the success or failure of your business will depend primarily on your local marketing efforts;" "earnings and profits will be primarily dependent on your own individual efforts in operating your centers;" and that "high levels of customer service would enable franchisees to 'develop and/or sustain a sufficient customer base to' achieve profitability." (4th Compl. ¶ 78.)

Defendants argue these representations are not actionable and, alternatively, that Plaintiffs could not reasonably have relied on such representations as a matter of law. The court agrees. First, to the extent the RFAs could be read as providing (as opposed to disavowing) any representation regarding profitability, the challenged language merely concerns future events; mainly, Plaintiffs' efforts in running their stores and the correlated profitability. Such predictions are not actionable. *See Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells,* 86 Cal.App.4th 303, 309, 103 Cal.Rptr.2d 159 (2000) ("It is hornbook law that an actionable misrepresentation must be made about past or existing facts; statements regarding future events are merely deemed opinions.").

Second, the challenged representations are found in the RFAs, wherein Plaintiffs explicitly accepted the risks associated with the venture, and acknowledged that "MBE CANNOT GUARANTEE THAT YOUR BUSINESS WILL EVER ACHIEVE PROFITABILITY." (Joint Stip. ¶ 8, Exh. H at FOC 11.) Thus, to the extent the RFAs may be read as giving rise to actionable misrepresentations, Plaintiffs' alleged reliance is unjustifiable as a matter of law. *See Alliance Mortgage Co. v. Rothwell,* 10 Cal.4th 1226, 1239, fn. 4, 44 Cal.Rptr.2d 352, 900 P.2d 601 (1995) ("whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.") (internal quotation marks and citations omitted); *see also SpeeDee Oil,* 95 Cal.App.4th at 725-26, 116 Cal.Rptr.2d 497 ("In the absence of [reasonable] reliance, no liability can arise under [CFLA] section 31300.").

Here, in effect, Plaintiffs purport to rely on Defendants' disclaimer of liability, the RFAs. As the very notion suggests, such reliance is patently unreasonable. *See In re Rexplore, Inc. Sec. Litig.,* 671 F.Supp. 679, 683 (N.D. Cal. 1987) ("Memorandum is replete with disclaimers and warnings, thus making the investors' reliance [ ] unjustified as a matter of law."); accord *Winn v. McCulloch Corp.,* 60 Cal.App.3d 663, 671, 131 Cal.Rptr. 597 (1976) (mere negligent reliance is not unreasonable as matter of law).

Plaintiffs also argue that the RFAs concealed "known risks of unprofitable controlled margins,

drop-offs, drop boxes, internet shipping, and other [unspecified] factors." (Opp'n at 13.) This allegation stems from Plaintiffs' belief that Defendants intended to compete with Plaintiffs and so priced their services as to ensure the failure of Plaintiffs' businesses and the enrichment of Defendants. Not only does this argument lack business sense, as Defendants point out, but it is also belied by the record. As discussed above, Defendants reserved the right to contact customers; Plaintiffs agreed to accept UPS drop-off packages; and Defendants disclosed their prices and incentives-expressly reserving the right to modify them. Plaintiffs do not allege that Defendants raised their prices and/or reduced Plaintiffs' incentives. Nor do Plaintiffs adduce appreciable evidence supporting their theory.

Finally, Plaintiffs base their fraud claim on language in the FOCs providing that "the core underlying business that we [MBE] are franchising remains the same as the business we and our predecessors have franchised for over 20 years." (Opp'n at 13). Plaintiffs then conclude, without supporting evidence, that factual disputes preclude summary judgment "because, inter alia, [the prior system] offered a multi-shipper platform and did not allow for controlled margins." (Id.)

This statement is indeed actionable, as Plaintiffs argue, but it does not support Plaintiffs' claim in this case. First, as Defendants point out "[t]he very next sentence in the FOC refers the reader to the 'more detailed discussion below in this Item.' " (Mot. at 13) ("That discussion explains that ... The UPS Store

would 'change certain operating procedures.' "). Second, to the extent that any undisclosed change in Defendants' system is based on franchisees' inability to exceed the maximum prices set by Defendants, Plaintiffs expressly assented to these "controlled margins." Thus, Plaintiffs cannot now complain that Defendants misrepresented the very matter.

As to the "multi-shipper platform," Defendants argued that "the [FAs do not] prohibit Plaintiffs from offering multi-carrier shipping services." (Mot. at 12) ("[I]f a carrier such as FedEx elected not to offer services [ ], that is [ ] beyond Defendants' control."). Plaintiffs do not address this argument or otherwise raise a genuine issue for trial. Accordingly, because none of the representations in the FOCs and RFAs support fraud recovery under section 31200, Defendants' motion is GRANTED.

Section 31201

Section 31201 prohibits misrepresentations, other than those in documents registered with the Commissioner. Plaintiffs' sole claim under this section appears to arise from alleged misrepresentations made at promotional "road shows." Defendants argued in their moving papers that none of the Phase I Plaintiffs attended these "road shows" and Plaintiffs do not dispute this fact. Accordingly, because Plaintiffs cannot support a claim for fraud under the CFIL, Defendants' motion is GRANTED.[13]

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[13] The court finds no allegations supporting Plaintiffs' fraud claim under section 31202.

4. Tenth Claim: Bus. & Prof. Code §§ 17200 and 17500, et seq.

Plaintiffs' UCL claims turn on the allegations discredited above, and fail for much the same reasons. (*See* Mot. at 20-23.) As Defendants point out, moreover, Plaintiffs lack standing under these statutes because neither Plaintiffs' "unrealized profits" nor their "franchise fees" amount to "lost money" under sections 17200 or 17500. (Id. at 20.) Defendants' motion as to this claim is therefore GRANTED.

5. Eleventh Claim: Breach of Non-California Laws

Defendants argue this claim "fails because Plaintiffs' Agreements are governed by California law." (Mot. at 23) (citation omitted). Plaintiffs contend "conflict of law principles" suggest otherwise. (Opp'n at 20-21.)

Briefly, as Plaintiffs argue, "[i]n determining the enforceability of arm's-length contractual choice-of-law provisions, California courts [ ] apply the principles set forth in Restatement [Second of Conflict of Laws (Restatement)] section 187, which reflects a strong policy favoring enforcement of such provisions." *Expansion Pointe Properties Ltd. Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP,* 152 Cal.App.4th 42, 58, 61 Cal.Rptr.3d 166 (2007) (citation omitted). As the California Supreme Court articulated:

> "[T]he proper approach under Restatement section 187, subdivision (2) is for the court

> first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue....' [Citation.] If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy."

Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 482, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992).

Here, MBE is a California corporation and the franchisor of The UPS Store. The "choice of law" clause is thus substantially related to the parties, including Plaintiffs, who contracted with a California corporation and filed their action in this state. The clause is also reasonably understood as Defendants' attempt to avoid nationwide litigation and invoke the

laws of their home state. This is sufficient under both tests one and two above. *Id.* The third inquiry also favors enforcement of the provision because California is the chosen state whose laws shall govern, and no conflict exists. California has expressed a fundamental policy in enacting the CFIL, and Plaintiffs' claims were duly adjudicated thereunder. Accordingly, California law governs, and Defendants' motion as to this claim is GRANTED.

6. Declaratory Relief and Rescission

Declaratory relief and rescission are not independent claims, they are remedies. In light of the foregoing, Plaintiffs are not entitled to such relief.[14]

V. CONCLUSION-Phase I

Defendants did not breach the "best efforts" and "consultation" provisions; the Risk Factors Acknowledgment does not impose on Defendants contractual duties; Plaintiffs adduce no evidence as to other alleged breaches; and Plaintiffs' bad faith claim regarding the reasonableness of UPS prices is preempted by federal law. Accordingly, Defendants' motion for summary judgment as to breach of contract is GRANTED. Plaintiffs' fraud and negligent

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[14]Plaintiffs only sought rescission based on their fraud claim, but the remedy was also available under the CFIL, which displaced Plaintiffs' fraud claim. *See Little Oil Co., Inc. v. Atl. Richfield Co.,* 852 F.2d 441, 447 (9th Cir. 1988) ("The exclusive remedies available under California's Franchise Investment Law are damages and rescission.") (citing Cal. Corp. Code §§ 31300, 31306). As discussed above, the allegations underlying both claims are identical, and all were considered under the CFIL.

misrepresentation claims are preempted by the CFIL (section 31306). Plaintiffs cannot support a CFIL fraud claim based on alleged misrepresentations in the RFAs or at promotional "road shows." Plaintiffs' claimed reliance is also unjustifiable as a matter of law, and Defendants' motion as to the CFIL claim is GRANTED. Because Plaintiffs' substantive claims fail, Defendants' motion for summary judgment as to the unfair competition laws (Cal. Bus. & Prof. Code §§ 1700, 17500) is GRANTED. Defendants' motion as to the violation of non-California laws is also GRANTED. Finally, because Plaintiffs' claims for affirmative relief fail, they are not entitled to the requested remedies.

Phase II

The Phase II Plaintiffs' claims largely replicate those discussed under Phase I. The court will therefore limit its inquiry to the differences, and elaborate where necessary-all with reference to the foregoing analysis.

The Phase II Plaintiffs are "Dudley," centers 94 & 2109, and "Johnson," centers 894 & 1300 (selected by Plaintiffs), and "Bull," center 4069, and "Skiersch," center 4099 (selected by Defendants). The moving Defendants are Mail Boxes Etc. USA, Inc., Mail Boxes Etc., Mail Boxes Etc., Inc., and United Parcel Service, Inc (DE, NY, and OH). (Phase II Mot. at 1.)

