

**STATE OF MICHIGAN**  
**IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND**

**WALDRON PROPERTIES 11, LLC,**  
**Plaintiff,**

v.

**Case No. 13-136376-CK**  
**Hon. James M. Alexander**

**ZOUP! SYSTEMS, LLC and**  
**ERIC ERSHER,**  
**Defendants.**

---

**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendant Eric Ersher's Motion to Dismiss and Motion to Strike Jury Demand. On March 20, 2011, Plaintiff Waldron and Defendant Zoup entered into a Franchise Agreement, whereby Waldron would own and operate a Zoup franchise. Both sides allege that the other violated various portions of said agreement.<sup>1</sup>

Relevant to the current motion, Defendants argue that the Franchise Agreement contains provisions that: (1) prohibit Defendant Ersher's inclusion in this lawsuit, and (2) waive Plaintiffs' right to demand a jury.

To their end, Defendants now move for summary disposition under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

---

<sup>1</sup> Plaintiff Waldron initially filed suit against only Defendant Zoup. With its Answer, Zoup also filed a counterclaim against Waldron and a third-party claim against Waldron's principal, Dennis Stevens. Plaintiffs then answered said Complaints with their own third-party Complaint naming Waldron's principal, Eric Ersher as a Defendant. For ease, the term Plaintiffs refers to Waldron and Stevens, and the term Defendants refers to Zoup and Ersher.

Defendants argue that they are entitled to summary disposition on these issues based on language found in a written contract. Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

#### **1. Zoup’s principal, Eric Ersher, as a Defendant.**

Defendants first argue that, under the plain terms of the Franchise Agreement, Eric Ersher (Zoup’s principal) must be dismissed from this lawsuit. Section 16(G) provides (emphasis added):

Franchise Owner acknowledges and agrees that in all of its dealings with the Company, the Company’s owners, members, officers, directors, employees and agents act only in a representative and not in an individual, capacity and that business dealings between Franchise Owner and them as a result of this Agreement are deemed to be only between Franchise Owner and the Company. **Franchise Owner agrees that any claims it (or any of Franchise Owner’s owners) may have against the Company’s owners, members, officers, directors, employees or agents must be brought against the Company only, and not against such owners, members, officers, directors, employees or agents in their individual capacity.**

Under this provision, Defendants argue that Eric Ersher, Zoup’s principal, is an improper Defendant and must be dismissed from this lawsuit.

In response, Plaintiffs argue that claims made against Mr. Ersher under Michigan’s Franchise Investment Law Act cannot be subject to contractual waiver. In support, Plaintiffs cite

to MCL 445.1527(b), which provides that “[a] 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.” In their Amended Complaint, Plaintiffs specifically allege that Defendants (including Mr. Ersher) violated MCL 445.1505 of the Franchise Investment Act.<sup>2</sup>

The Court notes that much of Defendants’ Reply Brief focuses on arguing that Plaintiffs’ Response Brief was untimely as it was filed on February 24, 2014 – five days after the February 19 due date. Defendants’ argument, however, fails to recognize the February 24, 2014 “**Stipulated** Order Adjourning Dates for Answer to Motion for Summary Disposition and Reply” that extended the Response due date to February 26, 2014. As a result, the Court rejects Defendants’ argument that Plaintiffs’ Response was untimely.

Defendants also fail to address whether MCL 445.1527 applies in this situation. By the Act’s plain terms, if a franchise document purports to waive a party’s ability to sue based on rights provided **in the act**, such a provision is void and unenforceable. In this case, Plaintiffs claim violations of the Franchise Investment Act. Because the Act provides Plaintiffs with the right to sue both the individual and corporate Defendants for violations of the act, the waiver clause is void and unenforceable as to such claims.

---

<sup>2</sup> This section provides:

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.

Under MCL 445.1503(5), a “person” is defined as “an individual, corporation, a partnership, a joint venture, an association, a joint stock company, a trust, or an unincorporated organization.” Under MCL 445.1532, “a principal executive officer or director of a corporation” is “jointly and severally with and to the same extent” as said corporation.

With respect to Plaintiffs' breach of the Franchise Agreement claim, however, Plaintiffs fail to argue that the waiver is somehow unenforceable. Such a claim does not arise from rights provided in the Act, but rather arises from traditional contract law. Because Plaintiffs fail to identify any basis to defeat the waiver in a straightforward breach of contract claim, the Court finds that it must enforce the unambiguous contract's terms and the parties' apparent intent – that any claims relating to a breach of the franchisee agreement must be brought only against the corporate Defendant.

This finding is consistent with the general notion that the only parties bound by a contract are those named in the document. And Mr. Ersher only signed the Agreement as Zoup's "Managing Member" and not in his individual capacity.

For the foregoing reasons and viewing the evidence in the light most favorable to Plaintiffs, this Court concludes that there are no material facts in dispute and Defendants are entitled to partial judgment as a matter of law. Defendants' Motion to Dismiss Eric Ersher is GRANTED IN PART. Mr. Ersher is dismissed as a Defendant only as it pertains to Plaintiffs' breach of contract claim. With respect to Plaintiffs' claim for Violation of Michigan's Franchise Investment Law, however, Defendants' motion is DENIED.

## **2. Waiver of trial by jury.**

Next, Defendants argue that Plaintiffs' jury demand must be stricken under the plain terms of Franchise Agreement, which provides: "The Company and Franchise Owner (and Franchise Owner's Owners) irrevocably waive trial by jury in any action, proceeding, or counterclaim, whether at law or equity, brought by either the Company or Franchise Owner (or its Owners). Section 15(H).

Our Supreme Court has held that “the right to a jury trial in a civil action is . . . permissive, not absolute,” and therefore, the same may be waived. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 183; 405 NW2d 88 (1987).

In response, Plaintiffs concede “it is true that a jury trial can be waived and that the language of 15(H) provides for a jury waiver.” But Plaintiffs argue that the language of the waiver provision is “misleading and, thus, confusing.” The Court disagrees.

The cited section plainly states that Plaintiffs Waldron (as franchise owner) and Stevens (as franchise owner’s owner) waive their right to a jury trial “in any action, proceeding, or counterclaim, whether at law or equity” brought by any of these parties. The present action certainly fits within this provision.

Further, Plaintiffs offer no substantive analysis on this issue and cite to no authority in support of their argument. Michigan law is clear that, “A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

For the foregoing reasons and viewing the evidence in the light most favorable to Plaintiffs, this Court concludes that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. As a result, Defendants’ Motion to Strike Plaintiffs’ jury demand is GRANTED.

**IT IS SO ORDERED.**

March 12, 2014  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge