STATE OF MICHIGAN

IN THE SUPREME COURT

DAVID ABBO, ~~an Individual,~~
COLORADO TOYZ, INC.,
~~a Colorado Corporation,~~
WIRELESS PHONES, LLC,
~~a Colorado Limited Liability Company~~,

Plaintiffs/Appellees,

vs.

WIRELESS TOYZ FRANCHISE, LLC;
~~A Michigan Limited Liability Company,~~
JOE BARBAT, ~~an Individual,~~
RICHARD SIMTOB, ~~an Individual,~~
JSB ENTERPRIZES, INC., ~~a Michigan Corporation~~, and JACK BARBAT,
~~an Individual,~~

Defendants/Appellants.

Supreme Court No. ____________

COA No. 304185 Gpu 5-13-14

CC No. 2007-082804-CK
Hon. Shalina D. Kumar
Oakland

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APPLICATION FOR LEAVE TO APPEAL OR FOR PEREMPTORY REVERSAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendants/Appellants Wireless Toyz Franchise, LLC, Joe Barbat, Richard Simtob and JSB Enterprises, Inc. (collectively "Wireless Toyz") seek leave to appeal the May 13, 2014 majority opinion of the court of appeals on reconsideration (Tab A). The Court erred in reversing the trial court's order of JNOV in favor of Wireless Toyz as to silent fraud, the only count on which Plaintiffs/Appellees David Abbo, Colorado Toyz, Inc, and Wireless Phones, LLC (collectively "Abbo") had obtained a favorable verdict at trial. The jury rejected several other claims, including Abbo's fraud claims based on statutory franchise law.

This is a franchise case, involving the offer and sale of two Wireless Toyz franchises. The majority reversed the JNOV—both originally and on reconsideration—on the grounds that:

- the merger/integration clauses in the sale documents do not bar claims based upon oral statements that pre-dated delivery of the statutorily required written franchise offering documents;
- Abbo presented sufficient evidence of misleading pre-offer oral statements; and
- Abbo's reliance upon the pre-offer oral statements was reasonable.

The dissenting judge would have affirmed the JNOV based on the merger/integration clauses and the absence of reasonable reliance (Tab B). The alleged pre-offer oral statements were directly contradicted by the express representations, disclosures, disclaimers and acknowledgements in the Uniform Franchise Offering Circular and in the Franchise Agreement, Development Agent Agreement and Acknowledgements executed by Abbo.

Wireless Toyz asks this Court to grant leave to appeal to take up the important questions of franchise law presented or, in the alternative, to reverse the court of appeals at the application stage and reinstate the trial court's JNOV order on the basis of the dissenting opinion below (as well as the opinion of the trial court in granting JNOV on the silent fraud issue).

JURISDICTIONAL STATEMENT

This appeal was originally decided on February 4, 2014 (Tab C). The majority (Presiding Judge Elizabeth Gleicher and Judge Amy Ronayne Krause) reversed, Judge Michael Riordan dissenting. Wireless Toyz timely sought reconsideration because of significant errors in the majority opinion and, on May 13, 2014, the court of appeals granted the motion, vacating the February opinions and substituting new opinions. This application for leave to appeal is being filed within 42 days of May 13, 2014. MCR 7.302(C)(2)(b). Thus, this Court has jurisdiction to grant leave to appeal, enter a final order, or issue a peremptory order. MCR 7.302(H)(1).

STATEMENT OF QUESTIONS INVOLVED

I. Should this Court reverse peremptorily under MCR 7.302(H)(1) and affirm the trial court's JNOV on Abbo's "silent fraud" claim for the reasons stated in the Court of Appeals dissenting opinion, which gave effect to the parties' merger clauses as well as the other provisions in the Uniform Franchise Offering Circular, the fully-integrated Franchise Agreement and Development Agent Agreement, and Abbo's written acknowledgment of non-reliance on oral statements, all of which negated any possibility of reasonable reliance and silent fraud in this case?

Wireless Toyz says "Yes."

The trial court would say "Yes."

The dissenting court of appeals judge would say "Yes."

The court of appeals says "No."

II. Should this Court, which has never written on fraud issues in connection with the Michigan Franchise Investment Law, grant leave to appeal to consider the jurisprudentially significant issues raised on the effect to be given to the prescribed governing documents used in the offer and sale of franchise businesses in Michigan and elsewhere, in the face of fraud claims seeking to circumvent those governing documents?

Wireless Toyz says "Yes."

The trial court would say "Yes."

The dissenting court of appeals judge would say "Yes."

The court of appeals says "No."

INTRODUCTION

The court of appeals majority opinion, even after a second try, fails to accord the merger/integration clauses in the parties' contracts the weight they must be accorded under settled Michigan and federal precedent, which standing alone is enough to warrant an MCR 7.302(B)(5) reversal on the application papers. This can conveniently be done by reversing for the reasons set forth in the dissenting opinion.