1. First Claim: Breach of Contract and Good Faith

This claim fails for the same reasons discussed under Phase I. To the extent Plaintiffs contend the

Carrier Agreement contained open price terms, requiring Defendants to set them reasonably, they are mistaken. As Defendants point out, the Carrier Agreement "is not a contract with an 'open price term' because it expressly states that the price [ ] UPS would charge the franchisee was the price set forth in the UPS Rate and Service Guide, available on line, reduced by the incentive that was expressly stated in the [agreement]." (Phase II Reply at 4.)

Plaintiffs' remaining arguments, primarily aimed at Defendants' good faith obligations, do not preclude summary judgment. Plaintiffs have neither raised a genuine issue as to Defendants' assent to a contractual good faith obligation nor, had they done so, that Defendants in fact breached that duty. Plaintiffs' sole evidence in support of this argument is a hearsay e-mail of questionable origin and significance, which cannot add to or contradict the parties' integrated agreement. (*See* Phase II Opp'n at 4; Phase II Reply at 2-3.)

2. Third and Fifth Claims: Fraud and Negligent Misrepresentation

The allegations supporting these claims are the same as those underlying the Phase I Plaintiffs' claims, except that some of the same challenged representations are found in the Gold Shield Amendment. These claims are preempted, and will be considered under the CFIL.

3. Seventh Claim: CFIL Violations/Fraud

These claims fail for much the same reasons discussed above. Insofar as these Plaintiffs allege

claims under 31200 arising from Defendants' alleged failure to register the Gold Shield Amendment as a "material modification" to the Mail Boxes Etc. franchise, those claims are barred by section 31105, which precludes out-of-state franchisees from maintaining claims for violation of Chapter 2. *See* 723-25, *supra.*

Plaintiffs also allege fraud based on flawed Gold Shield testing and material omissions relating to those tests. (Phase II Opp'n at 16) ("Unbeknownst to Plaintiffs, UPS had run a five-month test in mid to late 2001 'in selected markets' on the effect of going to a lower price/higher volume model plan [ ] of [T]he UPS Store."). Primarily, Plaintiffs point to a paper by David Mounts, which allegedly shows that conversion to The UPS Store would be unprofitable. (Id. at 16-17.) As Defendants point out, however, "the document on which Plaintiffs so heavily rely is a school paper co-written by a former UPS employee and five other students, purely to satisfy an academic requirement." (Phase II Reply at 5). A review of the evidence, including Mr. Mounts' deposition testimony, confirms the nature of this inadmissible document, and the futility of Plaintiffs' argument. (Id. at 5-6.)[15]

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[15] Plaintiffs argue Defendants failed to test for "net profits" despite promising that "profitability would be a main concern." (Opp'n at 16.) It is not altogether clear how this allegation gives rise to a fraud cause of action. Defendants did not purport to study "net profits;" Plaintiffs allege no such representation; and Plaintiffs admit they were informed of the nature of the testing by a "a carefully scripted power-point presentation"-with multiple references to "gross profits." (UF 46; *see also* Phase II Reply at 6 n. 6.)

Plaintiffs next attack "the Gold shield tests that were conducted in 2002 in San Antonio, Seattle, St. Louis, Greenville, Harrisburg, and Phoenix." (Phase II Opp'n at 17.) Plaintiffs argue, "[b]ecause the [test] results were so poor, Defendants controlled the methodology and results." (Id.) But Plaintiffs offer no evidence that the test results were poor-aside from their misplaced reliance on the Mounts paper. Nor is it clear what misrepresentation caused them damage-that Defendants had sufficiently tested for profitability, or that Defendants had misrepresented the results.

Similarly vague (and seemingly unfounded) is Plaintiffs' contention that Defendants manipulated the Franchise Advisory Committee to gain their endorsement of the conversion to The UPS Store. While the Committee did express concern regarding the proposed conversion, (Opp'n at 17), Plaintiffs offer no evidence that Defendants obtained the Committee's endorsement by manipulation or coercion.

Finally, the court notes the futility of Plaintiffs' block-citation to sixty (60) alleged facts purporting to demonstrate Defendants' several misrepresentations and omissions. (*See* Phase II Opp'n at 16-18) (citing UF 46-106). Aside from the fact that these allegations are unsupported, immaterial, and/or otherwise inadmissible, Plaintiffs' indiscriminate offering is decidedly insufficient at this stage in the litigation.[16]

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[16] "A party opposing a summary judgment motion must produce *specific* facts showing that there remains a genuine

4. Plaintiffs' Remaining Claims

The remaining claims fail for the same reasons discussed above, the requested relief is denied, and Defendants' motion as to these claims is therefore GRANTED.

CONCLUSION

For the reasons discussed above, Defendants' motion for summary judgment is GRANTED in its entirety.[17]

IT IS SO ORDERED.

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factual issue for trial and evidence significantly probative as to any material fact claimed to be disputed." *Jespersen v. Harrah's Operating Co., Inc.* 444 F.3d 1104, 1111 (9th Cir.2006) (emphasis in original); *see also Forsberg v. Pacific N.W. Bell Tel. Co.,* 840 F.2d 1409, 1418 (9th Cir. 1988) ("The district judge is not required to comb the record to find some reason to deny a motion for summary judgment"). Plaintiffs' block-citation to sixty purported facts is not specific (or significantly probative) enough to defeat summary judgment.

[17] With the exception of those sections noted above, this order was initially issued as the court's tentative. Plaintiffs were then given an opportunity to oppose it as they saw fit. At the hearing, Plaintiffs reiterated the same arguments discussed herein. The court has carefully considered those arguments, but they do not warrant a different result.

APPENDIX C

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA,
WESTERN DIVISION

SAMICA ENTERPRISES, LLC, et al.,

Plaintiffs,

v.

MAIL BOXES ETC. USA, INC., et al.,

Defendants.

No. CV 06-2800 ODW (CT). | Feb. 26, 2010

Opinion

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

OTIS D. WRIGHT II, District Judge.

I. INTRODUCTION

On March 21, 2006, over two hundred franchisees, principals and guarantors of "The UPS Store" filed this action against various Mail Boxes Etc., Inc. ("MBE") and United Parcel Service, Inc. entities ("UPS") (collectively, "Defendants"). Plaintiffs claim Defendants duped them into investing in The

UPS Store franchises, which are allegedly economically unviable. On December 22, 2008, this Court granted Defendants' Motion for Summary Judgment against four representative "Phase I Plaintiffs," i.e., those Plaintiffs who purchased The UPS Store franchises (rather than converting Mail Boxes Etc. to The UPS Store). The Court also granted Defendants' Motion against four "Phase II Plaintiffs," who converted to the new brand. (*See* December 22, 2008 Order; Docket No. 179.) Defendants now move for summary judgment against all remaining Phase I and Phase II Plaintiffs.

As the parties are thoroughly familiar with the facts of this case, the Court proceeds to Defendants' pending Motions.

II. LEGAL STANDARD

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). That burden may be met by "showing-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts

that show a genuine issue for trial. *Id.* at 323-34; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1968). "[A] scintilla of evidence or evidence that is merely colorable or not significantly probative [ ] [does] not present a genuine issue of material fact." *Addisu v. Fred Meyer,* 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes-where the evidence is such that a reasonable jury could return a verdict for the nonmoving party-over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson,* 477 U.S. at 248.

It is not the task of the district court "to scour the record in search of a genuine issue of triable fact. [Courts] rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir.1996). *See also Carmen v. San Francisco Unified Sch. Dist.,* 237 F.3d 1026, 1031 (9th Cir.2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.").

III. DISCUSSION

It bears noting at the outset that the remaining Phase I Plaintiffs acknowledge that they "are similarly situated to the Phase I plaintiffs against whom the Court [ ] previously ordered summary judgment." (Opp'n at 1.) The Phase II Plaintiffs likewise concede that they "are similarly situated to

the Phase II plaintiffs against whom the Court [ ] previously ordered summary judgment." (Opp'n at 1.) Consequently, it would appear that the Court's prior rulings apply equally to the two hundred or so remaining Phase I and Phase II Plaintiffs.[1]

Rather than focus on distinctions warranting departure from the Court's prior findings, as the Court had suggested, Plaintiffs seek reconsideration of those findings. (*See* Opp'n at 1) (Plaintiffs' arguments "focus on the reasons the Court should reconsider its Order."). Among other things, Plaintiffs argue the Court should "reconsider its conclusions" regarding FAAAA preemption of claims challenging the reasonableness of UPS's prices (*id.* at 4); "reconsider that the CFIL preempts common law fraud" (*id.* at 10); "reconsider that plaintiffs were required to establish justifiable reliance" (*id.* at 19); and generally "reconsider and reverse its earlier order granting Defendants summary judgment as to the Phase I and Phase II Plaintiffs" (*id.* at 51).

Aside from the impropriety of utilizing their Opposition to seek reconsideration, Plaintiffs point to no new facts, change in law, or manifest error in the Court's earlier Order. Instead, they improperly raise the same arguments previously considered and rejected. *See* Local Rule 7-18. The Court will thus

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[1] At least one circuit court has recognized that, in actions with numerous plaintiffs, district courts may proceed with representative plaintiffs and then apply issue or claim preclusion to the remaining plaintiffs. *See, e.g., Bullard v. Burlington Northern Santa Fe Railway Company,* 535 F.3d 759 (7th Cir. 2008).

only address those arguments properly before it. Because Plaintiffs concede that they are similarly situated to those against whom the Court previously ordered summary judgment, and for the following reasons as to Plaintiffs' claim under other states' laws, Defendants' Motions for Summary Judgment as to these remaining Plaintiffs are GRANTED.

1. Violations of Other States' Laws

Defendants contend the Court should grant their Motions for Summary Judgment with respect to this claim because it is based on the same allegations that underlie Plaintiffs' California law claim. Specifically, Defendants contend that there was no fraudulent, unfair or unlawful conduct in connection with the sale of their franchises.

