

STATE OF MICHIGAN
IN THE SUPREME COURT

DAVID ABBO, an Individual; COLORADO TOYZ, INC., a Colorado Corporation, WIRELESS PHONES, LLC., a Colorado Limited Liability Corporation,) Lower Court Case No. 07-082804-CK
) Court of Appeals Case No. 304185
) Supreme Court Case No. 149536
)
Plaintiffs/Appellees)
vs.)
)
WIRELESS TOYZ FRANCHISE, LLC, a Michigan Limited Liability Company, JOE BARBAT, an Individual; RICHARD SIMTOB, and Individual; JSB ENTERPRISES, INC., A Michigan Corporation, a/k/a WT, Inc., a Delaware Corporation; and JACK BARBAT, and Individual, Jointly and Severally,)
)
Defendants/Appellants)

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PLAINTIFF/APPELLEES' SUPPLEMENTAL BRIEF PURSUANT TO THE COURT'S ORDER OF MAY 29, 2015

Dated: August 7, 2015

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STATEMENT OF QUESTIONS INVOLVED

I. DO THE MERGER AND INTEGRATION CLAUSES CONTAINED IN THE FRANCHISE AGREEMENTS DEFEAT PLAINTIFFS' CAUSE OF ACTION FOR SILENT FRAUD?

Plaintiff/Appellees Answer: No.
Defendant/Appellant Answers: Yes.
Judge Presiding Over Trial Answers: No.
Circuit Court Answers: Yes.
Jury Answered: No.
Court of Appeals Answers: No.

II. DOES THE PLAIN LANGUAGE OF THE MICHIGAN FRANCHISE PROTECTION ACT EVIDENCE A LEGISLATIVE INTENT TO PREEMPT OTHER COMMON LAW CAUSES OF ACTION BETWEEN A FRANCHISOR AND FRANCHISEE?

Plaintiff/Appellees Answer: No.
Defendant/Appellants Answer: Yes.
Judge Presiding Over Trial Answers: Did Not Address As Defendants Did Not Raise The Issue of Preemption In The Circuit Court Proceedings.

Circuit Court Answers: Did Not Address As Defendants Did Not Raise The Issue of Preemption In The Circuit Court Proceedings.

Jury Answered: Did Not Address As Defendants Did Not Raise The Issue of Preemption In The Circuit Court Proceedings.

Court Of Appeals Answers: Did Not Address.

RELEVANT PROCEDURAL HISTORY

On May 9, 2007, Plaintiffs sued Defendants for violations of the Michigan Franchise Investment Law ("MFIL") MCL 445.1501 et seq., breach of contract, violation of the implied covenant of good faith and fair dealing, rescission, silent fraud, fraudulent misrepresentation, innocent misrepresentation, and concert of action. Plaintiff' claims were based on Defendants' (1) misrepresentations and omissions with regard to the franchise offering; (2) misrepresentations and/or omission in franchise agreement itself including the Uniform Franchise Offering Circular ("UFOC") which was incorporated by reference into the franchise agreement; and (3) misconduct as part of a common scheme to deceive potential franchisees including Plaintiffs. On June 4, 2009, the Circuit Court Judge Shalina Kumar denied Defendants' Motion for Summary Disposition - except as to Plaintiffs' claim for implied covenant of good faith and fair dealing – stating in pertinent part:

Based on the material provided, the Court finds that Plaintiffs have submitted sufficient evidence to create a question of fact on its silent fraud, innocent misrepresentation, misrepresentation and rescission claims. ***Critically there is a question of fact that Defendants failed to disclose the nature and extent of "hits", buy backs and its effect on the estimate monthly and annual revenue for each franchise as part of the Franchise Agreement.*** MCR 2.116.(C)(10)

Of significant importance to this Court is the testimony of former Wireless Toyz employee and franchisee Nada Gulli who testified that when Wireless Toyz put information relevant to item 19 in the UFOC, that Defendants knew the information was false when they presented it to Plaintiffs prior to execution of the Franchise Agreement...***In this case the record leaves open an issue regarding whether Defendants committed fraud in attempting to induce Plaintiffs to sign the Franchise Agreement on August 23, 2004, by failing to disclose the extent of "hits" and chargebacks, advertising charges and actual monthly revenue per franchisee. Critically, the Court notes that Wireless Employee David Ebner testified that Defendants made a corporate decision not to disclose "hits" and chargebacks in the UFOC. (Exhibit 1; Judge Kumar's Opinion and Order Dated June 4, 2009)***

On February 4, 2010, trial commenced before the Honorable Steven N. Andrews as a visiting judge for Judge Kumar. At the conclusion of Plaintiffs' case, Defendants moved for a Directed Verdict as to all of Plaintiffs' claims. On February 25, 2010, Judge Andrews issued a written opinion denying Defendants' request - except as to Plaintiffs' claims against Jack Barbat. (*Exhibit 2; Judge Andrews Opinion and Order Dated February 25, 2010*) The crux of Defendants' argument was that Plaintiffs' claims were precluded as a matter of law based on the merger and integration clauses contained in the franchise agreement and development agent agreement signed by the parties. However, Judge Andrews determined that Plaintiffs had presented sufficient factual evidence to raise a question of fact as to whether they were fraudulently induced into signing the agreement. (*Exhibit 2*)

Here, the court finds that the evidence described on pages 9-16 of Plaintiffs' response raises the question of fact as to the existence of fraud in the inducement and reasonable reliance. [Emphasis Added] (*Exhibit 2, p. 3*)

At the conclusion of the trial, the jury returned a verdict finding that Plaintiffs had demonstrated "clear and convincing evidence" that Defendants Wireless Toyz, Joe Barbat, and Richard Simtob committed silent fraud in selling the franchise opportunity to Plaintiffs. (*Trial Transcript 02/26/10: PG. 8-15*) The jury also found that that Wireless Toyz and Mr. Simtob violated Section 8 and 32 of the MFIL; however, it determined that neither was liable based on the affirmative defense of estoppel. (*Trial Transcript 02/26/10: PG. 8-15*) The jury also found that Wireless Toyz breached the terms of their franchise agreement, but had successfully demonstrated the affirmative defense of first substantial breach by Plaintiffs. (*Trial Transcript 02/26/10: PG. 8-15*) The jury did not find the Defendants liable on any of Plaintiffs' remaining claims. (*Trial Transcript 02/26/10: PG. 8-15*)

On March 3, 2010, the jury returned a damage verdict in favor of Plaintiffs against Richard Simtob for \$20,000 and \$180,500.00 against Wireless Toyz Franchise, LLC. (*Trial Transcript 03/0310: PG. 144-147*) The jury did not find that Plaintiffs were damaged as a result of Joe Barbat's silent fraud. (*Trial Transcript 03/0310: PG. 144-147*)

On March 12, 2010, Defendants filed their Motion for Judgment Notwithstanding the Verdict ("JNOV") or alternatively New Trial and/or Remittitur. On August 5, 2010, Defendants filed a Supplemental Brief In Support of their earlier JNOV Motion.¹ On February 7, 2010, Judge Shalina Kumar (who did not preside over the trial) issued an Opinion and Order Granting Defendants' Motion for JNOV ruling that (1) the merger clauses in the franchise agreements and development agent agreements precluded, as a matter of law, Defendants' liability for silent fraud; (2) the trial evidence did not support a claim for silent fraud; and (3) Plaintiffs' failed to establish the reasonable reliance element of their silent fraud claim as a matter of law. (*Exhibit 3; Opinion and Order Dated February 7, 2011*)

On May 23, 2011, Plaintiffs' filed their appeal as of right as to the Judge Kumar's order granting the Motion for JNOV. On May 13, 2014, the Michigan Court of Appeals entered its Opinion and Order reversing the Judge Kumar's decision. *Abbo v Wireless Toyz Franchise*, Unpublished Opinion of the Court of Appeals 2014 Mich App LEXIS 846 (Mich Ct App May 13, 2014) On June 24, 2014, Defendants filed their Application for Leave to Appeal and/or Request for Peremptory Reversal of the Court of Appeals Decision pursuant to MCR 7.302(H)(1) on the basis that the merger/integration clause rendered Plaintiffs' reliance on Defendants' misrepresentations and/or omissions "unreasonable." During the pendency of Defendants' appeal, this Court has made it clear that "reasonable" reliance is not an essential

¹Defendants Motion and Supplemental Brief were identical to the arguments previously rejected by Judge Andrews in denying Defendant/Appellants' Motion for Directed Verdict.

element of a fraud claim. *Titan Insurance Company v Hyten*, 491 Mich 547; 817 NW2d 562 (2012).

Defendants are also seeking leave and/or peremptory reversal on the grounds that Plaintiffs' silent fraud claim is preempted under MFIL² notwithstanding the clear statutory language contained in MCL 445.1534, which explicitly states that "Nothing in this act shall limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect." Furthermore, Defendants failed to raise any objection with regard to the affirmative defense of preemption (nor did they raise the issue in any of their responsive pleadings) and specifically agreed to the jury instructions relative to Plaintiffs' claims for silent fraud (which omitted any reference to the affirmative defense of preemption) and have thus, waived the issue for further appellate review.

STATEMENT OF FACTS

In July of 2004, (prior to signing their franchise and/or area development agreement) Mr. Abbo and Mr. Bober attended a Wireless Toyz Discovery Day presentation. The program was hosted by the company's owner, Joe Barbat, Chief Financial Officer, David Ebner, and Vice President of Franchise Development Richard Simtob. (*Trial Transcript of D. Abbo 02/16/10: PG. 313*) During the initial presentation, Wireless Toyz discussed the concept of "hits" and chargeback. Afterwards Mr. Abbo sought additional information from Mr. Simtob about the overall impact that "hits" and chargebacks had upon a storeowner's revenue. (*Trial Transcript of D. Abbo 02/16/10: PG. 315-316*) Mr. Simtob stated that the chargebacks were between 5-7% and that a good operator could keep them down even lower. (*Trial Transcript of D. Abbo 02/16/10: PG. 313*) Mr. Simtob stated that the average "hit" on the sale of a new phone was \$50.00, but emphasized that Mr. Abbo would ***not*** have to take any "hits" because he was opening an out of

²Defendant/Appellant has raised this issue for the first time in its response to Plaintiff/Appellees initial appeal.

state store. (*Trial Transcript of D. Abbo 02/16/10: PG. 315-316*) In addition, Mr. Simtob represented that 75 post-paid activations per month was a break even number, and that 200 post-paid activations was a benchmark for profitability. (*Trial Transcript of D. Abbo 02/16/10: PG. 315-316*)

Mr. Simtob emphasized that Wireless Toyz had extensive training programs along with a national marketing plan that provided prospective franchisees with a competitive edge. (*Trial Transcript of D. Abbo 02/17/10: PG. 13*) Mr. Simtob also emphasized that Wireless Toyz had great relationships with the nation's largest cellular phone carriers. (*Trial Transcript of D. Abbo 02/17/10: PG. 6-7; Trial Transcript of M. Bober 02/12/10: PG. 108*) The information provided by Mr. Simtob was in response to specific inquiries posed by Mr. Abbo and his partner. Mr. Simtob testified that the figures in his presentation to Mr. Abbo were to illustrate the importance of working capital so that potential franchisees could establish a cushion before they started to receive their commission revenue. (*Trial Transcript of R. Simtob 02/09/10: PG. 319-322*) According to Mr. Simtob, his working capital calculations (which included the 200 phone per month benchmark for profitability) were derived from information contained within the UFOC which he personally reviewed. (*Trial Transcript of R. Simtob 02/09/10: PG. 263, 319-322*) The information provided by Mr. Simtob along with the information contained in the UFOC was a specific factor that Mr. Abbo relied on in deciding to move forward. (*Trial Transcript of D. Abbo 02/16/10: PG. 315-316*)

Mr. Abbo's partner (i.e. Michael Bober) posed similar inquires about anticipated revenue to Mr. Simtob. (*Trial Transcript of M. Bober 02/12/10: PG. 108; PG. 113- 114*) Mr. Simtob emphasized that because of their carrier relations, Wireless Toyz franchisees received the highest commissions in the industry. (*Trial Transcript of M. Bober 02/12/10: PG. 102; PG. 108*) Mr. Bober inquired into areas such as average monthly activations, commissions, and revenue based

on the average sales activity. (*Trial Transcript of M. Bober 02/12/10: PG. 113- 114*) Mr. Bober specifically asked Mr. Simtob how much he could expect to pay in chargebacks. Mr. Simtob informed him that chargebacks occurred on only 5-7% of commissions, and mentioned ways to reduce that percentage. (*Trial Transcript of M. Bober 02/12/10: PG. 115- 117*) The financial information was portrayed as accurate and achievable. (*Trial Transcript of M. Bober 02/12/10: PG. 121*) In addition, Wireless Toyz provided Mr. Bober with marketing materials indicating that they had the best carrier relations along with a proven marketing system. (*Trial Transcript of M. Bober 02/12/10: PG. 102*) The company touted that they had an excellent record for a return on investment along with a leveraged borrowing power that would ensure a lower cost for goods. (*Trial Transcript of M. Bober 02/12/10: PG. 102*) Mr. Simtob also emphasized that Wireless Toyz had a set training program and a proven advertising system. (*Trial Transcript of M. Bober 02/12/10: PG. 123- 126*)

In deciding to purchase their franchise location, Mr. Abbo and his partner relied on the information contained in the UFOC document itself (*attached hereto as exhibit 4*) along with information provided by Mr. Simtob which he himself admitted was derived from the information contained in the UFOC. (*Trial Transcript of D. Abbo 02/16/10: PG. 315; PG. 316; Trial Transcript of M. Bober 02/12/10: PG. 186, 205; Trial Transcript of R. Simtob: PG. 319-322*) The average income and cost information referenced by Mr. Simtob and contained in the UFOC³ were portrayed as accurate and relied upon by Plaintiffs. (*Trial Testimony of M. Bober 02/12/10: PG. 119*) Had Plaintiffs been provided with information sufficient to ascertain the real costs structure associated with “hits” and chargebacks, he would never have purchased the franchise locations. (*Trial Transcript of David Abbo 02/17/10: PG. 135*)

³The earnings claims as set forth in Item 19 the UFOC were incorporated into the Franchise Agreement and Area Agreement signed by the parties (*Exhibit 5; Franchise Agreement Section 11.2, p. 12 and Exhibit 6 Area Development Agreement Section 1.4, p. 3*)

Wireless Toyz Regional Franchise Director, Nada Gulli, testified that even before Plaintiffs attended the discovery presentation, Wireless Toyz non-franchised corporate stores owned by Mr. Barbat, Mr. Simtob, and Mr. Ebner⁴ were taking “hits” on all post-paid activations except for with Sprint. (*Trial Transcript of N. Gulli 02/16/10: PG. 164-166*) Ms. Gulli testified that the store manager for Mr. Barbat, Mr. Simtob, and Mr. Ebner’s corporate store was so concerned about chargebacks, that he directed employees to call customers after every activation to make sure that that there was no chargeback. (*Trial Transcript of N. Gulli 02/16/10: PG. 164-166*) Ms. Gulli emphasized, “hits” and chargebacks have always been a part of the wireless business.” (*Trial Transcript of N. Gulli 02/16/10: PG. 160-163*) Ms. Gulli also testified that in her experience the average hit in 2004 was \$70-100 per phone regardless of whether the store was in state or out of state. (*Trial Transcript of N. Gulli 02/16/10: PG. 269-270*)

During the same time, Ms. Gulli reviewed the Point of Sale (“POS”) reports for over 67 franchisees locations and noticed inconsistencies in the revenue information. (*Trial Transcript of N. Gulli 02/16/10: PG. 182*) According to Ms. Gulli, it scared her because ***Wireless Toyz was fraudulently manipulating the revenue information on its POS system.*** (*Trial Transcript of N. Gulli 02/16/10: PG. 287-288*) ***After conducting an internal audit, Wireless Toyz CFO, David Ebner, discovered that the data upon which the 2004 earnings claims were derived was unreliable and had been corrupted.*** (*Trial Transcript of D. Ebner 02/10/10: P. 259*) Mr. Ebner, admitted that the underlying data that was utilized to generate the 2004 UFOC earnings figures (i.e. 2003 commission figures from Wireless Toyz POS system) contained hundreds of instances of abnormal activation data (commissions in excess of \$1,000) (*Trial Transcript of D. Ebner 02/10/10: PG. 259*) Mr. Ebner testified that the underlying data as reported was ***not*** correct. (*Trial Transcript of D. Ebner 02/10/10 PG. 259*) Mr. Ebner also testified that the commission

⁴From 2004 to 2005, Ms. Gulli worked at a non-franchises store (i.e. JSB Enterprises) that was owned by Mr. Barbat, Mr. Simtob, Mr. Ebner. (*Trial Transcript of N. Gulli 02/16/10 at PG. 163-166; See also Trial Transcript of R. Simtob 02/09/10 PG. 248-249*)

revenue reported in the 2004 UFOC was neither accurate nor complete since the data in the 2003 POS system did not take into account additional chargebacks that could occur thru the first six months of 2004. (*Trial Transcript of D. Ebner 02/11/10: PG. 16*)

In preparing the information contained in the UFOC and in their presentations to Plaintiffs based on the information in the UFOC, Defendants were aware that “hits” and chargebacks were an important factor in assessing the profitability of a store. (*Trial Transcript of J. Barbat 02/11/10; PG. 140; Trial Transcript of R. Simtob 02/09/10: PG. 329; Trial Transcript of D. Ebner 02/10/10 at PG. 15, 20, 21, 23, 140*) Mr. Simtob admitted that the effect chargebacks had upon commissions was important in order to make an informed decision whether to invest in a store location. (*Trial Transcript of R. Simtob 02/10/10: P. 15*) ***Despite the importance of this information, Wireless Toyz and its executives made a deliberate decision not to disclose the extent of chargebacks relative to commission in the franchise circular.*** (*Trial Transcript of D. Ebner 02/10/10; P. 23; Trial Transcript of J. Barbat 02/11/10: P. 152*)

Mr. Ebner testified Wireless Toyz was aware that “hits” represented a big problem with regard to net revenue as far back as 2001, yet he Mr. Simtob, and Mr. Barbat made the decision ***not to include information regarding “hits” in the 2004 UFOC.*** (*Trial Transcript of D. Ebner 02/11/10: PG. 23; Trial Transcript of R. Simtob 02/09/10: PG. 335, 329*) ***Mr. Barbat admitted the Wireless Toyz received complaints about “hits” and chargebacks as far back as 2001.*** (*Trial Transcript of J. Barbat 02/11/10: PG. 155*)

Mr. Simtob recognized that it would have been relatively easy for Wireless Toyz to make a calculation of the average amount of “hits” and chargebacks using the data already available on its POS system. (*Trial Transcript of R. Simtob 02/11/10: PG. 46*) Mr. Simtob admitted that he calculated “hits” into the costs of goods sold for the stores he owned, yet admitted that the information was not made available to Mr. Abbo. (*Trial Transcript of R. Simtob 02/10/10: PG.*

34; *Trial Transcript of R. Simtob 02/09/10: PG. 326-328, 335*) Mr. Barbat, Mr. Simtob, and Mr. Ebner all testified that Defendants could have tracked the frequency of chargebacks (which they utilized to gauge the performance of their own non-franchised stores) during the 2003-2004 time frame. (*Trial Transcript of J. Barbat 02/11/10: PG. 148; Trial Transcript of R. Simtob 02/10/10: PG. 46; Trial Transcript of D. Ebner 02/11/10: PG. 15*) Despite the importance of this information, Wireless Toyz and its executives made a deliberate decision not include any information regarding “hits” in the 2004 UFOC. (*Trial Transcript D. Ebner 02/10/10: PG. 23; Trial Transcript of J. Barbat 02/11/10: P. 152*)

Mr. Ebner testified that it was a Wireless Toyz policy not to give franchisees all of the relevant information. (*Trial Transcript of B. Ebner 02/11/10: PG. 14*) Instead, they wanted franchisees to obtain the information on their own by contacting other storeowners. (*Trial Transcript of D. Ebner 02/11/10: PG. 14*) However, potential franchisees were not told that many of so-called comparable stores; (1) did not pay franchisee fees; (2) were not subject to the mandatory advertising expenses; (3) received alternate sources of income as training facilities; (4) and were owned by friends and/or family members of Mr. Barbat. (*Trial Transcript of R. Simtob 02/10/10: PG. 46; Trial Transcript of R. Enyart 02/08/10: PG. 19-25*) Each of these factors that Defendants elected not to disclose to potential franchisees was an importance source of information in gauging the overall cost and revenue structure for a store location.