There is another set of errors that is more jurisprudentially significant. MCR 7.302(B)(3). The offering of franchises—the subject of this case—is heavily regulated in Michigan under the Michigan Franchise Investment Law ("MFIL"), MCL 445.1501 *et seq* and federally by the Federal Trade Commission. These largely uniform regulations have been interpreted and applied often in other jurisdictions, but never by this Court. This case may be the perfect vehicle. The majority below criticized the dissenting judge for relying on federal securities decisions discussing the "bespeaks caution" doctrine, but never discussed the on-point franchise law decisions cited by Wireless Toyz. These decisions show that the majority's ruling here is an anomalous outlier. The very specific disclosure requirements in MCL 445.1508 were fully complied with by Wireless Toyz in the key franchise offering document required by law, while Abbo's case is premised on allegations of pre-offering statements that, in his own signed documents, he represents were not made. Abbo also represents that he did not rely on whatever statements were made before the offer. The court of appeals has rendered meaningless the protections designed by law to protect the franchisor from exactly the sort of after-the-fact and difficult-to-disprove "silent fraud" claims asserted by Abbo. This decision, if it stands, is a powerful disincentive to offer franchises to anyone if Michigan law governs. Accordingly, if this Court does not peremptorily reverse, it should grant leave to appeal to address these important questions.

Procedurally, this case reached the court of appeals after most of Abbo's nine claims were dismissed voluntarily (specifically, rescission) or rejected by a jury. Abbo received a favorable verdict on one claim only, a common law "silent fraud" claim based on trial evidence of alleged oral statements that predated the formal written offer required by franchise law. Abbo's theory was not fraud in the inducement, but merely "silent fraud." He did not plead fraud in the inducement, as both the trial court and court of appeals noted. The Hon. Steven Andrews presided over trial, shortly before retiring. The jury found no liability on any MFIL cause of action, including fraud. The damages awarded were rescissionary—the return of franchise fees. Wireless Toyz' JNOV motion on "silent fraud" was decided by the originally assigned judge, Hon. Shalina Kumar. The motion was granted and an appeal was taken. In February 2014, a divided panel reversed the JNOV and reinstated the jury's verdict. The majority mistakenly believed that the jury had not been instructed on the element of reliance as to silent fraud and that this presumed error had been waived. Wireless Toyz sought reconsideration of these and other errors. The panel vacated its opinions and released new ones on May 13. The majority continued to believe that JNOV was improvidently granted; the dissent continued to disagree.

Under Federal Trade Commission rules, which parallel the MFIL, franchises are offered only via a formal disclosure document called at the time of this transaction a Uniform Franchise Offering Circular ("UFOC"). (It is now called a Franchise Disclosure Document.) The UFOC, as its name implies, is uniform throughout the country. It is updated annually and is akin to a securities offering. Abbo's "silent fraud" claim is based entirely on preliminary discussions that *preceded* delivery of the UFOC, Abbo's own due diligence (such as it was), his formal acknowledgments of non-reliance on oral statements, and execution of the contract documents.

The gist of Abbo's case is that costs and expenses were not adequately disclosed, specifically "hits" and "chargebacks."[1] But a UFOC does not disclose operating costs or expenses at all and indeed expressly disclaims all such representations. Wireless Toyz could not create a false impression on a subject that it had no duty to address and was on record as not addressing. Moreover, Abbo was on record as understanding all this, agreeing with it, and undertaking its own investigation. And the majority simply erred on the law in thinking that the MFIL, specifically its general anti-fraud provision, MCL 445.1505, required disclosure of specific levels of operating costs and expenses. Neither Section 5 nor any other provision in the MFIL requires any disclosure of operating costs and expenses.

The majority thought that Abbo's "silent fraud" claim arose from Wireless Toyz' Section 5 duty not to omit to state material facts necessary to make the statements made—*i.e.*, the statements in the UFOC—not misleading (Tab A at 5). This is wrong for several reasons:

- Abbo's Section 5 claim was submitted to and rejected by the jury. The jury necessarily found no omission to state any material fact.
- Because there is no duty to address operating costs and expenses, per Section 8 of the MFIL, MCL 445.1508(2)(p), facts stated and unstated regarding them are not material in any Section 5 sense.
- Because operating costs and expenses are variable, local, and franchisee-driven, estimating them is part of each potential franchisee's due diligence before purchasing a franchise, as Abbo understood and agreed.
- Section 34 of the MFIL preempts common law claims subsumed within Sections 5, 8, and 32, so Section 5 cannot be the basis for Abbo's "silent fraud" claim. The majority fails to address this point.

[1] The wireless industry is one of many in which hits and chargebacks are common. "Hits" are cell phone discounts at the point of sale based on local competition, offered by the franchisee in its sole discretion. See §10.4 of the form agreement appended to Abbo's UFOC. "Chargebacks" are lost commission revenue when a customer's wireless service is cancelled within a period of time specified by the carrier, typically 6 months. Item 6 of the UFOC disclosed that all commissions are subject to the chargeback contingency. Abbo concededly understood both kinds of risks.

The majority has created a disclosure requirement for which there is no statutory basis, leading to a result inconsistent with virtually every franchise law decision nationally.

As for facts volunteered by a franchisor on topics there is no duty to disclose, the majority relied on an FTC regulation cited in a Colorado state court case (Tab A at 9-10), but ignored the many on-point opinions in franchise cases relied upon by Wireless Toyz. These cases, many with identical fact patterns, demonstrate the majority's errors regarding:

- the binding force and effect of merger/integration clauses;
- the binding force and effect of express disclaimers and franchisee acknowledgments;
- the absence of a legal duty to disclose particular levels of operating expenses; and
- the binding force and effect of acknowledgements, representations and warranties regarding the absence of oral representations and the absence of reliance.