Unlike the other claims, the Court cannot apply its prior Order, which disposed of this claim based solely on choice-of-law, because Plaintiffs have raised an argument not advanced in that round of summary judgment: that the choice-of-law analysis differs with respect to Plaintiffs who are residents of states with anti-waiver provisions. In their Oppositions to Defendants' earlier Motions, Plaintiffs did not raise this issue, discuss certain "State Law Addenda," or otherwise identify any specific provisions that would preclude enforcement of the California choice-of-law clause. Consequently, the Court did not consider these arguments, nor was it required to do so. *See Carmen,* 237 F.3d at 1031 (court need not search for evidence establishing a genuine issue of fact, where evidence is not set forth in opposing papers with adequate references). In their Oppositions to the

current Motions, however, Plaintiffs for the first time do discuss the "State Law Addenda" and argue that certain states' franchise and consumer protection statutes are non-waivable, even in the face of an otherwise valid choice-of-law clause.

While Defendants are correct that Plaintiffs agreed that disputes with MBE would be resolved under California law, the parties' agreements do in fact contain a "State Law Addenda," which states that the "Franchisor and Franchisee acknowledge that certain state statutes have been enacted in various states which are intended to supersede certain specific provisions of this Agreement. MBE and Franchisee agree that provisions in the State Law Addenda set forth below may supersede specific provisions in this Agreement which are inconsistent with or contrary to the specific state laws." (Hankes Decl. Ex. 14.) The Court must thus examine the issue anew.

A. Scope of Plaintiffs' Claim and Other Concerns

Plaintiffs' claim under other states' laws is maintained by all franchisees who reside or operate a franchise in Arizona, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wisconsin. (FAC ¶ 201.) Plaintiffs allege Defendants violated these states' laws by engaging in fraudulent acts and omissions as described in Paragraphs 43 through 80 of the operative complaint. (FAC ¶ 200.) In their Opposition, Plaintiffs identify Defendants'

actionable conduct as follows: (1) representations about wholesale costs, (2) the RFA's, (3) the same twenty year business UFOC representation, (4) concealing that the new model did not work (i.e., the Mounts and Boston Consulting Group studies), (5) misleading promises of best efforts, (6) concealing and failing to disclose and register UPS as a franchisor, and (7) failure to register Gold Shield amendments on behalf of Converting Plaintiffs. (Opp'n at 28.)

The Court first addresses Plaintiffs' attempt to expand the scope of this claim. In their operative complaint, Plaintiffs advanced this claim only on behalf of residents of the states listed above. To the extent that Plaintiffs now attempt to assert this claim on behalf of residents of states not listed above, the Court rejects that attempt as improper because it is outside the scope of the allegations in the Fourth Amended Complaint. Specifically, Plaintiffs' attempt to invoke the laws of the following states is improper and outside the scope of the allegations in the operative complaint: Alabama, Louisiana, Maine, and Washington. *See, e.g., Wasco Prods. v. Southwall Techs., únc.,* 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings.") (quotation marks and citation omitted); *Speer v. Rand McNally & Co.,* 123 F.3d 658, 665 (7th Cir. 1997) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.") (quotation marks and citation omitted).

For the same reason, the Court rejects Plaintiffs' attempt to base this claim on other allegations not included in their operative complaint. As Defendants point out, "Plaintiffs' [ ] Claim for Violation of Other State's Law was based expressly and exclusively on allegations that Defendants made misrepresentations in connection with the Gold Shield Program and in The UPS Store franchise offering circular." (Defendants' Supplemental Brief at 2, 3-5.) Plaintiffs did not then allege that Defendants failed to comply with other state's registration requirements, but advanced such arguments in their Opposition. "Plaintiffs cannot now use the supplemental briefing (or their summary judgment oppositions, for that matter) to raise new claims under various state's law that were not pleaded." (*Id.*)

As to this issue, "Plaintiffs propose to amend the complaint in very minor fashion to meet the alleged notice deficiencies of which Defendants complain." (Plaintiffs' Supplemental Reply at 4.) The Court believes it is far too late in the day for such amendments. In the Scheduling Order issued by this Court, the last day to amend pleadings was November 5, 2007. (*See* Docket No. 55.) Plaintiffs are on their Fourth Amended Complaint, moreover, and their attempt to salvage a claim at this late stage will prejudice Defendants, who have been litigating this action for nearly four years, cause undue delay, is futile (*see* Defendants' Supplemental Brief at 13-16), and is simply but an attempt to defeat summary judgment. *See Ascon Properties, Inc. v. Mobil Oil Co.,* 866 F.2d 1149, 1160 (9th Cir. 1989) ("Leave need not be granted where the amendment of the complaint

would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay.... The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.") (citations omitted).[2]

As to Plaintiffs' contention that they need not identify the specific statutes under which they seek relief, they are simply wrong. Plaintiffs' claim seeks relief under numerous different statutes based on certain Plaintiffs' residence, or operation of a franchise in those states. While the allegations in their claim are clearly bare-bones, at least Defendants could count on the fact that Plaintiffs had identified the particular states and state statutes under which Plaintiffs sued them. To allow Plaintiffs to now add new states and state statutes would be tantamount to amending the complaint via summary judgment briefing, which is improper. And, to the extent Plaintiffs contend that their claim as currently pled puts Defendants on sufficient notice that they may be sued under any slightly relevant state statute, they are mistaken. Were the Court to adopt Plaintiffs' proposition, Defendants would have had no notice whatsoever, depriving them of a fair

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[2] Defendants are correct that Court requested supplemental briefing only of those relevant state statutes with anti-waiver provisions. (*See* Defendants' Supplemental Reply at 8-9) (listing statutes discussed by Plaintiffs, but which have no anti-waiver provisions). Plaintiffs discussion of those laws is disregarded.

opportunity to respond to claims based on statutes not identified in the Fourth Amended Complaint.

Lastly, insofar as Plaintiffs raise, for the first time, new arguments in their supplemental briefing, the Court will not address such arguments because they were not raised in the initial Opposition and were outside the scope of the requested supplemental briefing. The Court did not request supplemental briefing to give either party the opportunity to enlarge their briefs on summary judgment. Quite the contrary, the Court requested supplemental briefing to obtain precise arguments from the parties about the effect of certain state statutes on the choice-of-law clause in the parties' contracts. The Court does not appreciate Plaintiffs' decision to bombard this Court with new arguments in response to the Court's request for *specific* information. If Plaintiffs were unable to construct arguments and provide the Court with the requested information, they simply should have said so instead of flooding the Court with page after page of irrelevant information and newly crafted, largely improper arguments. The Court next turns to the choice-of-law question.

B. Choice of Law

As an initial matter, Plaintiffs direct the Court to *Laxmi Invs., LLC v. Gold USA,* 193 F.3d 1095 (9th Cir. 1999) for the proposition that, because there was no meeting of the minds on the choice-of-law provision, it is unenforceable. Aside from the inapplicability of *Laxmi,* however, and the parties' consistent agreements, Plaintiffs have long waived their argument that the provision is invalid.

Plaintiffs have not only argued California law for the past four years or so, but several of their claims are in fact expressly premised on California law, including the California Franchise Investment Law and California Business & Professions Code sections 17200 and 17500. *See, e.g., Nagrampa v. MailCoups, Inc.,* 469 F.3d 1257, 1296 (9th Cir. 2006) (parties waived franchise agreement's Massachusetts choice of law provision by arguing their respective causes on the basis of California law). Nevertheless, the Court proceeds with its discussion to the extent that Plaintiffs seek to apply both California *and* other states' laws. (*See* Opp'n at 30) ("[T]here is no reason why both sets of laws cannot be applied."); (*see also* Plaintiffs' Supplemental Opp'n at 3) (citing *S.A. Empresa De Viacao Aerea Rio Grandense v. Boeing Co.,* 641 F.2d 746, 749 (9th Cir. 1981)).

As the Court noted in its December 22, 2008 Order, the California Supreme Court articulated the following choice-of-law inquiry:

> [T]he proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy

> of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue....' [Citation.] If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.

Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 482, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992).

This Court previously found, and Plaintiffs do not dispute that California has a substantial relationship to the parties (it is MBE's home state, with whom Plaintiffs contracted), and that the choice of California law was rational (as MBE's home state, it provides uniform standards to govern MBE's relationship with its franchisees). Thus, as Defendants argue, "the California choice of law clause should be enforced unless (1) California law conflicts with a fundamental policy reflected in another state's law, and (2) that other state has a materially greater interest in the determination of the particular matter than does California." (Defendants' Supplemental Brief at 6.)

Defendants first correctly point out that "[w]hile an 'anti-waiver' provision [like those at issue in this case] may reflect a determination by another state

that its law reflects a fundamental public policy of that state, that says nothing about whether there is a conflict between California law and the other state's law, or whether the other state has a materially greater interest." (*Id.*) Defendants then argue that the other states' laws do not conflict with California's and, in any event, those states do not have a materially greater interest in the determination of the particular issues at hand. (*See id.* at 6-12, 11 Cal.Rptr.2d 330, 834 P.2d 1148.)

Defendants argue that the language of the CFIL is not only "generally used in other states' franchise investment laws which were enacted after the CFIL [, b]ut the CFIL offers more protection to Plaintiffs [ ] than other state's franchise laws because the CFIL defines a 'sale' and 'offer to sell' as including a 'material modification' of an existing franchise." (Defendants' Supplemental Brief at 8) (citation omitted). "By contrast, other states' anti-fraud provisions are limited to actual offers to sell." (*Id* .) ("In the context of this case, this Court considered the Gold Shield program-whereby franchisees amended (modified) their franchise agreements-as constituting a 'sale' within the meaning of the CFIL. Thus, Plaintiffs' best chance to establish their claims was under the CFIL, not their home state's laws."). It would thus appear that the CFIL is not only consistent with other states' franchise laws, but also more generous. (*See also id.* at 8-12, 11 Cal.Rptr.2d 330, 834 P.2d 1148) (discussing other states' laws).