Mr. Simtob confirmed that the UFOC does not identify which of the stores were franchise locations that were required to pay a franchise and royalty fee and which were corporate stores that were exempt from the franchise and royalty fee requirements. (Trial Transcript of R. Simtob 02/10/10: PG. 46) Mr. Simtob also stated that the UFOC does not disclose which of the stores received additional income for training prospective franchisees. (Trial Transcript of R. Simtob 02/10/10: PG. 46) As a result of these factors, the corporate

owned stores had a completely different cost structure than the stores owned by individual franchisees. (*Trial Transcript of R. Enyart 02/08/10: PG. 19-20, 25, 51*) **Accordingly, Mr. Simtob admitted that he had no way of determining whether the numbers in the UFOC were accurate or not.** (*Trial Transcript of R. Simtob 02/10/10: PG. 48*)

With regard to the source of co-op revenue identified in the UFOC, Wireless Toyz did not disclose that the revenue is actually a reimbursement for mandatory advertising expenditures incurred by its franchisees. **Mr. Barbat confirmed that the revenue is not an actual source of income but an offset for an expense already incurred.** (*Trial Transcript of J. Barbat 02/11/10: PG. 157-158*) Thus, the credit is really an offset and not a true source of income – although it was identified as such in the UFOC. (*Trial Transcript of J. Barbat 02/11/10: PG. 158*)

Furthermore, Wireless Toyz failed to disclose that the advertising co-op fund was nothing more than a corporate slush fund which Wireless Toyz manipulated in order to pay for its own expenses and bolster its earning claims. Mr. Simtob admitted that co-op money was used to pay for the travel expenses of corporate officers and frequently not paid out to the franchisees who incurred the advertising expenses. (*Trial Transcript of R. Simtob 02/09/10: PG. 304-306*) According to Wireless Toyz's Co-Op Administrator,⁵ the advertising program consisted of "A few files in a cabinet." (*Trial Transcript of A. Millar 02/11/10: PG. 292-293, 297-298*) Mr. Millar also testified that there were no training manuals to assist franchisees in getting their reimbursements. (*Trial Transcript of A. Millar 02/11/10: PG. 292-293, 297-298*) The co-op program had no means of tracking money due and payable to its franchisees. (*Trial Transcript of A. Millar 02/11/10: PG. 294-295*) At training sessions, franchisees received only a small packet of information; however there was no actual co-op training or marketing materials in the packet. (*Trial Transcript of A. Millar 02/11/10: PG. 293*) Mr. Millar testified that he worked hard to try

⁵Aaron Millar was Wireless Toyz' Co-Op Administrator from March 14, 2005 to November 13, 2007. (*Trial Transcript of A. Millar 02/11/10: PG. 290-291*)

and improve the co-op program, but franchisees still had massive difficulties in obtaining their reimbursements. (*Trial Transcript of A. Millar 02/11/10: PG. 294-295*) During his tenure, Wireless Toyz fabricated advertising invoices and received over \$600,000.00 in carrier reimbursement. (*Trial Transcript of A. Millar 02/12/10: PG. 64- 65; 02/11/10: P. 301*) This was done with the full knowledge of Mr. Simtob. (*Trial Transcript of A. Millar 02/11/10: P. 301*) Although Wireless Toyz had fraudulently procured hundreds of thousands of dollars in bogus ads through its co-op program, the legitimate expenses incurred by its franchisees went unpaid. (*Trial Transcript of A. Millar 02/11/10: PG. 294-295*) For all the co-op reimbursements that were approved by Wireless Toyz, only 20-25% of the funds were actually paid to the individual franchisees. (*Trial Transcript of A. Millar 02/11/10: PG. 294-295*) Mr. Simtob also admitted that co-op funds were not always returned to the individual franchisees who had incurred the advertising expenses. (*Trial Transcript of R. Simtob 02/09/10: PG. 306, LN. 1-6*) Furthermore, by including co-op advertising as a source of revenue in the UFOC, Wireless Toyz inflated the source of potential revenue to its franchisees. (*Trial Transcript of J. Barbat 02/11/10: PG. 157-158*)

Wireless Toyz' Director of Corporate and Franchise Marketing, Linda Daischendt, confirmed that Wireless Toyz had no marketing plan. (*Trial Transcript of L. Daischendt 02/10/10: PG. 231*) During her tenure, Ms. Daischendt testified that she received numerous franchisee complaints about co-op advertising. (*Trial Transcript of L. Daischendt 02/10/10: PG. 182, 228*) According to Ms. Daischendt, other senior executives were well aware of problems with the lack of a marketing plan. (*Trial Transcript of L. Daischendt 02/10/10: PG. 182, 228*) Ms. Daischendt admitted that Wireless Toyz did not have any system for tracking where the co-op reimbursements should go or what individual franchisees were owed. (*Trial Transcript of L. Daischendt 02/10/10: P. 199*) She admitted that Wireless Toyz did not distribute the co-op money to its franchisees. (*Trial Transcript of L. Daischendt 02/10/10: PG. 201*) She estimated

that only about 20% of franchisees were getting any co-op reimbursements. (*Trial Transcript of L. Daischendt 02/10/10: PG. 216*) Plaintiffs testified that they never got any of their co-operative funds back other than a couple of payments. (*Trial Transcript of M. Bober 02/12/10: PG. 204; PG. 205*)⁶

Mr. Simtob admitted that a prospective franchisee was going to rely on the revenue data contained in Item 19 UFOC. (*Trial Transcript of R. Simtob 02/09/10: PG. 321-322*) ***Wireless Toyz principal officers admitted that they were required to provide accurate information to potential franchisees so that they could accurately assess the cost structure of the wireless industry.*** (*Trial Transcript of Joe Barbat 02/11/10: PG. 139; Trial Transcript of Richard Simtob 02/09/10: PG. 262; Trial Transcript of D. Ebner 02/11/10: PG. 16*) In fact, Defendants' own expert admitted that Wireless Toyz was obligated to include information in its franchise circular about industry-specific costs structures including information about "hits" and chargebacks. (*Trial Transcript of K. Tidd 02/23/10: PG. 88-91*)

After becoming a franchisee, Mr. Abbo discovered that Wireless Toyz did not have any real training program, or even real trainers, but only glorified salespeople masquerading as trainers. (*Trial Transcript of D. Abbo 02/17/10: PG. 13-14*) He also discovered that Wireless Toyz did not have any marketing plan. (*Trial Transcript of David Abbo 02/17/10: PG. 16-17*) In fact, the only advertising program was through a third-party vendor (i.e. ADVO). (*Trial Transcript of D. Abbo 02/17/10: PG. 16-17*) During the first year of operation, Plaintiffs spent over \$35,000 on advertising. (*Trial Transcript of D. Abbo 02/17/10: PG. 73- 76*) The next year, they continued to spend thousands of dollars on advertising with no effect. (*Trial Transcript of D. Abbo 02/17/10: PG. 73- 76*) According to Mr. Abbo the advertising system did not work.

⁶Although Plaintiff spent between \$3,000.00 to \$4,000.00 a month in advertising they received a total of \$1,800.00 in co-op reimbursement for the entire time that they operated their store location (i.e. 2005-5009) (*M. Bober at 02/12/10 PG. 186*)

(Trial Transcript of D. Abbo 02/17: PG. 73- 76) Even worse, Plaintiffs were not receiving any of the co-op reimbursements that were submitted to Wireless Toyz. *(Trial Transcript of D. Abbo 02/17/10: PG. 76-77; Trial Transcript of M. Bober 02/12/10: PG. 205)* Mr. Abbo explained that he tried numerous times to navigate the difficult and tedious process, but it became so forbidding that by early 2006, he had stopped trying to get his co-op reimbursements. *(Trial Transcript of D. Abbo 02/17/10: PG. 76-77)* In the Spring of 2006, Mr. Abbo spoke to Greg Kuperstein – Wireless Toyz’s Marketing Director about the problem. Mr. Kuperstein urged Mr. Abbo to stop spending money on advertising despite the fact that he was required to spend \$3,000.00 under the terms of the franchise agreement. *(Trial Transcript of D. Abbo 02/17/10: PG. 76-77; Trial Transcript of M. Bober 02/12/10: PG. 186)*

Plaintiff also discovered that chargebacks and “hits” were a serious problem. *(Trial Transcript of D. Abbo 02/17/10: PG. 85-87)* Although, Plaintiff had previously been told that they would not incur any “hits” because they were operating an out of state store, Mr. Abbo testified that the average hit rates for their store was approximately \$100 for each phone that was sold. *(Trial Transcript of D. Abbo 02/19/10: PG. 64- 69)* Plaintiffs also testified that they took a hit on 90% of all their new equipment sales. *(Trial Transcript of D. Abbo 02/19/10: PG. 68-69; Trial Transcript of M. Bober 02/12/10: PG. 203-204)*

Mr. Abbo testified that in November of 2008, he compiled information about the total amount of chargebacks for the entire time period of his store’s operation.⁷ *(Trial Transcript of D. Abbo 02/17/10: PG. 90-92)* According to his reconciled reports, the negative net commissions (commissions lost to chargebacks) totaled \$151,000.00 *(Trial Transcript of D. Abbo 02/17/10: P. 114)* By way of comparison, Mr. Abbo’s total commission revenue per year was as follows: \$34,786,⁸ for 2005, \$211,376.92⁹ for 2006 and \$170,499¹⁰ for 2007. Based on these figures,

⁷Joint Trial Exhibit 28.