These state and federal cases uniformly support Wireless Toyz and the JNOV granted by the trial court on the "silent fraud" claim. They show an appreciation, completely lacking in the majority opinion, for the way in which franchises are offered and sold throughout the country. They do not disregard, as the majority did, Abbo's admissions that it was his own duty to investigate expenses like "hits" and "chargebacks" and that he was not relying on statements from Wireless Toyz. They appreciate, as the majority does not, the national application and repercussions of these uniformly correct franchise law decisions. Apart from the injustice to Wireless Toyz, the majority has made Michigan an outlier—a jurisdiction hostile to franchising.

The majority's dismissal of the merger/integration clauses in the Franchise Agreement and the Development Agent Agreement has hostile implications for businesses of all kinds. The dissent recognized this and rebutted the majority's efforts to circumvent those clauses (Tab A at 4-7) by treating precontractual statements as dealing with subjects not addressed in or absorbed by the contract. This is particularly troubling in the franchise context, because the content of the

UFOC and the contracts is so heavily regulated by statute. And it is troubling in this specific case because Abbo admittedly knew the limitations of the statements he alleges were made.

Not only does the majority allow Abbo to contradict his own formal, signed statements that the representations he alleges were not made to him and that he did not rely on whatever pre-offer "puffing" statements were made, it permits him to prove fraud by means of evidence that "hits" and "chargebacks" in 2006 were more costly to him than the generalities he recalls about what he alleges he was told in 2004 concerning what others experienced in 2003 and earlier. Abbo introduced *no* evidence as to the cost of "hits" or the rate of "chargebacks" in 2003.

This Court should either reverse peremptorily on the basis of the dissenting opinion, which will provide Wireless Toyz with the relief it seeks and go far to remedy the majority's disregard of the law governing merger and integration clauses, or it should grant leave to appeal to address the important issues raised concerning the Michigan Franchise Investment Law.

STATEMENT OF FACTS

A. The parties

On May 9, 2007, Abbo (again, a collective reference to the plaintiffs David Abbo, Colorado Toyz, Inc., and Wireless Phones, LLC), sued Wireless Toyz (collectively, defendants Wireless Toyz Franchise, LLC, Joe Barbat, Richard Simtob, JSB Enterprizes, Inc., and Jack Barbat) in the Oakland County Circuit Court. Abbo alleged various statutory and common law claims relating to the offer and sale of a Franchise Agreement (to Wireless Phones) and a Development Agent Agreement (to Colorado Toyz). The latter agreement gave Colorado Toyz the exclusive right to market and sell Wireless Toyz franchises in Colorado; the former agreement was for a store opened in Aurora, Colorado. David Abbo formed Wireless Phones with nonparty Michael Bober. Abbo formed Colorado Toyz with his father and uncle, also nonparties. Abbo paid $20,000 for the store franchise in August 2004 and $180,600 for the Colorado development agreement in August 2005.

Wireless Toyz, a Michigan limited liability company, offers and sells Wireless Toyz franchises nationally. JSB Enterprizes supplies Wireless Toyz's franchisees with wireless merchandise and services, and also owns and operates Wireless Toyz stores. Joe Barbat is the founder and president of Wireless Toyz and JSB Enterprizes. Richard Simtob, a Wireless Toyz vice president, participated in the offer and sale to Abbo. Jack Barbat, Joe's younger brother, handles operations, franchise support and training for Wireless Toyz. Abbo did not receive a verdict against either JSB Enterprizes or Jack Barbat.

B. The transaction documents

Under the MFIL, there are four important documents in this case—the Uniform Franchise Offering Circular (UFOC) (Tab D), the Franchise Agreement (Tab E), Abbo's Acknowledgment (Tab F), and the Development Agent Agreement (Tab G).

1. The UFOC

Franchises are offered and sold under state law (MFIL, MCL 445.1501 *et seq*) and federal regulation (rules of the Federal Trade Commission). These uniform rules mandate in detail what must be disclosed and how. The UFOC (Tab D) is the required disclosure document.

The UFOC cannot provide "complete" information regarding the franchise opportunity, and is required by the FTC to say so:

> [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. READ ALL OF YOUR CONTRACT CAREFULLY. (*id.*, cover page)

The UFOC has more than 50 pages and includes attachments totaling perhaps twice as many pages more (Tab D is just the UFOC itself, but the version in the record includes the exhibits). It describes the franchise opportunities and provides disclosures about wireless carriers, market competition, demographics and economic factors that affect the business opportunities.

Item 19 of the UFOC ("Earnings Claims") is of particular importance in this case. After a page of disclosures in all capitals, there is a table of average results per location followed by notes A through L, several of which are pertinent here (Tab D at 43-46). The emphasized text at the beginning stresses that operating costs and expenses are not included:

> THE EARNINGS CLAIMS FIGURE(S) DOES (DO) NOT REFLECT THE COSTS OF REVENUES, OPERATING EXPENSES OR OTHER COSTS OR EXPENSES THAT MUST BE DEDUCTED FROM GROSS REVENUE FIGURES TO OBTAIN YOUR NET INCOME OR PROFIT. YOU SHOULD CONDUCT AN INDEPENDENT INVESTIGATION OF THE COSTS AND EXPENSES YOU WILL INCUR IN OPERATING YOUR FRANCHISED BUSINESS. FRANCHISEES OR FORMER FRANCHISEES, LISTED IN THE OFFERING CIRCULAR, MAY BE ONE SOURCE OF THIS INFORMATION. (*id.* 43)

Item 19 also expressly disclosed that:

> THE AVERAGE COMMISSIONS, ACTIVATIONS, MONTHLY STORE REVENUE FROM MERCHANDISE AND COOP ADVERTISING CREDIT PAID SHOULD NOT BE CONSIDERED AS THE ACTUAL OR PROBABLE RESULTS THAT WILL BE REALIZED BY YOU. ACTUAL RESULTS WILL VARY FROM STORE TO STORE AND WE CANNOT ESTIMATE OR GUARANTEE THE RESULTS OF ANY SPECIFIC STORE. (*id.*)

Finally, Item 19 states that: "WE DO NOT REPRESENT THAT YOUR STORE WILL BE PROFITABLE." (*id.*)

The notes following the table in Item 19 disclose that less than half of the stores in operation attained or surpassed the historical averages (*id.* 44). Note F in Item 19 states again that operating expenses (other than some fees payable to Wireless Toyz in Item 6) are not reflected and that they will be significant:

> The table does not reflect expenses that will be incurred and that must be deducted to determine net income or profit. These expenses, which are likely to be significant, will vary widely among stores...(*id.* 45).

The Notes disclosed other factors like local competition (Note I), comparative expertise (Note J), managerial skills (Note K), and local demographic and economic conditions (Note L), all of which affect profitability (*id.*).

While the effect of "hits" and "chargebacks" could not be and was not quantified in any way in the UFOC, the existence of chargebacks are disclosed in Item 6, Note 2 (*id.* 6; "Net activations are new activations less charge backs (cancelled activations) from previous activations"). Hits are simply self-imposed discounts, when franchisees choose to boost sales volume by selling equipment at reduced prices that they, in their sole discretion, decide upon.

Item 17 of the UFOC explains to the franchisee as part of the initial offer that the franchise agreement, if one is later signed, will contain a merger/integration clause (*id.* 39, item "t" in table). It tells the prospective franchisee that "[o]nly the terms of the Franchise Agreement are binding. The Franchise Agreement supersedes any prior agreements. Any other promises may not be enforceable" (*id.*). Finally, it points the franchisee to the actual merger/integration clause in a sample franchise agreement, attached as an exhibit to the UFOC (*id.*). The same procedure is followed with the development agent agreement later in the table (*id.* 42, item "t" in table). The franchisee is given the same admonition about the effect of the merger/integration clause in the development agent agreement, another exhibit to the UFOC (*id.*).

2. The Franchise Agreement

The Franchise Agreement (Tab E) is the contract between Wireless Toyz and Abbo's company, Wireless Phones. With respect to "hits," it provides that Wireless Phones, *i.e.*, Abbo, "shall establish the prices at which the Merchandise is to be sold" (*id.* §10.4 at 9). Pricing is a function of local market competition, as discussed throughout the UFOC. The Franchise Agreement, like the UFOC, makes it clear that Wireless Toyz has made no representations or estimates concerning costs, other than in the UFOC itself. Abbo formally represented and warranted that:

> Except as provided in the Offering Circular delivered to the Franchise Owner, the Franchise Owner acknowledges that Wireless Toyz has not, either orally or in writing, represented, estimated or projected any specified level of sales, costs or profits for this Franchise, nor represented the sales, costs or profit level of any other Wireless Toyz Store. (Tab E §11.2 at 12)

Abbo also represented and warranted that he had consulted with his own professional advisors and was able to accept the risks associated with the business (*id.* §11.3 at 12).

3. The Acknowledgement

In the Acknowledgement, signed at the time of the Franchise Agreement, Abbo represented that "[n]o oral, written or visual claim or representation, which contradicted the Franchis Offering Circular, was made to me" (Tab F at (c)(2)) and that "[n]o oral, written or visual claim or representation except for what is included in the UFOC, which stated or suggested any sales, income, profit levels or *operating expenses* was made to me" (*id.* (c)(3) (emphasis added). Wireless Toyz required prospective franchisees to sign the Acknowledgment to verify that they were not relying upon any representations beyond those contained in the transaction documents (Simtob trial testimony, 2/10/10 at 153).

4. The Development Agent Agreement

The Development Agent Agreement (Tab G) is the contract between Wireless Toyz and Abbo's company, Colorado Toyz (called the "Development Agent" in this agreement). Abbo entered into this contract about a year after the Franchise Agreement, and after participating in extensive classroom and on-the-job training with Wireless Toyz. In this agreement, Abbo acknowledges that he is familiar with the business and that his success depends primarily on his own efforts and, specifically, that:

neither Wireless Toyz nor any of its agents have made or are authorized to make any oral, written or visual representations or projections of potential earnings, sales, profits, *costs*, *expenses*, prospects or changes of success except as set forth in Wireless Toyz's Franchise Offering Circular or as otherwise set forth in writing. Development Agent agrees that is has not relied on and that Wireless Toyz will not be bound by allegations of any representations as to potential earnings, sales, profits, *costs*, *expenses*, prospects or chances of success except as set forth in Wireless Toyz's Franchise Offering Circular or as otherwise set forth in writing. (Tab G §1.4, last paragraph, at 3; emphasis added)

Both the franchise agreement and the development agent agreement also provide explicitly that the franchise fee is nonrefundable (Tab E §6.1 at 4; Tab G §4.1 at 6).