Plaintiffs argue conflicts exist between California and their states' laws because their states allegedly

provide greater protection. Specifically, Plaintiffs contend that justifiable reliance, which is but *one* of the grounds pursuant to which the Court previously entered summary judgment, is not an element of their statutory state law claims. (*See, e.g.,* Plaintiffs' Supplemental Reply at 5-16.) Defendants establish otherwise. (*See* Defendants' Supplemental Reply at 12-14); *see also California Bagel Co., LLC v. American Bagel Co.,* 2000 U.S. Dist. LEXIS 22898 (C.D. Cal. June 2, 2000) (reasonable reliance is an element of California and other states' franchise laws).

Plaintiffs also rely on the "State Law Addenda" to the parties' agreements, pursuant to which the parties "acknowledge that certain state statutes have been enacted in various states which are intended to supersede certain specific provisions of this Agreement" and "agree that provisions in the State Law Addenda [ ] may supersede specific provisions in this Agreement which are inconsistent with or contrary to the specific state laws." (Hankes Decl. Ex. 14; *see also* Plaintiffs' Supplemental Opp'n at 6-35.) This provision then lists various states' laws and their possible effect on the parties' agreements. Plaintiffs' do not explain how the other states' statutes are inconsistent with California law, however, while Defendants show that the laws are in fact consistent. (*See* Defendants' Supplemental Brief at 7-12; Reply at 11-14.)

Even if some inconsistencies exist between California and the other states' laws, moreover, such differences do not constitute conflicts with a

fundamental policy of those states. As Defendants argue, the public policy evinced in the CFIL-to prohibit false and misleading statements to prospective franchisees-is entirely consistent with the public policy of the other states. (Defendants' Supplemental Reply at 15.) Finally, as Defendants point out, even were the Court to apply the home states' laws, Plaintiffs' claims would fail for the same reasons they failed under the CFIL. (*See* December 22, 2008 Order; Mots. at 20, 25; Defendants' Supplemental Brief at 12-13; Defendants' Supplemental Reply at 15-16 .)

In sum, Plaintiffs have thoroughly waived their argument that the California choice-of-law provision is unenforceable in its entirety, and Defendant have met their burden of establishing that it is otherwise enforceable. For the reasons discussed above, Defendants' Motions for Summary Judgment as to this claim is GRANTED.[3]

2. The Court's December 22, 2008 Order is Hereby Amended

Plaintiffs are correct that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as

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[3] The Court need not discuss the balance of Plaintiffs' remaining arguments. Suffice it to say, Plaintiffs' arguments either misread the Court's prior Order, attempt to inject new issues into the action, or are otherwise unavailing. In short, they neither merit discussion nor reconsideration of the Court's prior Order.

to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." (Plaintiffs' Supplemental Reply at 1) (quoting Fed.R.Civ.P. 54(b)); *see also Amarel v. Connell,* 102 F.3d 1494, 1515 (9th Cir.1996) ("[T]he interlocutory orders and rulings made pre-trial by a district judge are subject to modification by the district judge at any time prior to final judgment."). Accordingly, the Court's December 22, 2008 Order is amended to include the choice-of law discussion in this Order.

IV. CONCLUSION

For the reasons discussed above and in the Court's December 22, 2008 Order, Defendants' Motions for Summary Judgment are GRANTED in their entirety. The December 22, 2008 Order is amended to include the discussion contained herein. Defendants shall lodge a proposed judgment reflecting the Court's Orders.

SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed Jan. 17, 2012

SAMICA ENTERPRISES LLC, an Illinois Limited Liability Company; et al.,

Plaintiffs-Appellants

v.

MAIL BOXES ETC., INC., a Delaware Corporation; et al.,

Defendants-Appellees

No. 10-55433

D.C. No. 2:06-cv-02800-ODW-CT

Central District of California, Los Angeles

ORDER

Before: SCHROEDER, REINHARDT, and MURGUIA, Circuit Judges.

The panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are **DENIED.**

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Filed Feb. 6, 2012

SAMICA ENTERPRISES LLC, an Illinois Limited Liability Company; et al.,

Plaintiffs-Appellants

v.

MAIL BOXES ETC., INC., a Delaware Corporation; et al.,

Defendants-Appellees

No. 10-55433

D.C. No. 2:06-cv-02800-ODW-CT

Central District of California, Los Angeles

ORDER

Before: SCHROEDER, REINHARDT, and MURGUIA, Circuit Judges.

Appellants' second petition for panel rehearing and rehearing en banc is construed as a motion to file an untimely and second petition, and is **DENIED**. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX F

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

D.T. WOODARD, INC.,

Plaintiff-Appellant,

v.

MAIL BOXES ETC., INC., et al.,

Defendants and Respondents.

B228990
(Los Angeles County
Super. Ct. No. BC294647)

Filed 1/12/12

Appeal from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Reversed.

Opinion

KITCHING, J.

INTRODUCTION

Plaintiff D.T. Woodard, Inc. (Woodard) appeals from a judgment entered after the grant of a motion for summary judgment by defendants Mail Boxes Etc., Inc., BSG Holdings, Inc.; BSG Holdings Subsidiary, Inc.; United Parcel Service, Inc. (Delaware); United Parcel Service, Inc. (Ohio); and United Parcel Service, Inc. (New York).

Woodard represents a class of plaintiffs who were franchisees of Mail Boxes Etc. USA, Inc., which was acquired by United Parcel Service. Woodard sued defendants alleging causes of action for negligent and intentional misrepresentation, and for violations of the California Franchise Investment Law (CFIL) (Corp.Code, § 31000 et seq.) in connection with the conversion of Woodard's Mail Boxes Etc. Center franchise to a The UPS Store franchise.

We conclude that triable issues of fact exist regarding whether defendants made, and whether plaintiff relied on, misrepresentations and omissions of fact to plaintiff, and that Woodard provided evidence creating a triable issue of fact as to damages. We therefore reverse the grant of summary judgment.

STANDARD OF REVIEW

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings ... but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action....' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476–477.)

FACTUAL AND PROCEDURAL HISTORY

Mail Boxes Etc. operated businesses which packaged and shipped parcels, sold shipping materials, and provided private mail box rental and photocopy, fax, and voicemail services. In 1980, Mail Boxes Etc. began franchising this business to independent franchisees which would operate Mail Boxes Etc. Centers. Mail Boxes Etc. licensed to franchisees the right to use the Mail Boxes Etc. trademark, trade name and system, but franchisees

could offer services from several shipping companies and could set their own retail prices. Plaintiff Woodard purchased a Mail Boxes Etc. franchise in June 1997, from the franchisor, Mail Boxes Etc. USA, Inc. (MBE USA).

Before executing the original franchise agreement in 1997, Woodard received and signed a document titled "Risk Factors Associated With the Purchase of an MBE Franchise." The "Risk Factors" document contained warnings and disclosures about the risks of purchasing and operating an MBE franchise and factors that would affect whether a franchise would succeed and be profitable. The Risk Factors document stated: "You understand and acknowledge that MBE cannot guarantee that your business will ever achieve profitability[;]" "You understand that the ability to operate a profitable MBE Center requires some level of business and management skills and the capability of providing good customer service[;]" and "you understand that if your Center does not consistently provide the highest level of customer service, you may not be able to develop and/or sustain a sufficient customer base to ever achieve profitability at your MBE Center."

In April 2001, a subsidiary of United Parcel Service, Inc. (UPS) purchased the Mail Boxes Etc. franchise agreements and transferred them to Mail Boxes Etc., Inc., (MBE) a wholly owned subsidiary of UPS. Beginning in September 2002, MBE conducted "Gold Shield tests" in which participating franchisees in three "cells" charged the UPS retail rate, with each cell using a different brand. Franchisees in Cell 1

(Phoenix and San Antonio) retained the Mail Boxes Etc. brand. Most franchisees in Cell 2 (Greenville, South Carolina and Harrisburg, Pennsylvania) used both Mail Boxes Etc. and UPS branding, although shopping center constraints or other restrictions prevented approximately 20 percent of test centers from displaying the UPS shield. Franchisees in Cell 3 (St. Louis and Seattle) were branded "The UPS Store."

In February 2003, MBE offered franchisees the Gold Shield Amendment to the MBE Franchise Agreement. At the time the Gold Shield Amendment was presented to franchisees, each franchisee could charge customers any price on goods or services offered by the franchisee (except for national accounts, in which case the franchisee could accept or not accept the business). By executing the Gold Shield Amendment, franchisees agreed to allow their MBE Center to be re-branded as "The UPS Store" and to reflect other UPS marks, and agreed not to charge customers more than the maximum retail prices designated by UPS for UPS shipping services. Franchisees who executed the Gold Shield Amendment also executed a Mail Boxes Etc., Inc. Franchisee UPS Incentive Program Contract Carrier Agreement, which granted franchisees incentives (discounted rates) from the published UPS Rate and Service Guide. These incentives were greater than the incentives previously offered to MBE franchisees.

Between February 8 and March 1, 2003, MBE and UPS made "road show" presentations to franchisees at locations across the United States.

Woodard attended a road show on February 11, 2003, where MBE and UPS employees presented a PowerPoint slide show and made the points contained in the "talking points" associated with the slide show. Woodard received documents entitled "Mail Boxes Etc., Inc. Summary of New Gold Shield Program" and "Gold Shield National Rollout: Frequently Asked Questions" and received copies of the Gold Shield Amendment and the UPS Contract Carrier Agreement.