⁸Joint Trial Exhibit 20, 2005 Tax Return for Wireless Phones, Supporting Statement of Form 1065 p1-2/Line 1a.

Plaintiffs lost 39.85% of their commission revenue to chargeback. These figures were consistent with Mr. Bober's testimony that 40% of Plaintiffs post-paid activations resulted in chargebacks. (*Trial Transcript of M. Bober 02/12/10: PG. 204*) By August 2006, Mr. Abbo sold over 200 phone activations a month – well above the break-even amount of 75 activations per month represented by Mr. Simtob. (*D. Abbo 02/17/10: PG. 160*) Based on the number of phone activations Mr. Abbo's store was posted on Wireless Toyz Starz List (a list of top performing stores) and considered a model store. (*Trial Transcript of D. Abbo 02/17/10: PG. 71-72, 160-165*) In fact, Mr. Abbo's performance was in the top one-third for all Wireless Toyz store locations. (*Trial Transcript of D. Abbo 02/17/10: PG. 160*) Despite his success, Mr. Abbo was having trouble maintaining cash flow and breaking even. (*Trial Transcript of D. Abbo 02/17/10: PG. 160*)

Contrary to Wireless Toyz's claim that they had excellent relationships with all of the major carriers, Mr. Abbo and Mr. Bober learned that there was no carrier support for Verizon or Cingular. (*Trial Transcript of D. Abbo 02/17/10: PG. 9-10*) Mr. Abbo was also unable to sell Cingular equipment because Wireless Toyz did not have a carrier agreement for Mr. Abbo's store territory. (*Trial Transcript of D. Abbo 02/17/10: PG. 6-7*) Mr. Ebner later confirmed that Wireless Toyz did not have any relationships with Cingular in Colorado and encouraged Mr. Abbo try to develop his own relationship with Cingular. (*Trial Transcript of D. Abbo 02/17/10: PG. 9-10*) In fact, the majority of Wireless Toyz carrier relationships were not with the carriers themselves but with carrier brokers (i.e. middlemen) known as Master Agents whose commission payments were less than paid by the carriers directly. (*Trial Transcript of D. Abbo 02/17/10: PG. 9-10; Trial Transcript of M. Bober 02/12/10: PG. 125*) Mr. Abbo emphasized

⁹Joint Trial Exhibit 21, 2006 Tax Return for Wireless Phones. Statement 1 shows royalties of \$27,479. Since royalties are 13% of commissions pursuant to the Franchise Agreement, \$27,479 divided by 13% equals commissions of \$211,376.92.

¹⁰Joint Trial Exhibit 22, 2007 Tax Return for Wireless Phones, Statement 1.

that if Wireless Toyz had disclosed the true facts regarding “hits” and chargebacks, he would never have become a Wireless Toyz franchisee. (*Trial Transcript of David Abbo 02/17/10: PG. 87-88, 135*)

STANDARD OF REVIEW

A motion for JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004); *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Reed v Yackell*, 473 Mich 520; 703 NW 2d 1 (2005); *Id. at 123-124*. When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005); See also *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997), *leave granted*, 457 Mich 871, 586 NW 2d 918 (1998); *Zander v Ogihara Corp*, 213 Mich App 438, 540 NW 2d 702 (1995).

A judgment notwithstanding the verdict is not appropriate where reasonable jurors could have reached different conclusions. *Pakideh v Franklin Commercial Mortgage Group Inc*, 213 Mich App 636, 639; 540 NW2d 777 (1995); *Troyanowski v Village of Kent City*, 175 Mich App 217; 437 NW2d 266 (1988). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Jones v Powell*, 227 Mich App 662, 577 NW 2d 130 (1998). A full review of the record is required, with an emphasis on what

“reasonable jurors could find.” *Id.*; *Phinney v Perlmutter*, 222 Mich App 513, 564 NW 2d 532 (1997) When deciding the great weight of the evidences issues, a court is not permitted to substitute its judgment for that of the finder of fact. [Emphasis Added] *Green v Evans*, 156 Mich App 145, 401 NW 2d 250 (1985); *Bell v Merritt*, 118 Mich App 414, 325 NW 2d 443 (1982). Where there is competent evidence to support the finding of the jury, its verdict should not be set aside because the trial judge would weigh and devaluate the evidence differently. *Board of County Road Comm’rs v Bera*, 373 Mich 310, 129 NW 2s 427 (1964)

LAW AND ARGUMENT

To support the fraud exception, the *UAW-GM Human Resource Center* Court relied on *Professor Corbin’s* treatise, which is quoted in the opinion as follows

“If a written document, mutually assented to, declares in express terms that it contains the entire agreement of the parties, and that there are no antecedent or extrinsic representations, warranties,¹¹ or collateral provisions that are not intended to be discharged and nullified, this declaration is conclusive as long as it has itself not been set aside by a court on grounds of fraud or mistake, or on some ground that is sufficient for setting aside other contracts....The fact that a written document contains one of these express provisions does not prove that the document itself was ever assented to or ever became operative as a contract” *Corbin on Contracts, supra*, § 578.

Similarly, Professor Corbin noted that “Paper and ink possess no magic power to cause statements of fact to be true when they are actually untrue.” *UAW-GM Human Resource Center, supra* at 516 citing *3 Corbin, Contracts, supra*, § 578. “Fraud in the inducement of assent...may make the contract voidable without...showing that the writing was not agreed on as a complete integration of its terms. In such case[,] the offered testimony may not vary or contradict the terms of the writing, although it would be admissible even if it did so; it merely proves the existence of collateral factors that have a legal operation of their own, one that prevents the written contract

¹¹Such language is not contained in the integration clauses at bar, which refer only to other agreements or understandings and do not mention representations, warranties, or collateral provisions, or for that matter, other information or data.

from having the full legal operation that it would otherwise have had. This is not varying or contradicting the written terms of the agreement, although it does vary or nullify in part their legal effect.” *Star Ins Co v United Commer Ins Agency, Inc*, 392 F Supp 2d 927 (ED Mich, 2005), quoting 3 Corbin, *Contracts, supra*, § 580. Such a provision, even though it is contained in a complete and accurate integration does not prevent proof of fraudulent representations by a party to the contract, or of illegality, accident, or mistake. [Emphasis Added] *Star, supra* citing 3 *Corbin, Contracts, supra*, sec 578. Such evidence may directly contradict the writing; but at the same time, it shows the whole writing to be void or voidable, including the statement by which representations and mistakes are denied.

In *Star Insurance Co, supra* the court held that a merger clause in a contract does not preclude a party from bringing a fraud claim alleging another party's pre-contractual misrepresentation induced the complaining party to enter into the contract. Despite the presence of a merger clause in the contract, a party could have justifiably relied, as element of fraud in the inducement under Michigan law, upon pre-contractual representations made by another party regarding things outside the scope of the contractual terms, such as the other party's solvency, indebtedness, experience, clientele, client retention rate, or business structure, and if these representations are false when they are made and not merely opinion or future promises, they could constitute fraud in the inducement. *Star Insurance Co, supra* at 930.

This principal was most recently recognized in in *Barclae v Zarb*, 300 Mich App 455; 834 NW2d 100 (2013) in which the Court of Appeals held that pre-contractual factual misrepresentations and/or omissions made by a party are a not wiped away by simply including a merger clause in the final contract. As in the present case, the court considered a fraud claim in a

situation in which the parties had signed a contract containing a merger clause. The *Barclae* Court, however, recognized the limited reach of the *UAW-GM* holding:

There is an important distinction between (a) representations of fact made by one party to another to induce that party to enter into a contract, and (b) collateral agreements or understandings between two parties that are not expressed in a written contract. It is only the latter that are eviscerated by a merger clause, even if such were the product of misrepresentation. It stretches the *UAW-GM* ruling too far to say that any pre-contractual factual misrepresentations made by a party to a contract are wiped away by simply including a merger clause in the final contract. Such a holding would provide protection for disreputable parties who knowingly submit false accountings, doctored credentials and/or already encumbered properties as security to unknowing parties as long as they were savvy enough to include a merger clause in their contracts. *Barclae*, 13-14, quoting *Star Ins Co v United Commercial Ins Agency, Inc.*, 392 F Supp 2d 927, 928-929 (ED Mich 2005).

To establish fraud in the inducement, the plaintiff must show the following elements (1) the defendant made a material representation; (2) the representation was false when the defendant made the representation, (3) the defendant knew that it was false, and/or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *Custom Data Solutions*, 274 Mich App 239; 733 NW2d 102 (2006); *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 477; 666 NW2d 271 (2003); *M & D, Inc v McConkey [McConkey I]*, 226 Mich App 801, 806; 573 NW2d 281 (1997).

The most relevant requirement here is the reliance requirement. In *Titan Ins v Hyten*, 491 Mich 547, 817 NW 2d 562 (2012), this court recognized several interrelated but distinct common-law fraud doctrines that entitle a party avoid a contractual obligation through traditional legal and equitable remedies under the loosely aggregated rubric of “fraud” - including an action for silent fraud. In *Titan* this court set forth its recitation of the six elements necessary to establish a fraud claim. In setting out these six elements, the Court in *Titan* relied on its 1919 decision in *Candler v Heiho*, 208 Mich 115; 175 NW 141 (1919), which stated:

[t]he general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. 491 Mich at 555.