C. Procedural history

1. The allegations in the complaint

On May 9, 2007, Abbo sued Wireless Toyz, alleging various statutory claims under the MFIL, common law misrepresentation and omission claims and breach of contract. Abbo admitted in the court of appeals that he did not plead a fraud-in-the-inducement claim (Brief of Appellants at 12). The JNOV opinion noted the absence of such a claim (Tab H at 9), as did the court of appeals majority opinion (Tab A at 8). Nonetheless, Abbo argued in the court of appeals as though he had presented such a claim. The majority concluded that a simple silent fraud claim sufficed to vitiate the contracts here (*id.*). Abbo did not directly challenge the existence, substance or enforceability of the merger/integration clauses.

2. The trial proceedings

This case was initially assigned to Judge Shalina Kumar. It was tried before a jury and Judge Steven Andrews, shortly before he retired, and returned to Judge Kumar for postjudgment proceedings. Trial began on February 4, 2010. On February 23, Judge Andrews granted Jack Barbat's request for directed verdict. The next day, Abbo elected the remedy of damages over the inconsistent, alternative remedy of rescission and voluntarily dismissed his rescission claim

(Count IV) with prejudice (Trial transcript, 2/24/2010 at 7-9). Nonetheless, Judge Andrews permitted the jury to consider both remedies. The jury's award was for rescissionary damages.

The trial was lengthy, but the evidence relevant to Abbo's silent fraud claim is simply stated. Abbo and Bober met representatives of Wireless Toyz, including Richard Simtob, in July 2004, before delivery of the UFOC, at a "Discovery Day" event (Trial testimony 2/10/10 at 150-151, 43-44). The UFOC was completed more than two months earlier, not just for Abbo. Because chargebacks can occur up to six months after service activation, Wireless Toyz representatives could not and did not have current information when they met Abbo and Bober. Wireless Toyz did not even track such operational expenses (*e.g.*, Trial testimony 2/9/2010 at 247, 263-266, 327; 2/10/1010 at 38-39, 43-44, 112; 2/11/2010 at 16, 21-22, 146-147, 152). As to hits, Wireless Toyz did not set prices (Tab E, §10.4; Trial testimony 2/11/201 at 20) and franchisees accounted for and reported operating expenses differently, so Wireless Toyz could not include such third-party information in the UFOC. Simtob discussed the nature and uncertainty of hits and chargebacks with Abbo and Bober on Discovery Day (*id.* 2/9/2010 at 310-311; 2/10/2010 at 43-44).

Bober's recollection of Discovery Day was that chargebacks were generally discussed, but he could not recall specifics, except that Simtob gave a passing range of 5-7% (*id.* 2/12/2010 at 116-117). He did not recall any specific discussion of hits (*id.* 117). He admitted that Simtob's chargeback range was not based on historical, empirical data and did not relate to Colorado (*id.* 242-244; 2/16/2010 at 11). After Discovery Day, Bober and Abbo spent a month doing due diligence and their own investigation, including their own accountant's advice, before signing the Franchise Agreement (*id.* 2/12/2010 at 270-271). Bober/Abbo investigated alternative business ventures with Wireless Giant, a retail/franchisor competitor of Wireless Toyz (*id.* 2/16/2010 at 19-20, 56-57).

Abbo's recollection of Discovery Day was generally similar to Bober's, although Abbo claimed that Simtob said, as to the alleged chargeback range of 5-7%, that a good operator could keep them in that range (*id.* at 312-316). His testimony, like Bober's, was vague, as his testimony about "hits" shows:

> I can't remember the nature of it. It might have been his little example of what he was doing. But we asked him about it, and he basically said that, you know, the—the majority of hits are about 50 bucks, but this is what he said, this—greatest thing is since you're moving out of state, a lot of our out of state stores don't even have to take hits.

Abbo admitted that there were no Colorado-specific statements or projections (*id.* 2/18/2010 at 164-167). Like Bober, he testified to the due diligence performed (*id.* 36-38, 96), adding that they contacted virtually every Wireless Toyz franchisee (*id.* 96-99), but did not ask them about hits or chargebacks (*id.* 178). Abbo signed all the transaction documents, understood the merger/integration clauses, and understood that per the UFOC no representations were being made about operating costs or expenses (*id.* 31, 52-54, 79-80, 106, 108, 114, 174, 198-199).

The jury rendered its liability verdict on February 26, returning "no cause" verdicts as to each and every one of Abbo's claims, except for silent fraud. On that claim, the jury found Wireless Toyz, Joe Barbat and Richard Simtob liable. On March 3, the jury returned a verdict on damages, awarding $20,000 against Simtob for the Franchise Agreement fee, $180,600 against Wireless Toyz for the Development Agent Agreement fee, and $0 against Joe Barbat.[2]

On March 12, 2010, Wireless Toyz, Joe Barbat and Simtob moved for JNOV, new trial, or remittitur. The briefing and argument was extensive—Wireless Toyz submitted three

[2] The jury specifically found zero damages attributable to hits and chargebacks, the ostensible subject of Abbo's silent fraud claim (Trial Transcript, 3/3/10 at 144-147).

additional briefs between August 2010 and January 2011—since Judge Kumar was not present at trial. The court granted JNOV in an Opinion and Order dated February 7, 2011 (Tab H). The trial court's opinion will be discussed in the argument section of this application.

Abbo appealed of right. The court of appeals reversed in a split decision on February 4, 2014 (Tab C) and again on reconsideration, again on a 2-1 vote, on May 13 (Tabs A and B). These opinions also will be discussed in the argument section of this application.