The Gold Shield summary and PowerPoint show came to the following conclusions: "The UPS Store" brand in Cell 3 had the best name recognition of the 3 cells in terms of driving customers into the store; "The UPS Store" brand in Cell 3 outperformed the other two brands in Cells 1 and 2 in terms of average daily UPS volume, and when measured by year-over-year comparisons in total STR (subject to royalty) growth, monthly customer counts, and net profit from combined shipping, packing, mailbox, and document services.

On February 27, 2003, Woodard executed a Gold Shield Amendment to its Franchise Agreement, which MBE countersigned on April 2, 2003.

In April 2003, MBE began selling only The UPS Store franchises in the United States.

On April 25, 2003, a complaint was filed against UPS and numerous UPS executives for violation of state franchise laws, tortious interference with contracts and with prospective business advantage, and unfair business practices. By the time of the 10th amended complaint filed on July 11, 2006, plaintiffs

included a large group of MBE franchisees who did not convert their MBE franchises to The UPS Store. D.T. Woodard, Inc. was an MBE franchisee who represented MBE franchisees who did join the Gold Shield Program and did sign the UPS Carrier Agreement, and by doing so converted their MBE franchises to The UPS Store based on allegedly false information and omissions of MBE and UPS.

In 2007, Woodard executed a new "The UPS Store Franchise Agreement" and entered into a new contract carrier agreement with UPS for another 10–year term.

In its non-published opinion *D.T. Woodard, Inc. v. Mail Boxes Etc., Inc., et al.* (B194599) filed October 17, 2007 (Woodard I), this court reversed an order denying a motion to certify a class action in causes of action alleging defendants' violation of the CFIL and common law intentional misrepresentation. On remand, the trial court granted Woodard's motion to certify a national class of all United States franchisees who operated a Mail Boxes Etc. store and who converted their franchise to The UPS Store through the Gold Shield Amendment on or before March 21, 2003. The motion to certify the class was granted as to the second cause of action for negligent misrepresentation; the fourth cause of action for intentional misrepresentation; and causes of action for violation of Corporations Code sections 31101, 31201, and 31202.

On April 2, 2010, defendants moved for summary judgment against class plaintiff D.T. Woodard, Inc. After a hearing on the motion, the trial court granted

summary judgment as to MBE and UPS, finding that Woodard and the class failed to show false statements of material fact or justifiable reliance, and failed to carry their burden of producing evidence of damages caused by the misrepresentations. Judgment in favor of defendants Mail Boxes Etc., Inc.; BSG Holdings, Inc.; BSG Holdings Subsidiary, Inc.; United Parcel Service, Inc. (Delaware); United Parcel Service, Inc. (Ohio); and United Parcel Service, Inc. (New York) was entered on September 27, 2010.

Woodard filed a timely notice of appeal.

ISSUES

Woodard claims on appeal that:

1. Woodard demonstrated triable issues of fact regarding defendants' misrepresentation and omission of material facts;

2. Woodard demonstrated disputed issues of fact regarding the materiality of the Gold Shield test results and their reliability;

3. Triable issues of fact exist regarding whether Woodard justifiably relied on defendants' misrepresentations;

4. The trial court erred in granting summary judgment on Woodard's alleged inability to prove damages.

DISCUSSION

1. *Triable Issues of Fact Exist on Whether Defendants Made, and Whether Plaintiff Relied on, Misrepresentations and Omissions of Fact, and Therefore Summary Judgment Should Be Reversed*

A. *Plaintiff's Causes of Action*

Plaintiff brought an action for negligent misrepresentation, which requires proof that (1) defendant misrepresented a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) plaintiff's justifiable reliance on the misrepresentation, and (5) resulting damage. (*Wells Fargo Bank, N .A. v. FSI, Financial Solutions, Inc.* (2011) 196 Cal.App.4th 1559, 1573.) Plaintiff also brought an action for intentional misrepresentation, which requires proof that (1) defendant represented to plaintiff that an important fact was true; (2) the representation was false; (3) defendant knew the representation was false when defendant made it, or made the representation recklessly and without regard for its truth; (4) defendant intended that plaintiff rely on the representation; (5) plaintiff reasonably relied on the representation; (6) plaintiff was harmed; and (7) plaintiff's reliance on defendant's representation was a substantial factor in causing that harm to plaintiff. (*Manderville v. PCG & S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.)

Plaintiff also brought three claims for violation of the California Franchise Investment Law (CFIL)

(Corp.Code, § 31000 et seq.). Plaintiff alleged that defendants violated Corporations Code section 31101 [setting forth minimum net worth, experience, disclosure, and notice filing requirements] and section 31202 [prohibiting making untrue statements of material fact or omitting any material fact required to be in any statement required to be disclosed in writing pursuant to section 31101]. Section 31300, the liability statute for sections 31101 and 31202, states: "Any person who offers or sells a franchise in violation of Section 31101[or] 31202 ... shall be liable to the franchisee ... who may sue for damages caused thereby[.]"

Plaintiff also alleged that defendants violated Corporations Code section 31201 [prohibiting the offer or sale of a franchise by means of written or oral communication enumerated in Section 31200 which includes an untrue statement of a material fact or omits to state a material fact necessary to make statements made not misleading]. The second CFIL liability statute, Corporations Code section 31301, states: "Any person who violates Section 31201 shall be liable to any person (not knowing or having cause to believe that such statement was false or misleading) who, while relying upon such statement shall have purchased a franchise, for damages, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know, (or if he had exercised reasonable care would not have known) of the untruth or omission."

B. *Plaintiff Provided Evidence Creating a Triable Issue of Fact as to Defendants' Alleged Misrepresentations and Omissions of Fact*

Plaintiff contends that this appeal concerns its reliance on defendants' factual assertions regarding the past performance of the UPS Store model in market tests and defendants' assurances that those tests reliably measured The UPS Store model. We agree, and find that plaintiff has raised triable issue of fact whether defendants made false or misleading representations about the past performance of The UPS Store model in market tests. We also find that plaintiff raised triable issues of fact whether defendants falsely claimed that the market tests reliably measured The UPS Store model.

Plaintiff relies on statements by defendants about the reliability of the field testing results. The "Summary of New Gold Shield Program" stated: "After more than a full year of research and analysis on how the post-acquisition UPS–MBE relationship could be optimized to reduce the long-term risks and increase the long-term opportunities for all, MBE and UPS began to formulate the Gold Shield Program. It was decided early on that a field test was needed to help determine whether actual results, *on a small but reliable scale,* supported the hypotheses that were the foundation for the Gold Shield Program." (Italics added.)

The Gold Shield Program summary also stated: "The conclusions summarized below and in Exhibit 4 are based solely upon the financial information that was reported to us by the participating Test Center

franchisees. A representative sample of the Test Centers was asked to report their results. The approximately 25% of Test Centers in each cell whose results are reported below reported those results voluntarily. We have not independently audited the numbers reported. However, in some instances, our in-house auditors assisted in inputting the reported financial information in the proper categories in order to maximize *the accuracy and reliability* of the information for comparative and other analytical purposes. We consistently endeavored to confirm the reliability of the Test Center financial information. However, all numbers are based on numbers reported by franchisees." (Italics added.)

The Gold Shield Program summary stated: "The Gold Shield Test Program started with 3 separate 'cells.' Each cell consisted of 2 cities and 1 branding concept. The markets chosen for the cells were selected in order to have a representative cross-section of centers."

The Gold Shield Program summary stated: "Mail Boxes Etc., Inc .... is giving you this Summary of New Gold Shield Program ... so that you have *relevant information to help you decide* whether or not you voluntarily will amend your existing MBE Franchise Agreement ... and sign a new UPS Incentive Program Contract Carrier Agreement in order to join the Gold Shield Program [.]" (Italics added.)

Plaintiff argues that its evidence showed that defendants knew the Gold Shield tests were not conducted reliably and therefore their statements were false, and defendants failed to disclose flaws in

the Gold Shield tests to franchisees for their consideration when determining whether to become The UPS Store.

Plaintiff cited evidence from a declaration of Randolph E. Bucklin, a Professor of Marketing at the UCLA Anderson School of Business, that unequal conditions of the three test cells invalidated the outcome of the tests and that the Gold Shield market tests contained numerous flaws. First, stores in Cell 1 MBE-branded stores lowered prices to different levels tha n stores in Cell 2 (co-branded MBE and The UPS Store) and Cell 3 (branded The UPS Store). Second, the test results used to compare within each test cell were from different periods of the year. Third, advertising began later for the test period for Cell 1 than in Cells 2 and 3, and less was spent overall on advertising in the MBE-branded Cell 1 than in The UPS Store-branded Cell 3. Fourth, changes in signage were incompletely implemented for Cell 2. The existence of these differences among the three test cells meant that test results could be due to factors other than the differences in branding.

Plaintiff also cited evidence from Professor Bucklin's declaration that the Gold Shield test was flawed because test cell cities were not balanced in size and geographic location. Cell 2, for example, comprised two small markets, Greenville, South Carolina and Harrisburg, Pennsylvania, while Cell 3 comprised two large markets, St. Louis and Seattle. Thus market size and geography were not consistent factors in the Gold Shield Test.

Plaintiff further cited evidence from Professor Bucklin's declaration that the tests were flawed or invalid because stores selected for the test were not representative of the MBE network in three respects. First, store owners in Phoenix and San Antonio submitted a request to MBE to try lower prices. These stores later became part of Cell 1. Professor Bucklin stated that the business conditions which led the stores in Phoenix and San Antonio to request intervention were materially different from business conditions in other cities, which posed a risk to a valid test. Second, UPS package volume for MBE centers in Cell 1 was lower than in the rest of the network at the start of the Cell 1 test. Third, stores in Cell 3 had higher average revenues than stores in Cells 1 and 2.