Notably missing from essential elements of a fraud claim enumerated in *Titan* is the requirement that the victim of such fraud prove that his/her reliance on the misrepresentation and/or omissions was “reasonable.” The omission of a “reasonableness” requirement was not inadvertent. In *Titan* this court elaborated on this point in a footnote. Rather than examining the question of whether a party’s reliance on fraudulent misstatements was “reasonable,” the *Titan* Court merely identified two situations in which a party could not successfully make out a claim for fraud based on the extent of that party’s knowledge of the inaccuracy of the misrepresentation. The Court in *Titan* first ruled that “fraud is not perpetrated upon one who has full knowledge to the contrary of a representation.” *Id.* at 555, n. 4 (emphasis added). Thus, a party will be unable to make out a claim for fraud where he/she has full knowledge that the representation that is the basis for the fraud claim was false. *Cf. Sautter v Ney*, 365 Mich 360, 363-364; 112 NW2d 509 (1961) (for a defendant to challenge the reliance component of a fraud claim, “it must be shown that the plaintiff’s knowledge was so informatively complete as to render the allegation of reliance quite as false as the representation itself.”); *Papin v Demski*, 383 Mich 561, 570; 177 NW2d 166 (1970). In the same footnote in which it held that a fraud claim cannot be established where the plaintiff has “full knowledge” of the inaccuracy of a statement, the *Titan* Court further observed that a fraud claim will not lie where the “allegedly defrauded party was given direct information refuting the misrepresentations.” 491 Mich at 555, n. 4. However the completeness of information necessary to refute the falsity of a representation simply cannot exist where the information is withheld or omitted.

In footnote 4 of *Titan*, this Court’s recitation of the six elements of a fraud claim notably did ***not*** include the requirement of “reasonable” reliance. *Titan, supra at 555-556*. Footnote 4 in *Titan* explained how other Court of Appeals decisions had erred in imposing a requirement that reliance must be “reasonable” and in so doing “limited the scope of the two prior decisions, *Nieves v Bell Industries, Inc.*, 204 Mich App 459; 517 NW2d 235 (1994) *Webb v First of Michigan Corp*, 195 Mich App 470; 491 NW2d 851 (1992), and expressly overruled a third, *Mable Cleary Trust v Edwards-Marlah Muzyl Trust*, 262 Mich App 485; 686 NW2d 770 (2004).

What is noteworthy about the ruling in *Titan* is that this Court ***restored*** Michigan law to what it had been prior to several decisions of this Court in the 1990's. *See Nieves v Bell Industries Corp*, 204 Mich App 459, 464; 517 NW2d 235 (1994); *Webb v First of Michigan Corp*, 195 Mich App 470, 474-475; 491 NW2d 851 (1992). In setting out the elements of a fraud claim, the *Titan* Court relied on its 1919 decision in *Candler v Heigho*, 208 Mich 115; 175 NW 141 (1919). 491 Mich at 555. Thus, long before *Titan* was decided, Michigan law recognized that reasonable reliance was ***not*** an element of an intentional fraud theory. *See also Kassab v Michigan Basic Property Ins Ass’n*, 441 Mich 433, 442; 491 NW2d 545 (1992) (also quoting *Candler* on the six elements of a fraud claim); *Hi-Way Motor Co v Int Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976) (same).

I. THE MERGER AND INTEGRATION CLAUSE CONTAINED IN THE FRANCHISE AGREEMENT DOES NOT DEFEAT PLAINTIFFS’ CAUSE OF ACTION BASED ON SILENT FRAUD.

A. The plain language of the merger and integration clause contained in the franchise and development agent agreement only applies to prior agreements or understandings between the parties

In the first issue that Defendants raise in their application for leave to appeal, they claim that Plaintiffs’ cause of action is defeated by the merger clauses in two agreements that the parties entered into. There are a number of errors in Defendants’ argument. Perhaps the most

telling defect is that fact that they have not attempted to explain how the merger clause (which only applies to prior or contemporaneous “agreements” or “understandings”) defeats Plaintiffs’ claims that they were deceived into purchasing the Wireless Toyz franchise based on material information that was ***not*** disclosed. In other words, there can be no prior agreement or understanding with regard to a subject matter that is not disclosed. In their application, Defendants do not even quote the relevant contract language and merely reference the language as quoted in the court of appeals decision. (“the two clauses are quoted (id. 6)”)(*See Defendants’ Application for Leave, p. 17*) The actual language of the merger/integration clause is contained in section 28 of the franchise agreement and states as follows:

28. ENTIRE AGREEMENT

This Agreement and the Manuals contain all of the covenants and agreements of the parties with respect to this subject matter, and supersede any and all prior or contemporaneous agreements, whether oral, written, or express or implied between the parties with respect to this subject matter.

The development agent agreement contains the following language:

16.9 Entire Agreement; Modifications. This Agreement and all appendices and other documents attached to this Agreement are incorporated in the Agreement and will constitute the entire agreement between the parties. This Agreement supersedes all previous written and oral agreements or understandings between the parties. This Agreement may not be amended or modified except in writing executed by both parties.

These two clauses merge all prior ***covenants***, ***agreements*** and ***understandings*** that the parties may have reached in the negotiation stage into the contract itself. In other words every covenant, agreement, or understanding that the parties may have rendered before signing the contracts is not enforceable unless it is incorporated into the contract itself.

But what Defendants completely ignore is the theory upon which the jury found in favor of Plaintiffs – silent fraud. Silent fraud is based on that which the Defendants did ***not*** tell

Plaintiffs - despite a duty to do so. That theory of recovery has nothing to do with any agreements, covenant, or understanding that the parties have reached prior to signing the contract. To the contrary, silent fraud is based on “understandings” that the parties were never able to reach precisely because Defendants failed to provide Plaintiffs with material information that they were legally obligated to provide. There is no language in section 28 or 16.9 indicating that the agreements supersede and all “representation,” “statements,” “information” or “data” or that the franchisee should not rely on outside information to understand what the franchisee is agreeing to. In fact, the UFOC (which is incorporated into the franchise and area development agreements) specifically advises potential franchisees to consult outside sources of information when entering into the agreement.

[THE UFOC] SHOULD HELP YOU MAKE A DECISION. STUDY IT CAREFULLY. WHILE IT INCLUDES SOME INFORMATION ABOUT YOUR CONTRACT, **DON'T RELY ON IT ALONE TO UNDERSTAND YOUR CONTRACT.** (*Exhibit 4, p. 1*)

YOU SHOULD CONDUCT AN INDEPENDENT INVESTIGATION OF THE COSTS AND EXPENSES YOU WILL INCUR IN OPERATING YOUR FRANCHISE BUSINESS. FRANCHISEES OR FORMER FRANCHISEES LISTED IN THIS OFFERING CIRCULAR, MAY BE ONE SOURCE OF THIS INFORMATION (*Exhibit 4, p. 43*)

According to the plain language of the franchise and development agent agreement, the merger/integration only applied to exclude evidence of any prior “agreements” or “understandings.” The parole evidence rule does not exclude pre-contract representations that do not contradict or vary from the contract. The pre-contract representations here did not contradict or vary from the contract. Rather, these representations merely supplemented information that was missing (i.e. fraudulently omitted) from the contract.

Defendants concede that the UFOC contains only limited information and that they actively encouraged potential franchisees to obtain additional information from other sources

(including other franchise operators) to understand the costs and expenses involved with the operation of the franchise. Thus, the responses to Mr. Abbo's inquiries did not constitute "agreements" of any kind, nor did the information "contradict" the statements in the franchise agreement disclaiming any guarantee of profitability. Mr. Simtob testified that the figures in his presentation to Mr. Abbo were to illustrate the importance of working capital so that potential franchisees could establish a cushion before they started to receive their commission revenue. (*Trial Transcript of R. Simtob 02/09/10: PG. 319-322*) According to Mr. Simtob, his working capital calculations (which included the 200 phone per month benchmark for profitability) were derived from information contained within the UFOC. (*Trial Transcript of R. Simtob 02/09/10: PG. 319-322*) Similarly, the statements made by Wireless Toyz and/or its principals relating to the nature and impact of "hits" and chargebacks did not alter or contradict the information contained in the UFOC and franchise agreement as neither provided any quantification as to the amount or frequency of "hits" and chargebacks.

Judge Kumar (and dissenting opinion of Judge Rirodan in the Court of Appeals) determined that in light of *Hamade v Sunoco, Inc*, 271 Mich App 145; 721 NW 2d 233 (2006) Plaintiffs reliance on the pre-contractual statements was inherently "unreasonable" due to the existence of the merger and integration clause. However where the basis for the fraud is the failure to disclose material information (i.e. silent fraud) a merger clause *cannot* integrate that which was not disclosed. Judge Riordan's dissenting opinion emphasizes that Mr. Abbo utilized the assistance of his personal accountant along with his past business experience in order to ascertain the relative risks involved in the franchise opportunity, but concedes that certain information relative to "hits" was not fully disclosed in the UFOC. As set forth in *Titan*, it is not

incumbent upon Mr. Abbo (nor is it possible) to verify the accuracy of information that is fraudulently omitted.