ARGUMENT

I.

IF THE COURT CHOOSES NOT TO GIVE PLENARY REVIEW TO THE MFIL ISSUES, IT SHOULD PEREMPTORILY REVERSE ON THE BASIS OF THE MERGER/INTEGRATION CLAUSE AND RELIANCE ISSUES, FOR THE REASONS GIVEN BY THE DISSENTING COURT OFAPPEALS JUDGE AND THE TRIAL COURT JUDGE

A. The standard of review is de novo

The propriety of a JNOV ruling is a question of law on appeal. *Reed v Yackell*, 473 Mich 520, 528 (2005); *Craig v Oakwood Hosp*, 471 Mich 67, 77 (2004); *Forge v Smith*, 458 Mich 198, 204 (1998).

B. The dissenting judge and the trial court judge were right on the merger/integration and reliance issues

The scorecard stands at two judges apiece on the effect to be given to the merger/ integration clauses in the parties' agreements and the related question whether Abbo's claimed reliance was reasonable in light of those clauses and Abbo's acknowledgments. These were primarily legal questions for a court to answer. To the limited extent they had a potential factual component—whether the clauses themselves were infected with fraud—there was no evidence from which the jury could have so concluded and nothing to indicate that they did so conclude.

In granting JNOV, the trial court explained why Abbo could not claim to have reasonably relied on oral statements made to him before he received the UFOC (Tab D), did his own due diligence, and signed the Franchise Agreement (Tab E), the Acknowledgment (Tab F), and (later) the Development Agent Agreement (Tab G):

> [U]nder Michigan law, the merger/integration clauses and signed acknowledgements are valid, binding and enforceable, and bar Plaintiffs' Silent Fraud claim, which is based upon alleged extra-contractual and oral misrepresentations or omissions, as a matter of law. [Citing *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486 (1998), and *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145 (2006).] As the court of appeals held in

> *Hamade*, "when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself, that is, fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause." [271 Mich App at 169-170] The Court finds Plaintiffs failed to introduce any evidence of fraud relating to the merger clause. Id. On the contrary, the testimonial evidence demonstrates that Plaintiffs acknowledged and understood the significance and legal effect of the merger/ integration and signed acknowledgements. (Tab H, JNOV Opinion at 15-16)

Because the merger/integration clauses were valid and enforceable, they had the explicitly intended effect of superseding any and all prior statements, oral or otherwise. And because Abbo knew *that*, he could not have reasonably relied on earlier statements about "hits" and "chargebacks" when he signed his companies' agreements with Wireless Toyz. Again, the trial court understood this:

> ...Plaintiffs failed to establish the reasonable reliance element of the Silent Fraud claim as a matter of law....[3] [B]ased upon the evidence, any reliance on extra contractual statements was inherently unreasonable. In fact, the Court notes that the extra-contractual statements regarding hits and chargebacks were contradicted by the express disclaimers in the UFOC, Franchise Agreement, Development Agent Agreement, and Acknowledgements. In particular, the Development Agent Agreement provided [quoting Tab G §1.4, at 3; most of the quotation is reproduced earlier in this brief at pages 9-10; it's the passage where Abbo agrees that he has not relied on extra-contractual statements].
>
> Plaintiffs could not have reasonably relied on any extra contractual oral comments regarding hits and chargebacks, nor could such alleged statements have damaged Plaintiffs. [Citing *UAW-GM, supra.*] The mere existence of a merger and integration provision renders reliance upon oral statements unreasonable. Id. The Court further notes that Plaintiff Mr. Abbo admitted that the UFOC disclosed the existence of the merger/integration clauses in both the Franchise Agreement and the Development Agent Agreement (Joint Exhibit 2 pp. 39). Therefore, the merger/integration clause effectively eviscerates any counter argument that such extra-contractual statements influenced Plaintiffs to sign the agreements with Defendants. (Tab H, JNOV Opinion at 18)

[3] At this point in the JNOV opinion, deleted here, the trial court erroneously states that the jury was not instructed on the reasonable reliance element of a silent fraud claim. It was. The trial court goes on, however, as quoted above, to reach the same conclusion either way. The Court of Appeals majority was confused and in error in its original opinion on this instructional issue (Tab C at 12-14), but reconsidered and deleted that discussion from its May opinion (Tab A).

Based on that reasoning and those authorities, and applying the right review standard, *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 86 (2009), the trial court granted judgment to Wireless Toyz. Court of Appeals Judge Riordan, dissenting, agreed with the trial court.

The dissenting opinion (Tab B), which this Court could easily adopt, properly holds that (1) the merger/integration clauses bar Abbo's silent fraud claims based on the Discovery Day conversation that preceded delivery of the UFOC and (2) Abbo's claimed reliance on that conversation was unreasonable as a matter of law. The opinion begins by stressing the purpose of merger/integration clauses and why parties include them in their contracts (*id.* 1-2). Like the trial court, the dissent points out that only fraud infecting the merger clause itself or the entire contract could vitiate the contract (*id.* 2).