Finally, plaintiff cited evidence from Professor Bucklin's declaration and from deposition testimony and e-mails of MBE executives that limiting the study to three months during the holiday season, a period when shipping assumed a greater percentage of stores' mix of business than during the rest of the year, could have invalidated test results of the three different branding scenarios for the remaining nine months of the year.

Plaintiff cited evidence from deposition testimony of the MBE executive director of marketing strategy that franchisees participating in the Gold Shield test provided data about revenues and cost of goods sold, and although the participating franchisees were asked to report operating expenses, there was not a consistent response with regard to operating

expenses. Defendants did not have access to franchisees' individual operating expenses, and had to rely on the accuracy of information that franchisees provided. Defendants had no systematic means of collecting that data. Twenty-five percent of total franchisees in the test sales provided their gross profit information. Some franchisees provided net profit, but not enough to compare net profits in each cell.

Plaintiff cited evidence from deposition testimony of a former MBE vice president of product development and management that there were no control cities used in phase two of the Gold Shield test.

Plaintiff cited evidence from deposition testimony of the President of MBE that defendants refused a request by the MBE Franchisee Advisory Council to allow an outside expert to review the Gold Shield test results. Defendants did not use any outside consultants to ensure that test results would be statistically reliable.

Professor Bucklin concluded that these flaws in the Gold Shield tests meant that factors other than those being tested—the differences in the three branding scenarios—could have caused the test results, and that the Gold Shield test results were not valid for determining the likely performance of the branding scenarios in the rest of the MBE network or over a full calendar year. Defendants informed franchisees that assessing what brand created the highest customer counts and what brand created the greatest opportunity for franchisee profit

growth were two of the primary objectives of the Gold Shield testing.

We conclude that plaintiff's evidence created a triable issue of fact as to whether defendants made misrepresentations and omissions of fact with regard to the Gold Shield tests, the accuracy and reliability of the results of those tests, and whether The UPS Store brand and business model achieved superior performance.

C. *Defendants Did Not Meet Their Burden of Showing That Plaintiff Did Not Rely on Defendants' Representations*

Reliance is a necessary element of all five of plaintiff's causes of action. Although defendants' summary judgment motion argued that Woodard could not establish actual reliance on any statement made by defendants, defendants' separate statement contained no facts alleging that plaintiff did not rely on representations defendants made in documents presenting the Gold Shield test results to franchisees. Consequently defendants failed to meet their burden of showing that the causes of action had no merit by showing that one or more elements of the cause of action could not be established (Code Civ. Proc., § 437c, subd. (p)(2).)

D. *Disclaimers Were Not Effective to Preclude Plaintiff's Reliance on Misrepresentations and Omissions of Fact in the Reporting of Test Results and of the Testing Procedures That Produced Those Results*

Defendants argued that they did not represent to plaintiff that each franchisee could predict future

profits based on the results of the test centers, and cited the following disclaimers in the Gold Shield Summary:

"Neither MBE Nor UPS makes any forecast, projection, or representation that your center will achieve any increases in, or a particular level of, revenue, STR, profits, or expenses if you voluntarily join the Gold Shield Program. To the contrary: (1) your results are likely to differ substantially from any results that might have been achieved by centers that participated in the Gold Shield Test, and (2) there is no assurance that you will do as well as the centers that participated in the Gold Shield Test. [¶] If you rely upon the figures presented, you must accept the risk of not doing as well. Your success or failure under the Gold Shield Program will be influenced by, among other factors, your capabilities, your effort, and local economic conditions. Substantiation of the data used in preparing the information below will be made available to you upon reasonable request." (Boldface and some capitalization omitted.)

"Of course, there is no guaranty that any franchisee will be successful if he or she joins, or refuses to join, the Gold Shield Program. Owning any type of franchise presents risk. Likewise, joining the Gold Shield Program involves risk. Neither MBE, UPS, Area Franchisees, nor any of our other authorized representatives may make any promises or representations regarding the revenue, STR, profits, or losses that you might (or might not) experience if you join the Gold Shield Program. Just

as during the pre-Gold Shield history of the Mail Boxes Etc. system, a franchisee's financial success or failure is heavily influenced by the degree to which the franchisee consistently applies all of the effort, skill, and other capabilities that the franchisee promised MBE that he or she possessed when he or she applied for the franchise. [¶] If you believe that an authorized MBE or UPS representative has represented to you that you can expect to achieve a particular level of revenue, STR, or profits as a result of joining the Gold Shield Program, we ask that you (1) immediately report the relevant details in writing to MBE's Legal Department and (2) not rely upon those representations in deciding whether or not to join the Gold Shield Program."

The trial court found that these disclaimers, and an integration clause in the Gold Shield Amendment, defeated plaintiff's claims that it relied on representations that the Gold Shield Tests were valid to predict future success of The UPS Store and future profitability of franchisees who converted to The UPS Store. Plaintiff, however, contends that it relied on misrepresentations and omissions of fact about *past* Gold Shield test results and their validity and reliability, not about *future* profitability and success of The UPS Store franchises. The disclaimers were not effective to preclude plaintiff's reliance on misrepresentations and omissions of fact in the reporting of test results and of the testing procedures that produced those results. The disclaimers did not advise or warn franchisees to disregard test results, and elsewhere defendants reported tests results in such a way as to emphasize their reliability.

Documents provided to plaintiff stated that "a field test was needed to help determine whether actual results, *on a small but reliable scale,* supported the hypotheses that were the Foundation for the Gold Shield Program" (Italics added); "We consistently *endeavored to confirm the reliability* of the Test Center financial information" (Italics added); "Markets chosen for the cells were selected in order to have a representative cross-section of centers"; "Mail Boxes Etc., Inc .... is giving you this Summary of New Gold Shield Program ... so that you have *relevant information* to help you decide whether or not you voluntarily will amend your existing MBE Franchise Agreement ... and sign a new UPS Incentive Program Contract Carrier Agreement in order to join the Gold Shield Program[.]" (Italics added.) In light of these representations of the reliability of the Gold Shield testing and its results, the disclaimers do not preclude plaintiff's reliance. (See *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 867–868 [because of defendant's invitation to plaintiffs to base investment decisions on defendant's offering memorandum, disclaimers of the accuracy and completeness of information in the offering memorandum did not preclude plaintiffs' reasonable reliance on that offering memorandum].)

Moreover, under Civil Code section 1668, a party cannot contract away liability for his fraudulent or intentional acts or for his negligent violations of statutory law. Thus "a party to a contract is precluded ... from contracting away [its] liability for fraud or deceit based on intentional

misrepresentation." (*Manderville v. PCG & S Group, Inc., supra,* 146 Cal.App.4th at p. 1500.) A party to a contract who has been guilty of fraud in its inducement cannot absolve itself from the effects of its fraud by any stipulation in the contract that no representations have been made. (*Id.* at pp. 1500–1501.) Moreover, fraud in the inducement renders an integration/no oral representations clause voidable: "a per se rule that an integration/no oral representations clause establishes, as a matter of law, that a party claiming fraud did not reasonably rely on representations not contained in the contract is inconsistent with California law." (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 301; *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp.* (1995) 32 Cal.App.4th 985, 992–993.)

E. *Conclusion*

We conclude that triable issues of fact exist on whether defendants made, and whether plaintiff relied on, misrepresentations and omissions of fact, and therefore summary judgment should be reversed.

2. *Woodard Provided Evidence Creating a Triable Issue of Fact as to Damages*

Woodard claims that the trial court erroneously granted summary judgment on Woodard's alleged inability to prove damages. Plaintiff makes two arguments. First, plaintiff argues that defendants' separate statement did not argue that Woodard could not establish damages and itself submitted evidence that Woodard suffered damages, and therefore defendant did not shift the burden of production to

plaintiff on the issue of damages. Second, plaintiff argues that even if defendants did shift the burden of proving damages to plaintiff, Woodard produced evidence that created a triable issue of fact as to damages. We find the second argument meritorious.

A. *A Plaintiff Must Show It Sustained Damages Caused by Defendants' Misrepresentations or by Violations of the CFIL*

To establish a claim for negligent misrepresentation, plaintiff must have sustained damage as a result of his reliance on the truth of the representations. (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 402.)

To establish a claim for intentional misrepresentation, plaintiff must show that the plaintiff was harmed and that plaintiff's reliance on defendant's representation was a substantial factor in causing plaintiff's harm. (*Manderville v. PCG & S Group, Inc., supra,* 146 Cal.App.4th at p. 1498.)

Corporations Code section 31300 makes a person offering or selling a franchise in violation of sections 31101 or 31202 liable to the franchisee, "who may sue for damages caused thereby[.]"

Corporations Code section 31301 states that a person who violates section 31201 shall be liable for damages to any person (not knowing or having cause to believe that such statement was false or misleading) who, while relying upon such statement shall have purchased a franchise.

Thus a plaintiff must show that it has sustained damages caused by defendant's misrepresentations or

violations of the California Franchise Investment Law statutes.

B. *Woodard Produced Evidence Creating a Triable Issue of Fact as to Damages*

Defendants' summary judgment motion argued that Woodard could not prevail on its causes of action for violation of Corporations Code sections 31201 and 31200, negligent misrepresentation, and intentional misrepresentation because, inter alia, Woodard could not prove damages caused by defendants' purported misrepresentations.