Furthermore, the findings of Judge Kumar (and dissenting opinion of Judge Rirodan in the Court of Appeals) are irreconcilable with the fact that the jury was presented with evidence demonstrating that the information included in the UFOC itself (and incorporated into the franchise and development agent agreement) omitted material information sufficient to allow Plaintiffs to accurately assess the true economic cost structure associated with the franchise opportunity. The jury's finding that Plaintiffs supported their claim for silent fraud by "clear and convincing" evidence took into consideration the omission of material information in the UFOC relating to the overall cost and revenue structure along with Mr. Simtob's responses to specific inquiries. As set forth in *Diamond Computer Systems, Inc v SBC Communications, Inc*, 424 F Supp 2d 970 (ED Mich 2006) and in *Barclae v Zarb*, 300 Mich App 455; 834 NW2d 100 (2013), an integration and merger clause does not render unreasonable the Plaintiffs reliance on the alleged misrepresentation where the party was induced by the fraud to enter into the agreement. Thus, Judge Kumar and Judge Riordan's insistence that *Hamade* eviscerates Plaintiffs fraud claims is unsupported by existing law – especially in light of this Court's determination in *Titan*.

The average income, activations, and revenue information contained in the UFOC (which was incorporated into the franchise and area development agreements) were portrayed as accurate and relied upon by Plaintiff. (*Trial Testimony of M. Bober 02/12/10: PG. 119*) However the jury was presented with evidence that Wireless Toyz chose to omit information regarding negative cost structures that were known to affect a store's performance from the company's accounting system and UFOC.

Although the UFOC indicates that commissions are subject to chargebacks it does not identify the extent, ratio, or percentage of commissions that are actually charged back - facts

which were known to have an adverse impact on store costs and revenue but not disclosed by Defendants. The fact that a commission may be charged back does not provide any meaningful information about its effect on a store's revenue and cashflow. Both Mr. Abbo and Mr. Bober testified that the 2004 UFOC did not provide them with any meaningful information about the amount or percentage of chargebacks. (*Trial Transcript of M. Bober 02/12/10: PG. 115- 117, 153, Trial Transcript of D. Abbo 02/17/10: PG. 135*)¹²

Mr. Barbat, Mr. Simtob, and Mr. Ebner, all testified that Defendants could have tracked the frequency of chargebacks (which they utilized to gauge the performance of their own non-franchised stores) during the 2003-2004 time frame. (*Trial Transcript of J. Barbat 02/11/10: PG. 148; Trial Transcript of R. Simtob 02/10/10: PG. 46; Trial Transcript of D. Ebner 02/11/10: PG. 15*) Despite the importance of this information, Wireless Toyz and its executives made a deliberate decision not to disclose (either in the UFOC or otherwise) truthful information regarding the subject matter. (*Trial Transcript D. Ebner 02/10/10: PG. 23; Trial Transcript of J. Barbat 02/11/10: P. 152*) Defendants' asymmetrical use of chargeback information to gauge the overall performance of their own stores while at the same time withholding the same information from other franchisees is the precise type of "omission" that the jury considered in finding Defendants' liable for silent fraud.

With regard to the impact of "hits," Mr. Simtob admitted that he calculated "hits" into the costs of goods sold for the stores he owned, yet admitted that the information was not made available to Mr. Abbo. (*Trial Transcript of R. Simtob 02/10/10: PG. 34; Trial Transcript of R. Simtob 02/09/10: PG. 326-328, 335*) Similarly, Mr. Ebner testified that the UFOC provided no information about "hits" at the point of sale. (*Trial Transcript of D. Ebner 02/11/10: PG. 16*) Although Wireless Toyz was aware that "hits" represented a big problem with regard to net

¹²The chargebacks encountered by Abbo and Bober during the time their store was open for just six of the carriers totaled \$166,037.88. See Joint Exhibit 28, November 2008 Chargeback Reports.

revenue as far back as 2001, Mr. Ebner, Mr. Simtob, and Mr. Barbat made the decision *not to include information regarding “hits” in the 2004 UFOC.* (Trial Transcript of D. Ebner 02/11/10: PG. 23) Meanwhile, Mr. Bober and Mr. Abbo discovered that they were incurring “hits” on 90% of their post-paid activations with amounts ranging from \$75-\$125 per phone. (Trial Transcript of M. Bober 02/12/10: PG. 203-204; Trial Transcript of D. Abbo 02/17/10: PG. 133-135) Their experience was in stark contrast to the information provided in the UFOC and by Mr. Simtob. (Trial Transcript of D. Abbo 02/16/10: PG. 316) Mr. Simtob also admitted that Mr. Abbo was not informed that in 2003-2004, Wireless Toyz largest carriers (i.e. Sprint and Nextel) were only 2-3% of the cellular market in Colorado. (Trial Transcript of R. Simtob 02/10/10: P. 35)

With regard to the co-op revenue figures contained in the UFOC, Wireless Toyz did not disclose that the money paid by the carriers is actually a reimbursement for advertising that has already been paid by its franchisee. Mr. Barbat confirmed that the revenue is not an actual source of income but an offset for an expense already incurred. (Trial Transcript of J. Barbat 02/11/10: PG. 157-158) Thus, the credit is really an offset and not a true source of income – although it was identified as such in the UFOC. (Trial Transcript of J. Barbat 02/11/10: PG. 158) Moreover, the signed written agreements fail to disclose to prospective franchisees the known (and intentional) difficulties in processing co-op reimbursement or that Wireless Toyz routinely utilized the funds for its own business purposes. (Trial Transcript of S. Rupani 02/05/10: PG. 55. 66. 67) Aaron Millar and Linda Daischendt, both former Wireless Toyz Corporate employees, admitted that only 20-25% of co-op was actually disbursed to franchisees and of that percentage franchisees were only paid a small amount. (Trial Transcript of A. Millar 02/11/10: PG. 294-295; Trial Transcript of L. Daischendt 02/10/10: PG. 216, 228) Despite the fact that Wireless Toyz’s co-op program was administered so that they could acquire the money that rightfully belonged to the franchisees it was identified as a historical source of revenue upon

which they could rely. (*Trial Transcript of A. Millar 02/11/10: PG. 301*) Furthermore, the corrupt and unreliable nature of the data used by Defendants to support their earnings claims in Item 19 of the UFOC provides sufficient justification that the written disclosure documents and signed written agreements do not speak for themselves and that the jury took such matters into consideration when it rendered its verdict as to silent fraud.

B. In Light of *Titan v Hyten*, Plaintiffs were not required to show evidence of reasonable reliance in order to succeed on their claim of silent fraud

Judge Kumar's rationale for granting Defendants' JNOV Motion was that Plaintiffs could not establish "reasonable" reliance in light of the merger and integration clause contained in the franchise and development agent agreements. In their application and request for peremptory reversal, Defendants argue that Plaintiffs' reliance upon any extra contractual statements was "unreasonable," in light of the merger and integration clause contained in the written agreements signed by the parties. (*Defendant/Appellant's Application, p. 14*) However, in *Titan* this Court has made it clear that "reasonable" reliance is not an essential element of a fraud claim. Defendants have offered several arguments as to why they believe they can ignore this Court's ruling in *Titan*.¹³ Each of these arguments is unavailing. Defendants note in their application that *Titan* was "an auto insurance case" and presumably inapplicable. *Titan* may have been "an auto insurance case," but it is also something more - it was a *fraud* case - the same claim that the jury found was supported by "clear and convincing" evidence. Defendants may also attempt to distinguish *Titan* on the ground that that case did not involve a contractual merger clause. However both *Titan* and *Barclae* (a case involving a merger and integration clause decided after the trial court's ruling on Defendants' Motion for JNOV), render this distinction is irrelevant.

¹³*Titan* was decided by this Court subsequent to the Judge Kumar's ruling on Defendant/Appellant's Motion for JNOV.

Thus, whatever *factual* differences there may be, the *legal* issue in *Titan* is precisely the same as this case.

In their application, Defendants argue that under pre-*Titan* decisions of the Court of Appeals, a contract's merger clause purportedly undermined an otherwise valid fraud claim because it eliminates one of the purported elements of such a claim – reasonable reliance. The argument made by Defendants - who were sued for fraud - was that Plaintiffs could not reasonably rely on pre-signing fraudulent representations that did not make their way into the final version of the contract. Now that *Titan* has eliminated the reasonableness of Plaintiffs' reliance as an element in a fraud claim, the entire justification for the court's decision finding a fraud theory undone by the mere existence of a contractual merger clause has fallen. By eliminating the element of reasonable reliance, *Titan* eliminated the entire legal basis for Defendants' assertion that the merger clauses of the parties' agreement foreclose relief on Plaintiffs' claim of silent fraud.

C. Plaintiffs adequately raised the issues of false token and/or fraud in the inducement exceptions to a valid merger and integration clause such that the contractual disclaimers do not bar the introduction of oral representations to support their claim for silent fraud

On May 9, 2007, Plaintiffs filed their complaint alleging that Wireless Toyz and its principals acted improperly with regard to the offering and sale of a franchise and/or territory development area. In its complaint, Plaintiffs alleged that Defendants failed to provide material information with regard to nature and extent of "hits" and chargebacks. In addition, Plaintiffs alleged that Defendants failed to disclose information regarding the unreliability and/or exaggerated nature of the earnings claim contained within the UFOC. Plaintiffs also alleged that the information included in the UFOC (which was incorporated by reference into the franchise

and area developer agreements) failed to include material information necessary to make the statements and/or representations not misleading in light of the circumstances in which they were made. Plaintiffs further maintain that Defendants' advertising co-op program which was included in the UFOC earnings claims as a source of revenue was typically not paid and could not be counted on as a reliable source of revenue. Plaintiffs alleged that the failure to disclose all relevant information regarding the operation of the Wireless Toyz were made by Wireless Toyz and/or its principals "*with the intent to defraud and deceive Plaintiffs*" for "*the purpose of inducing Plaintiff's to rely upon the representations and to act or refrain from acting in reliance upon representations.*" (Exhibit 7; Plaintiffs Complaint ¶¶ 75, 84)