The dissent recognized that Abbo was an entrepreneur with proven business acumen (*id.* 4). He had an accountant working for him (*id.*). He sought out the opportunity by attending Discovery Day (*id.* 3-4). Later, when he received the UFOC, he understood the advice that he should contact other franchisees (*id.* 3). He did so. He knew what hits and chargebacks were (*id.*). The UFOC and contract documents were filled with "warnings and disclaimers" (*id.* 4). The dissent would have held that the "abundant and meaningful cautionary language" in the documents put Abbo on notice (bespoke caution) that he needed to verify anything he was told orally about operating expenses that was not in the documents (*id.*). This, however, is exactly what Abbo admittedly did not do in his contacts with other Wireless Toyz franchisees. Having signed the agreements without verifying matters that he now claims were important to him, and having formally acknowledged that he was not relying on non-contractual oral statements, he has no one to blame but himself. He was not defrauded.

C. The majority failed to apply Michigan's settled merger/integration law

The court of appeals majority understood that silent fraud is still fraud, requiring "suppression of the truth" (Tab A 4) or at least silence when there is a duty to speak (*id.* 5). The majority holds that silent fraud required Abbo "to establish that defendants (1) suppressed or concealed the truth by employing false and misleading words (2) with the intent to defraud or deceive, (3) while having a duty to disclose factually accurate information" (Tab A at 5). The majority, however, was incorrect in thinking that Wireless Toyz had any duty to speak on the subject of operating costs and expenses, including hits and chargebacks. The majority found a statutory duty to speak (*id.* 5), where none exists.

The majority's discussion of the merger clauses begins correctly (*id.* 5-6). The two clauses are quoted (*id.* 6), and lip service is paid to the proposition that they bar parol evidence introduced to revise or contradict the terms stated in the two agreements (*id.* 5-6). But, says the majority, "[a] party may present evidence that deceit induced a contract, thereby rendering the agreement void" (*id.* 6). Indeed, there is a doctrine of "fraud in the inducement" that, in an appropriate case, may void a contract. Abbo, however, did not plead fraud in the inducement, as the majority acknowledged (*id.* 8). Still, the majority thought this was no obstacle to Abbo:

> More than one type of fraud may vitiate a contract. Fraudulent inducement may serve, and so may silent fraud. Indeed, both types of fraud require proof that the defendant procured contractual promises through fraud. Like fraudulent inducement, silent fraud undermines a party's ability to make an informed economic decision to enter into a contract. Accordingly, defendants may not hide behind the merger clauses merely because Abbo pleaded a species of fraud other than fraudulent inducement. (*id.* 8).

Contrary to the majority's statement, it matters that this is not a fraud-in-the-inducement case, which is why Abbo likely will respond by claiming that this *is* such a case. It matters because it is not just any sort of fraud that may "vitiate a contract," and preliminary oral statements by a franchisor do *not* "undermine" a prospective franchisee's "ability to make an informed economic decision," even before the delivery of a detailed, formal offering document and an extended due diligence period, during which time the franchisee had free access to all other franchisees and the freedom to ask them about their experiences with operating expenses like "hits" and "chargebacks." Indeed, Abbo was *directed* to "conduct an independent investigation of the costs and expenses you will incur in operating your franchised business" by Item 19 of the UFOC (Tab D at 43). The UFOC disclosed the names and contact information for all current and former Wireless Toyz franchisees.

When parties have a contract, the economic loss doctrine prevents one of them from avoiding the contract's terms just by saying "fraud." *Neibarger v Universal Coop, Inc*, 439 Mich 512, 520 (1992). It is only a true "fraud in the inducement" claim that justifies allowing parties to avoid their contracts by saying "fraud." *Huron Tool & Engineering Co v Precision Consulting Serv, Inc*, 209 Mich App 365, 371-374 (1995) (fraud in the inducement is the only kind of fraud claim not barred by the economic loss doctrine). There is a key difference "between fraud extraneous to the contract and fraud interwoven with the breach of contract." *Id.* 373. Here, Abbo's alleged silent fraud claim is based on the "quality and characteristics" of the franchise opportunity he bought, just as the plaintiff in *Huron Tool* was complaining about the software system it bought. *Id.* 375. A true fraud-in-the-inducement claim must allege fraud distinct from the subject matter of the parties' contract, such as that the defendant is not who or what he says he is. Abbo has no such claim.

Abbo *must* avoid his contracts with Wireless Toyz to have any redress for his insufficiently profitable franchise operations, because—as the jury found—he had no redress for breach of contract under the terms of the agreements. Moreover—as the jury also found—there was no fraud under Section 5 of the Michigan Franchise Investment Law, which should itself have prevented Abbo from recovering on a common law "silent fraud" claim.[4] Abbo did not even plead a "fraud in the inducement" claim, however, and if he is permitted to recoup his franchise fees and avoid his contracts on the mere basis of a conversation when the parties met, then Michigan contract law will "drown in a sea of tort." *Neibarger*, 439 Mich at 531.

The case at bar is very much like one this Court addressed six years ago. *General Motors Corp v Alumi-Bunk, Inc*, 482 Mich 1080 (2008). In *Alumi-Bunk* the posture was summary disposition rather than JNOV. The court of appeals, on a 2-1 vote, allowed a fraud-in-the-inducement claim to proceed, when GM claimed it reasonably relied on a precontractual promise that never made it into the parties' contract. *Alumi-Bunk*, 2007 WL 2118796 (2007) (Tab I). The dissenting judge, citing *Neibarger* and *Huron Tool*, disagreed. *Id. Alumi-Bunk* shows that even if Abbo is deemed to have properly pleaded a fraud-in-the-inducement claim, the claim was not viable.