Plaintiff, however, produced evidence which created a triable issue of fact as to damages. Responding to defendants' claim that Woodard could not prove damages resulting from defendants' conduct, plaintiff filed a surreply in the trial court citing Denise Woodard's deposition testimony regarding damages. Denise Woodard testified that since converting to The UPS Store, the numbers at her franchise went down. She was concerned about the financial viability of her business. She was told by UPS that when she converted her franchise to The UPS Store, it would have the lowest retail rates, but she found that instead of an increase in customers who paid Woodard to ship packages, the number of customers with UPS accounts had increased enormously. Those customers paid UPS directly rather than paying Woodard, who received only a small amount for shipping packages from these "drop-off" customers. Woodard felt that UPS was her biggest competitor and took business away from her,

given that anyone could get a UPS account and ship for 10 percent less on their own account than it would cost to ship via Woodard. Woodard had lost customers who used to do business with her but who now had their own accounts with UPS directly. Woodard also testified that since converting to The UPS Store, she earned less per package, shipped fewer packages, and lost FedEx customers. As a result, in the previous two years Woodard served fewer customers and had increasing difficulty in making ends meet in operating her business.

This evidence created a triable issue of material fact concerning Woodard's damages resulting from the conversion to The UPS Store. Summary judgment therefore should be reversed on the issue of damages.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to plaintiff D.T. Woodard, Inc.

We concur: KLEIN, P.J., and ALDRICH, J.

APPENDIX G

The full list of plaintiffs in this action is as follows:

1) Samica Enterprises, LLC, an Illinois limited liability company;
2) Jeffrey T. Rubinstein;
3) Daniel Bendoff;
4) Larry Bowdoin;
5) Bowdoin UP, LLC, an Alabama limited liability company;
6) Eric D. Eshelman;
7) Peggy Eshelman;
8) Eshelman Enterprises, Inc., a California corporation;
9) John Habel;
10) Natalya Habel;
11) Habel, Inc., a Florida corporation;
12) Gary Archambault;
13) Shipping Services, LLC, a Connecticut limited liability company;
14) Jentzen E. Bull;
15) Osdila G. Bull;
16) Bulgar Properties, Inc., a North Carolina corporation;
17) Afrin Pezhman;
18) Persepolis Enterprises, a Michigan corporation;
19) John E. Moran;
20) Thomas Bagley;
21) OFQ Corporation, a Massachusetts corporation;
22) Stephen Roat;
23) Sarovette, Inc., a Pennsylvania corporation;

24) Robert J. Moorey;
25) Sandra A. Moorey;
26) BMSA, Inc., a Virginia corporation;
27) Britt J. Roberts;
28) Roberts-Dance, LLC, a Texas limited liability company;
29) John P. Thomas;
30) Terri L. Thomas;
31) Heritage Holdings Co, LLC, a Michigan limited liability company;
32) Mark A. Goggins;
33) Jamar Enterprises, Inc., a Missouri corporation;
34) John P. Ruhrup;
35) Micah 68, Inc., a Michigan corporation;
36) James L. Kolmer;
37) Doris J. Kolmer;
38) JaDor, LLC, a Wisconsin limited liability company;
39) Keith Davidson;
40) KEA, LLC, a New Hampshire limited liability company;
41) Lucy J. Orbes Benson;
42) Bernie Benson;
43) KOMB Holdings, LLC, a Wisconsin limited liability company;
44) Patrick Smith;
45) Smith Postal and Business Services, LLC, a Texas limited liability company;
46) Charles R. Hinzey;
47) WAJC Services, Inc., an Ohio corporation;
48) Charles Wilson;
49) C.K. Unlimited, Inc., a Florida corporation;
50) Gilder Varn;

51) Gayle Varn;
52) Tristar Property Development, Inc., a Missouri corporation;
53) Manu G. Mahtani;
54) Sundri M. Mahtani;
55) Mac Distributions, Inc., a Florida corporation;
56) Audrey Ritt;
57) Auxano, Inc., a Michigan corporation;
58) Bob Strickland;
59) Rachel Strickland;
60) AVS, Inc., a Virginia Corporation;
61) Robert L. Walker;
62) Frances T. Walker;
63) 5XW, Inc., a California corporation;
64) Glenn J. Burns;
65) Newport Shipping, Inc., an Illinois corporation;
66) Sterling Shipping, Inc., an Illinois corporation;
67) David B. Bean;
68) Sue A. Bean;
69) Beanotion, LLC, a North Carolina limited liability company;
70) Jay Friedman;
71) Laura Friedman;
72) LJ & Company, LLC, a New Jersey limited liability company;
73) Kenneth L. Huang;
74) Pro Business Solutions, Inc., a Massachusetts corporation;
75) Robert H. Mack;
76) Nancy J. Mack;
77) Mack Packaging, Inc., an Illinois corporation;
78) Don Bingham;
79) Debra Bingham;

80) Alan M. Cohen;
81) ARC Business Services, Inc., a Massachusetts corporation;
82) William C. Allem;
83) Karen E. Allem;
84) Allem Business Services, a Georgia corporation;
85) Bonnie Dixon;
86) Kettle Moraine Distributor, LLC, a Wisconsin limited liability company;
87) J. Michael Paulettia;
88) Steven W. Johnson;
89) Belinda C. Johnson;
90) White Cliffs of Dover, Inc., a New Hampshire corporation;
91) Extex, Inc., a New Hampshire corporation;
92) Arthur Brestlin;
93) Town and Country Partners Corp., a New York corporation;
94) Town & Country Partners Corp. II., a New York corporation;
95) Shawn W. Cochran;
96) Larry Ann Torrente;
97) COTO, Inc., an Arizona corporation;
98) James M. Skiersch;
99) John A. Raposo;
100) JR Management, Inc., a Massachusetts corporation;
101) Kevin Burke;
102) Burke Corporation, a Wisconsin corporation;
103) Alex Williams;
104) Charlotte Williams;
105) Derry Postal & Packaging, Inc., a New Hampshire corporation;

106) Margo Dixon;
107) Joseph McGuinness;
108) Joseph P. McGuinness Enterprises, LLC, a New Hampshire limited liability company;
109) Jerome Salerno;
110) Joseph Salerno;
111) SClass Management, Inc., a New York corporation;
112) Frederick W. Formon;
113) Janet V. Formon;
114) Formon Associates, Inc., a New Jersey corporation;
115) Ellis Abide;
116) ASHEN, LLC, a Florida limited liability company;
117) Thomas J. Diercks;
118) Donald C. Adams;
119) Acme, LLC, a Michigan limited liability company;
120) Michael L. Seiler;
121) Cynthia J. Seiler;
122) Kingman Enterprises, LLC, a Kentucky limited liability company;
123) William A. Connor;
124) Linda J. Connor;
125) JEM Connor Corporation, a Michigan corporation;
126) Marguerite Marchio;
127) Markio, LLC, an Ohio limited liability company;
128) Susan R. Newsom;
129) Hickory Flat Mail, Inc., a Georgia corporation;
130) Milos Todorovic;
131) Elizabeth M. Todorovic;

132) Boca, Incorporated, an Illinois corporation;
133) Connie J. Jones;
134) Michael J. Jones;
135) Broadwater Shipping Centre, LLC, a Florida limited liability company;
136) Jeffrey D. Hughes;
137) Robin Susan Hughes;
138) Jeffrey Hughes, LLC, a Michigan limited liability company;
139) Benny Newton;
140) Cheryl B. Newton;
141) Bencher Investments LLC, an Alabama limited liability company;
142) Robert B. Leach;
143) Regina M. Leach;
144) R & G Enterprises Company Inc., a Missouri corporation;
145) Nancy L. Dryburgh;
146) John R. Dryburgh;
147) Executive Business Group, Inc., a Wisconsin corporation;
148) Andrew R. Roquet;
149) Carrie L. Roquet;
150) CAL Partners, Inc., a Wisconsin corporation;
151) Timothy B. Coffee;
152) Coffee Times Eight, Inc., an Illinois corporation;
153) Herbert W. Howard;
154) Valerie L. Howard;
155) HV Howard Enterprises, Inc., a Florida corporation;
156) Kathleen A. Ladich;
157) Ladich, LLC, a Wisconsin limited liability company;

158) Blair Payne;
159) Denise Payne;
160) PDB, Inc., a New Hampshire corporation;
161) Paul Yanakakis;
162) Lindsey Yanakakis;
163) Yanaco, Inc., a Massachusetts corporation;
164) Keith L. Dean;
165) Solid Strategies, Inc., an Oregon corporation;
166) Donald Grout;
167) Grout Holdings, LLC, a Massachusetts limited liability company;
168) Gretchen L. Woods;
169) Robert Woods;
170) Lucille's Legacy, LLC, a Florida limited liability company;
171) Michael Gorlano;
172) Randy Gorlano;
173) M. Gorlano Enterprise, a Texas corporation;
174) Denise C. Taylor;
175) James T. Taylor;
176) October 15th Corp., a Pennsylvania corporation;
177) David J. Benson;
178) Linda A. Benson;
179) Benson Mail Service, Inc., a Pennsylvania corporation;
180) William A. Weir;
181) Jennifer R. Weir;
182) Breakpoint, Inc., a Texas corporation;
183) Christopher L. Burrell;
184) Jack Fiamingo;
185) Jax Maximus Inc., a Florida corporation;
186) Jeffrey Rozwadowski;
187) Stacy Rozwadowski;

188) Roz Enterprises, Inc., a Michigan corporation;
189) Kenneth Hugh Davis;
190) Kenneth L. Beets;
191) Gail M. Beets;
192) KLB Enterprises Inc., a Colorado corporation;
193) Village Post LLC, a Massachusetts limited liability company;
194) Thomas McMahon;
195) Laura McMahon;
196) Craig Bohn;
197) Linda Bohn;
198) Import Center Warehouse Division, Inc., a Texas corporation;
199) Scott Vradelis;
200) Catherine Montgomery;
201) Montellis Communications, Inc, a Pennsylvania corporation;
202) Barbara P. Feldman;
203) Walter M. Feldman;
204) Woodbine Enterprises, Inc., a Massachusetts corporation;
205) Stephen W. Grabowski;
206) Arca Investment Company, a California corporation;
207) Thomas Cuce;
208) Rosemary A. Merrigan;
209) Bux-Mont Parcel Services, LLC, a Pennsylvania limited liability company;
210) Roger D. Tapp;
211) Crystal L. Tapp;
212) Tapp Enterprises LLC, a North Carolina limited liability company;
213) W. Reid Richardson, Jr.;