In a June 4, 3009 order denying (in part) Defendants Motion for Summary Disposition, (attached hereto as exhibit 1) Judge Kumar recognized that the issue of "*whether Defendants committed fraud in attempting to induce Plaintiffs to sign the Franchise Agreement*" remained open. [Emphasis Added] (Exhibit 1; p. 21) At the conclusions of the Plaintiffs' case, Defendants moved for a Directed Verdict as to all of Plaintiffs' claims based on the same legal arguments set forth in its Motion for JNOV, response to Plaintiffs' Appeal, and Application for Leave to this Court (i.e. Plaintiffs' reliance on the misrepresentations and/or omissions was "unreasonable" in light of the merger and integration clauses contained in the franchise and development agent agreements). In the opinion of Judge Andrews who presided over the trial, the court determined that the evidence presented by Plaintiffs raises a question of fact as to the existence of fraud in the inducement and reasonable reliance. [Emphasis Added] (Exhibit 2, p. 3)

Subsequent to her opinion and order denying Defendants' Motion for Summary Disposition, and Judge Andrews' denial of Defendants' Motion for Directed Verdict (which allowed Plaintiffs' fraud in the inducement claims to be considered by the jury) Judge Kumar

(who did not preside over the trial) ruled that Plaintiffs' fraud in the inducement claims were barred as they were not sufficiently raised in Plaintiffs' pleadings. (*Exhibit 3, pp. 13-14*) Although it is true that Plaintiffs' complaint does not include a separate count entitled "Fraud in the Inducement," the language of the complaint was sufficient to have put Defendant/Appellants on notice as to the pendency of a fraud in the inducement claim which was previously recognized by Judge Kumar in her denial of Defendant' Motion for Summary Disposition (*see exhibit 1, p. 21*) In particular, Plaintiff/Appellees complaint specifically states that

"Such representations were made by WTF with the intent to defraud and deceive Plaintiffs into signing the Franchisee Agreements and to Cause Plaintiff to enter into the business relationship with WTF, and the representations for the purpose of inducing Plaintiffs to rely upon the representations and to act or to refrain from acting in reliance on the representations. with the intent to defraud and deceive Plaintiffs" for "the purpose of inducing Plaintiff's to rely upon the representations and to act or refrain from acting in reliance upon representations. (*Exhibit 7; ¶ 84*)

Michigan is a notice pleading state, and thus, the only requirement for stating a cause of action "is a presentation of factual allegations that would reasonably inform defendants of the 'nature of the claims' against which defendants are called on to defend." *Smith v Stolberg*, 231 Mich App 256, 260-261; 586 NW2d 103 (1998), quoting MCR 2.111(B)(1). Thus, for example, where a new theory of liability is presented that "fit[s] within the 'scope of the general factual allegations' previously pleaded in support of another claim, this Court has found that a complaint met the pleading requirements set forth under MCR 2.111(B)(1)." *Id.* quoting *Iron Co v Sundberg, Carlson & Assoc, Inc*, 222 Mich App 120, 124. Having sufficiently raised the issues of the false token or fraudulent inducement exception to the merger and integration clause, the findings of the jury (and Court of Appeals decision) were supportable as a matter of law.

D. Plaintiffs presented sufficient evidence as to the false token and/or fraud in the inducement exceptions such that the merger and integration clause did not bar their claim for silent fraud as a matter of law

The tort of fraudulent concealment or silent fraud, requires a Plaintiff to establish that (1) the defendant made a material misrepresentation; (2) that it was false; (3) the defendant knew at the time of the representation that it was false, or that the representation was made recklessly without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998); *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996); *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994) In addition, when alleging silent fraud, “[t]he false material representation ... may be satisfied by the failure to divulge a fact or facts that defendant has a duty to disclose.” *Clement-Rowe v. Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995); see also *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998); *Lorenzo v Noel*, 206 Mich App 682, 684-685; 522 NW2d 724 (1994). The duty exists where there is a legal or equitable duty of disclosure. *M&D, Inc v McConkey*, 231 Mich App 22, 30, 31 (1998). Section 5 of MFIL imposes a “legal” duty upon franchisors to disclose all material facts the omission of which would make the statements misleading. MCL 445.1505.¹⁴ This duty cannot be discharged or avoided.

During the trial, *Wireless Toyz principal officers admitted that they were required to provide accurate information to potential franchisees so that they could accurately assess the cost structure of the wireless industry.* (Trial Transcript of Joe Barbat 02/11/10: PG. 139; Trial Transcript of Richard Simtob 02/09/10: PG. 262; Trial Transcript of D. Ebner 02/11/10: PG. 16) *In fact, Defendants’ own expert admitted that Wireless Toyz was obligated to include information in its franchise circular about industry-specific costs structures including*

¹⁴According to MCL 445.1504 the restrictions of Section 5 of the MFIL act apply to all written and oral arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise. [Emphasis Added]

information about “hits” and chargebacks. (Trial Transcript of K. Tidd 02/23/10: PG. 88-91)

Accordingly, the only remaining issue is whether the jury was presented with sufficient factual information to support their finding that Defendants failed to disclose material information about Wireless Toyz cost and revenue structure in selling the franchise to Plaintiffs.

E. Plaintiff presented sufficient evidence to support the jury’s finding that Defendants were liable for silent fraud.

The failure to include quantifiable information about “hits” and chargebacks was not an oversight. *Mr. Barbat admitted the Wireless Toyz received complaints about “hits” and chargebacks as far back as 2001. (Trial Transcript of J. Barbat 02/11/10: PG. 155)* Mr. Simtob admitted that chargebacks and commissions were very important in order for a franchisee to make a decision on whether to invest in a store location. *(Trial Transcript of R. Simtob 02/10/10: PG. 35)* Defendants were keenly aware that information regarding “hits” and chargebacks was an important factor in determining the profitability of a store. *(Trial Transcript of R. Simtob 02/09/10: PG. 329; Trial Transcript of D. Ebner 02/10/10: PG. 20-21, 23; Trial Transcript of J. Barbat 02/11/10: PG. 140)* Despite the importance of this information, Wireless Toyz and its executives made a deliberate decision not to disclose the extent of chargebacks relative to commissions in the franchise circular. *(Trial Transcript of D. Ebner 02/10/10: PG. 23; Trial Transcript of J. Barbat 02/11/10: PG. 152)* Similarly, Wireless Toyz and its executives deliberately omitted any reference to “hits” in the franchise circular. *(Trial of R. Simtob Transcript 02/09/10: PG. 326)* In fact, Wireless Toyz never even had a system in place for tracking the nature and extent of “hits” on phones sold by franchisees. *(Trial Transcript of D. Ebner 02/11/10: PG. 18)* Mr. Simtob recognized that it would have been relatively easy for Wireless Toyz to make a calculation of the average amount of “hits” and chargebacks using the data already available on their POS system. *(Trial Transcript of D. Ebner 02/10/10: PG. 46)* During his testimony, Mr. Ebner stated that it was Wireless Toyz policy not to give franchisees

all of the relevant information. (*Trial Transcript of D. Ebner 02/11/10: PG. 14*) **Mr. Simtob and the other principals of Wireless Toyz did not provide prospective franchisees with the same information that they used to gauge the performance of their own stores.**(*Trial Transcript of R. Simtob 02/09/10: PG. 329, 335*)

Plaintiffs presented substantial proof of reliance. **Mr. Simtob admitted that a prospective franchisee was going to rely on the revenue data contained in Item 19 UFOC** (*Trial Transcript of R. Simtob 02/09/10: PG. 321-322*) Prospective franchisees were also encouraged to talk to current store owners in order to obtain further information about costs and expenses. (*Trial Transcript of D. Ebner 02/11/10: PG. 14*) For example, Mr. Bober called most out-of-state Wireless Toyz franchisees listed in the attachments to the UFOC. In each instance the franchisees reported that the Wireless Toyz opportunity was good and backed their opinion with specific activation figures, rent amounts, and number of phone units sold per month. (*Trial Transcript of M. Bober 02/12/10: PG. 139*) One of Mr. Bober's points of contact (i.e. Teddy Attallah) told him that his franchise was doing well, that he had multiple stores, and that the profits from just one of his stores was paying for the overhead of his other locations. Mr. Abbo recalls hearing the same statements from Mr. Atallah (*Trial Transcript of D. Abbo 02/17/10: PG. 22*) However, neither Mr. Abbo nor Mr. Bober were aware that Atallah was Joe Barbat's brother-in-law nor was that information disclosed by Wireless Toyz. (*Trial Transcript of M. Bober 02/12/10: PG. 143; Trial Transcript of D. Abbo 02/17/10: PG. 22*) Although the UFOC encouraged prospective franchisees to contact existing store owners to obtain additional information about the cost and expenses of operating a store location (*Exhibit 5, p. 43*), Wireless Toyz did **not** disclose that many of the existing store owners (with whom they were encouraged to contact) had substantially different cost and revenue structures. (*Trial Transcript of Russ Enyart 02/08/10: PG. 25*) Plaintiffs did not have any other known means of verifying the UFOC information or Defendants' oral representations and relied upon the accuracy of the information

provided. Thus, Plaintiffs presented sufficient evidence to support the jury's findings (and the decision of the Court of Appeals) that when selling the franchise to Plaintiffs Defendants fraudulently omitted material information which they were obligated to disclose.

F. Plaintiffs presented sufficient evidence that they “reasonably” relied upon the misrepresentations and/or omissions of the Defendants in entering into the franchise and devilment agent agreements

In its ruling granting Defendants' Motion for JNOV, Judge Kumar (erroneously) noted that the Jury Instruction omitted the necessary element of “reliance” and that the jury made its interpretation without being properly being instructed as to the necessary elements of Plaintiff/Appellees claim of Silent Fraud. (*Exhibit 3, p. 4*) However the record demonstrates, Judge Steven Andrew's instructed the jury that in order for Plaintiffs to prevail they must prove the elements of their claims for Silent fraud, Fraudulent Misrepresentation, and Innocent Misrepresentations by clear and convincing evidence and show that Plaintiffs “reasonably” relied on the misrepresentations and/or omissions attributable to Defendants. (*Trial Transcript 02/24/2010 PG. 126-127*)

In granting Defendant/Appellant's Motion for JNOV, Judge Kumar (who did not preside over the trial) supplanted the factual findings of the jury based on her determination that the “existence” of “hits” and/or “chargebacks” were known to Plaintiffs and therefore not concealed by Defendants. (*Exhibit 3, p. 16*) Judge Kumar's findings (and dissenting opinion of Judge Riordan in the Court of Appeals) supplant the reasoning of the jury without addressing the facts considered by the jury (i.e. Defendants intentional efforts to downplay and/or withhold information that would reveal the overall extent of “hits” and “chargebacks” in reducing the anticipated revenue stream for a store location. As noted in *Titan*, in order to preclude recovery under a fraud theory, it must be established that the victim had *full knowledge* of the inaccuracy of the misrepresentation or *was given direct information refuting the misrepresentation*. 451

Mich at 555-556 fn. 4 Defendants were aware of the importance of this information in gauging the overall profitability of a store location and elected *not* to disclose this information to prospective franchisees. (i.e. the ratio, extent, and/or frequency of “hits” and chargebacks) Here, the jury found that that Plaintiffs had presented “clear and convincing” evidence establishing that Defendants either in response to direct inquiries or in the UFOC agreement itself, omitted material information sufficient for Plaintiffs to determine the verify the accuracy of the reported sources of income or to determine the true economic risks associated with “hits” and chargebacks.

G. Since the jury found that Plaintiffs presented sufficient evidence factual evidence that the actions of the Defendants failed to include a statement of material fact necessary not to make the statements misleading the merger and integration clauses are void and unenforceable as a matter of law

Under Section 5 of MFIL, “a person shall not, in connection with the filing, offer, sale, or purchase of any franchise, directly or indirectly: (a) Employ any device, scheme, or artifice to defraud; (b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” MCL 445.1505. “‘Fraud’ and ‘deceit’ are not limited to common law fraud or deceit.” MCL 445.1503(2). Courts have recognized the strong remedial purposes of MFIL, which states that it “shall be broadly construed to effectuate its purpose of providing protection to the public”. MCL 445.1501. See *General Aviation, Inc v Cessna Aircraft Co.*, 13 F 3d 178, 181 (6th Cir 1993) (“*the general purpose of franchise legislation is to protect the rights of franchisees*”); *Banek Inc v Yogurt Ventures USA, Inc.*, 6 F 3d 357, 361 (6th Cir 1993) (“Michigan’s public policy, as expressed in the MFIL, is to protect franchisees from overreaching by franchisors and from the superior bargaining power franchisors possess”); [Emphasis Added] *Martino, supra*, at 61; (“MFIL notice

requirements are designed to make certain contract provisions illegal and to protect potential franchisees from the superior bargaining power of franchisors”). In *SEC v Conway*, 2009 US Dist. LEXIS 26588 (ED Mich 2009)¹⁵ the Court stated that a fact is material if “there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information available.” *Id.*, (citations omitted). The Court further stated that the “determination as to which inferences a reasonable shareholder would draw ‘requires delicate assessments’ **and as such should be made by the trier of fact.**” [Emphasis Added] *Id.*

On page 42 of the Franchise Circular, Defendants expressly recognize that the franchise and development agent agreements are subject to compliance with state franchise laws which may supersede the agreements. (*Exhibit 4*)

These states have statutes which may supersede the Franchise Agreement or Development Agent Agreement in your relationship with us...MICHIGAN [State. Section 19.854(27)...These and other States may have court decisions which may supersede the Franchise Agreement or Development Agent Agreement in your relationship with us, including the areas of termination and renewal of your franchisee.

APPLICABLE STATE LAW MAY REQUIRE ADDITIONAL DISCLOSURES RELATED TO THE INFORMATION IN THIS OFFERING CIRCULAR.

The extent of the fraudulent omissions perpetrated by the Defendants in the offering and sale of their franchise opportunity has been set forth at length in the previous sections herein. Not only did the Plaintiffs present sufficient evidence to establish that Defendants violated relevant provisions of the MFIL, but the verdict of the jury confirmed that Defendants did, in fact, violate the MFIL by virtue of their omission of a material fact which in light of the circumstances was misleading. In rendering their verdict in favor of Plaintiffs, the Jury found “clear and convincing

¹⁵This Circuit Court found *Conway* to be applicable to the case at bar (*Exhibit 1; Opinion and Order Dated June 4, 2009 Denying Defendants’ Motion for Summary Judgment, p. 19*)

evidence” that Defendants were liable for silent fraud - which by extension of the statutory language contained in section 5 is a violation of MFIL. The jury’s finding of fraud by omission (i.e. silent fraud) was precisely the type of fraud that that act was intended to address. The jury’s findings with regard to silent fraud demonstrate that Defendants did in, fact, violate Section 5 of the MFIL as well as MCL 445.1525. In seeking to reverse the Court of Appeals decision, Defendants are attempting to vitiate their fraud based on the disclaimers contained in the written franchise agreement. However, such provisions are clearly unenforceable under MCL 445.1527(b), which states that any requirement that a franchisee assent to a release, assignment, novation, waiver, or estoppel which deprives a franchisee of rights and protections provided in this act is void and unenforceable if contained in a document relating to a franchise.

H. Since Defendants were under a legal obligation to disclose all material facts necessary to make the statements regarding the offering and sale of a franchise agreement not misleading, Defendants had a duty to disclose information about the industry specific impact of “hits,” chargebacks, and co-op on a franchise operation

In their Motion for JNOV, response to Plaintiffs’ Appeal, and Application for Leave, Defendants’ allege that they were under no duty to disclose any information regarding the nature and extent of “hits”, chargebacks, and co-op. Defendants’ arguments are laughable at best. It is abundantly clear that the Section 5 MFIL imposes a “legal” duty upon franchisors to disclose all material facts the omission the omission of which would make the statements misleading. MCL 445.1505. This duty cannot be discharged or avoided. Rather, Defendants argue (through the testimony of their paid expert – Katt Tidd) that the disclosures were adequate and that they had no obligation to include any additional information. However, Defendants fail to address that the jury also heard testimony from Ms. Tidd acknowledging that the frequency of chargebacks were an important factor that franchisees should be aware of before entering into a franchise

relationship. (*Trial Transcript of K. Tidd 02/22/10 PG. 286: Trial Transcript of K. Tidd 02/23/10 PG.79-84*)

II. THE PLAIN LANGUAGE OF THE MICHIGAN FRANCHISE PROTECTION ACT DOES NOT EVIDENCE A LEGISLATIVE INTENT TO PREEMPT OTHER COMMON LAW CAUSES OF ACTION BETWEEN A FRANCHISOR AND FRANCHISEE

In their application, Defendant assert that Plaintiffs' silent fraud claim is preempted under MFIL notwithstanding the clear statutory language of contained in MCL 445.1534 which explicitly states that "Nothing in this act shall limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect." In the few instances in which the courts have interpreted a state statutory scheme as preempting other common law claims, courts have analyzed the specific statutory language in order to determine whether the legislature intended to preclude other common law causes of action. In *Kraft v Detroit Entm't, LLC*, 261 Mich App 534; 683 NW2d 200 (2004) the court determined that Plaintiff's common law claims were preempted under the Michigan Gaming Control and Revenue Act (MGCRA) based on the language of the statute stating "any other law that is inconsistent with this act shall not apply to casino gaming as provided for by this act." MCL 432.203(3).

The Legislature's use of the phrase "any other law" implies that the preemption clause is all-inclusive when referring to the laws it was meant to encompass. That the phrase "any other law" sweeps broadly suggests that the Legislature meant to include common law in addition to legislative enactments. *Kraft, supra*.

In applying the plain language of the MGCRA statute, the court in *Kraft* distinguished its application to other instances in which preemption has been denied based upon statutes that contained savings clauses similar to the language contained in MCL 445.1534.

These cases are distinguishable from the present case, because the Federal Communications Act contains a savings clause, which provides, "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to

such remedies." 47 USC 414. These cases held that the savings clause in the Federal Communications Act demonstrated that Congress intended to allow state court claims for breaches of independent duties that neither conflict with the specific provisions of the act, nor interfere with its regulatory scheme. *See Cellular Dynamics, Inc, supra*, slip op at 3. The MGCRA contains no such savings clause, but instead specifically provides that any other law that is inconsistent with the act is not applicable to casino gaming. MCL 432.203(3).

In contrast with the MGCRA in *Kraft*, the express written language MCL 445.1534 does not provide any indication that its application was intended to restrict other common law causes of action. To the contrary, MCL 445.1534 contains clear language stating that the act shall not limit liability that would otherwise be available under common law.

In *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187; 729 NW2d 898 (2006), the court determined the Public Works Bonding Act (PWBA) did not exclude the availability of alternative common-law remedies, and thus, Plaintiff could seek recovery for their common law claims separate and aside from any statutory right or remedy. Recently in *Aroma Wines & Equip, Inc v Columbian Distrib Servs*, 2015 Mich LEXIS 1433 (Mich. June 17, 2015) this court has recognized (although not in the context of a preemption argument) that Michigan's conversion statute provides a separate and independent right of remedy from its common law counter-part. The language set forth in subsection 2 of the conversion statute contains a savings clause that is nearly identical to the language set forth in MCL 445.1534 The plain language of the franchise statute's savings clause can only be read to affirm a party's ability to pursue independent common law and statutory rights. Had the Legislature intended for the act to be the sole and exclusive remedy, they certainly could have done so.

STATEMENT OF RELIEF SOUGHT

Plaintiffs request that this court deny, Defendants' Application for Leave thus allowing the case to be remanded back to the Circuit Court consistent with the ruling of the Court of Appeals.

Dated: August 7, 2015

/s/ John T. Herman

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