214) Randall M. Richardson;
215) Marshall D. Kohen;
216) Joseph T. Maher;
217) Jerald Reingold;
218) TamRoe Inc., a New York corporation;
219) Bruce E. Olson;
220) Olson Northstar, Inc., an Illinois corporation;
221) Charles R. Matthews;
222) Michele A. Matthews;
223) Matthews Mailing Enterprises, Inc., a Florida corporation;
224) Paul McClintock;
225) McClintock Enterprises, Inc., a Massachusetts corporation;
226) Joseph A. Rosenberg;
227) Stephanie M. Rosenberg;
228) 14 Bond Corp., a New York corporation;
229) Terrance Hayes;
230) Evanthe Hayes;
231) E.T. Hayes, LLC, a Louisiana limited liability company;
232) Joyce Wagner;
233) J & J Services, Inc, a Mississippi corporation;
234) Douglas B. Gard;
235) Don I. Gard;
236) Gard Properties, LLC, an Indiana limited liability company;
237) Gard Enterprises, LLC, an Indiana limited liability company;
238) Richard M. Rosenbaum;
239) RMR & Associates, Inc., an Illinois corporation;
240) Ian Coren;
241) Ellen Coren;

242) Coren Enterprises, LLC, a California limited liability company;
243) Kory Waisner;
244) Annette L. Waisner;
245) Waisner Inc., a Kansas corporation;
246) Amrish R. Desai;
247) Arti A. Desai;
248) R & B Corporation, a North Carolina corporation;
249) Joseph Malbrough;
250) Cara Malbrough;
251) Parkland Place Associates, LLC, a Georgia limited liability company;
252) Robert P. Minock;
253) Madeline J. Minock;
254) Kay W. Oak;
255) Chang Y. Oak;
256) Steve Hupka;
257) Larry Hupka;
258) Cathy Hupka;
259) 3 Eagles Enterprises, LLC, a Colorado limited liability company;
260) Brian Rogga;
261) The Rogga Corporation, a Wisconsin corporation;
262) Jack E. Gillary;
263) Lisa A. Gillary;
264) J & L Gillary, Inc., a Michigan corporation;
265) Erran Bennett;
266) Dean Koch;
267) Koch Enterprises, Inc., a Wisconsin corporation;
268) Gary C. Powell;
269) Pow-Pack, Inc., a Massachusetts corporation;

270) Kathleen M. Nevin;
271) Kyle Gregerson;
272) KGJH Shipping, LLC, a Wisconsin limited liability company;
273) Patrick J. Miller;
274) Diver Down Delivery, Inc., a Wisconsin corporation;
275) Jayesh M. Patel;
276) Nitasha Enterprises, Inc., a North Carolina corporation;
277) Makan Enterprises, Inc., a North Carolina corporation;
278) Shantilal L. Jani;
279) Jani & Son Inc., a Michigan corporation;
280) Shekhar Gosai;
281) Naggin Gosai;
282) Shiv Shakti Corporation, Inc. a North Carolina corporation;
283) Nancy Kasza-Scott;
284) John David Scott;
285) Scott Business Group, Ltd., an Illinois corporation;
286) Jayanti Patel;
287) Anitaben Patel;
288) Sandra Philhower;
289) MBMP, Inc., an Alabama corporation;
290) Laurie Ann Cobb;
291) Rudy Corp, a Michigan corporation;
292) Daniel J. Sweeney;
293) DJTS Inc., a Massachusetts corporation;
294) Raul Flores;
295) Cynthia Flores;

296) Flores Postal Services, LLC, a Texas limited liability company;
297) Philip J. MacGowan;
298) Donna M. MacGowan;
299) Aljohn Enterprises, Inc., a Michigan corporation;
300) Linda Knight;
301) Joe Knight;
302) NBI, LLC, a Rhode Island limited liability company;
303) Neil Gulsvig;
304) Janice Gulsvig;
305) David Child;
306) Victoria L. Child;
307) William-Dalton Consulting Inc., a Pennsylvania corporation;
308) Roger Egan;
309) Atwell Enterprises, Inc., a Massachusetts corporation;
310) Joaquin Rosal;
311) Jennifer Diaz;
312) Albert Diaz;
313) WB Pomona, LLP, a Texas limited liability partnership;
314) Joseph Spagnola;
315) James Walsh;
316) S & W Boston Stores, LLC, a Massachusetts limited liability company;
317) James J. Connelly;
318) Ton-Up, LLC, a Pennsylvania limited liability company;
319) Robert Carpinello;
320) Michael Carpinello;
321) Thomas Constantino;

322) Lenmik Express Corp., a New York corporation;
323) Bull Express Inc., a New York corporation;
324) Kingship, LLC, a New York limited liability company;
325) Thomas S. Ruth;
326) Platt Business Services, Inc., a Florida corporation;
327) Cornell Dyce;
328) Rosemarie Roopchand;
329) Corosenell, LLC, a New York limited liability company;
330) Carlos Garcia;
331) Donlos, Inc., a New York corporation;
332) Jesse McDaniels;
333) Leroy Langston;
334) Michael Majors;
335) MML, LLC, a Missouri limited liability company;
336) John K. Comerford;
337) Comerford Service Resources, Inc., a Colorado corporation;
338) Richard L. Rayment;
339) Mary E. Rayment;
340) Rayment MST, LLC, a Wisconsin limited liability company;
341) Ann Schauperl;
342) Joerg Schauperl;
343) Anjor Enterprises, LLC, an Oregon limited liability company;
344) Tom King;
345) MWK., Inc., a Missouri corporation;
346) Brandon Phillips;
347) Marcia Phillips;

348) Beemar, Inc., a New York corporation;
349) Philip R. Maniscalco;
350) Nancy L. Maniscalco;
351) AM-PM Business Services, Inc., a Pennsylvania corporation;
352) Stuart Ehlers;
353) Robin Ehlers;
354) Frank Flammer;
355) Judy Flammer;
356) Mail Call, Inc., a Kansas corporation;
357) Gerard Difruscia;
358) Edward Meyerhoefer;
359) Patricia Meyerhoefer;
360) Reali-Meyerhoefer, LLC, a New Jersey limited liability company;
361) Gary M. Davis;
362) GMD Enterprises, LLC, a Texas limited liability company;
363) Tessa Dee Meyers;
364) Terry Meyers;
365) Quicksilver Enterprises, Inc., a Virginia corporation;
366) Brian Coyle;
367) Patricia A. Coyle;
368) WPBC, Inc., an Illinois corporation;
369) Thomas H. Eblen;
370) Thomas W. Eblen;
371) Ebco, Inc., a Missouri corporation;
372) Linda V. Ollerman;
373) Robert J. Ollerman;
374) Saremma, Inc., a Wisconsin corporation;
375) David K. Smith;

376) Parcel Express Shipping & Storage, Inc., a Florida corporation;
377) Keith Ogren;
378) Candace Hill;
379) HCH, LLC, a Washington limited liability company;
380) John T. Gallo;
381) Rista Packaging, Inc., a Pennsylvania corporation;
382) Ken M. Patel;
383) Chintan K. Patel;
384) Parchino, Inc., a Texas corporation;
385) Frank Scarso;
386) Luigi Giunta;
387) Dean Giasi;
388) Pozzallo Partners, Inc., a New York corporation;
389) D.F.M. Corporation, a New York corporation;
390) James E. O'Connor;
391) JEO Enterprises, LLC, a Michigan limited liability company;
392) Susan Merkatoris;
393) Larboard Enterprises, LLC, a Wisconsin limited liability company;
394) Donald R. Snapp Jr., Inc., a Florida corporation;
395) Donald R. Snapp, Jr.;
396) William Michael Kirk;
397) Charles D. Stoflet;
398) Nannette Stoflet;
399) CDS Business Group, Inc., a Wisconsin corporation;
400) Clark Weisman;
401) Natvarlal C. Prajapati;
402) Varsha N. Prajapati;

403) Arjun Corporation, a North Carolina corporation;
404) Steven Richards;
405) Esther Richards;
406) Noah & Folks, LLC, a Washington limited liability company;
407) Mark A. Zimmerman;
408) Michelle Pare;
409) Zimmerman & Pare, LLC, a Wisconsin limited liability company;
410) Alvin F. Snyder;
411) Upscale Management, Inc., a Wisconsin corporation;
412) James Highley;
413) Ernest Highley;
414) H & H Enterprises, a Wisconsin corporation;
415) Janice Margaret Burke;
416) William Hunter Burke;
417) Ginger Louise Prohaska;
418) Timothy Arnold Prohaska;
419) Part II, Inc., an Iowa corporation;
420) Caroline Schroeder;
421) Fox Cities Business Services, LLC, a Wisconsin limited liability company;
422) Vincent L. Natelli;
423) Angela Natelli;
424) Eagle Shipping LLC, a New York limited liability company;
425) John Rousseau;
426) Boardwalk Communications, Inc., a Michigan corporation;
427) Albert Schomp IV;
428) Backoffice, Inc., a Massachusetts corporation;

429) David Leite;
430) Rebecca Leite;
431) DR Leite, Inc., a Colorado corporation;
432) Frederick Chris Farrar;
433) Farrar Enterprises, Inc., a South Dakota corporation;
434) Richard W. Marx;
435) Marx of Excellence, Inc., a Massachusetts corporation;
436) Don Freeman;
437) Diane Freeman; and
438) Freemax, Inc., a Georgia corporation,