This Court reversed in a paragraph for the reasons stated in Judge K.F. Kelly's dissenting opinion. *Alumi-Bunk* is an express adoption by this Court of the reasoning in *Huron Tool*. Chief Justice Young added that this tort claim "is clearly barred by the economic loss doctrine because it is inextricably interwoven" with the contract claim. The facts were that GM agreed to give Alumi-Bunk, which had been a Ford truck customer, a special price on 148 Chevy Silverado trucks—an extra $7,200 off each vehicle, over a million dollars off in all—with the understanding that Alumi-Bunk would "upfit" them—modify them into fifth-wheel haulers—before reselling them. Although GM claimed that Alumi-Bunk represented during negotiations

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[4] Wireless Toyz raised the preemption argument in the Court of Appeals, but not in the trial court. The Court of Appeals did not address preemption. If this Court grants leave to appeal to consider the MFIL issues raised in the next section of this application, Wireless Toyz requests that the Court ask the parties to discuss in their briefs the issue of whether the MFIL preempts common-law fraud claims, considering that the statute itself in Section 5 broadly describes what fraud claims may be asserted as to both misrepresentations and omissions.

that it would upfit the trucks, the parties' contract contained no such term, and Alumi-Bunk resold the trucks without upfitting them.

Similarly, the jury here could believe that Abbo was told on Discovery Day that hits generally were about \$50 and the level of chargebacks were about 5 to 7%, but the Franchise Agreement and the Development Agent Agreement have no such terms. Moreover, the agreements here are fully integrated, which was not the case in *Alumi-Bunk*. Even if Abbo *were* making a fraud-in-the-inducement claim, it would be subject to peremptory reversal on the basis of Judge Riordan's opinion, just as it was in *Alumi-Bunk* on the basis of Judge K.F. Kelly's opinion. But Abbo is making only the even-weaker claim that once Wireless Toyz said *anything* about hits and chargebacks, it was "silent fraud" not to say *everything* about hits and chargebacks, and that the parties could not thereafter agree to formal contracts that explicitly disclaimed any representations concerning operating costs and expenses. At least in *Alumi-Bunk* it appears the defendant actually promised to do something it did not intend to do and then never did. In the present case, Abbo's alleged facts are a quantum step weaker.

The majority attempts to distinguish between "information supplied to *induce* a contract" and "a contractual term" (Tab A at 7 n.4; emphasis added). This is a telling statement. First, it reveals that the majority *was* permitting Abbo to make a "fraud in the inducement" claim that he never pleaded (and that the majority ostensibly was not considering). Second, it disregards the parties' contractual intent to eliminate completely reliance on any information not expressly set forth in the documents and specifically on any information concerning operating expenses. The majority reads the merger/integration clauses too restrictively when it states that the clauses negate only prior agreements, not prior oral statements (*id.* 7). The contracts *do* speak to operating costs and expenses by asserting that *no* information not contained in the contract may be conveyed by franchisor to franchisee (lack of authorization), and that no information regarding operating costs and expenses has been conveyed, or is authorized to have been conveyed, or has in fact been relied upon by franchisee. This is what the parties agreed to.

The majority seems not to have understood this. Its footnote 5 (Tab A at 8), purports to dismiss the dissenting opinion because the issue was not a "guarantee of profitability," which the majority thought was all the dissent was talking about. Instead, according to the majority

> Abbo presented evidence substantiating that Abbo made a good faith attempt to calculate the likelihood of profiting from a franchise investment, and in so doing relied on information provided by [Wireless Toyz] that was *not* addressed, or was incompletely addressed, in the UFOC. Moreover, Abbo did not seek (or receive) "representations or projections of potential earnings, sales costs, expenses, prospects or chances of success" as disclaimed in the development agent agreement; he attempted to acquire the raw data necessary to make his *own* profit projections. (Tab A at 8 n.5; emphasis by the Court).

Abbo's "good faith" attempt, however, apparently was nothing more than using remarks made on Discovery Day as the "raw data" and inexplicably failing to ask any of the many franchisees Abbo contacted about their actual experience of "hits" and "chargebacks." The majority says that Abbo neither sought nor received "representations" concerning "sales costs" or "expenses," but the effect of its decision is precisely to give Abbo his franchise fees back for no reason other than an allegedly misleading oral statement of sales costs and expenses, even though the parties agreed there were not and could not be any such statements.

Fundamentally, Abbo's tort and contract claims were inextricably intertwined. Abbo claims he was induced to become a Wireless Toyz franchisee by statements that led him to believe he could make money doing so, but that his actual results were unsatisfying, for which he blamed Wireless Toyz. The situation here is the same as it was in *Huron Tool*, *Alumi-Bunk*, or more recent decisions like *Appleway Equip Leasing, Inc v River City Equip Sales, Inc*, 2012 WL 6177067 (Mich App 2012) (Tab J).

The majority cites a passage from Corbin on Contracts, 6 Corbin Contracts (rev ed), §25.20[A] at 277-279, to support a broad use of parol evidence to contradict the terms of a completely integrated writing (Tab A at 7). The only Michigan case citing this proposition in Corbin, or its predecessor, is *Barclae v Zarb*, 300 Mich App 455, 481 (2013) (one of the judges in the majority here was on the *Barclae* panel). *Barclae* involved a number of competing claims and parties, but the silent fraud claim against Zarb failed for lack of a duty to reveal the information at issue—also present in the case at bar—an inability to prove the silence was calculated to defraud, and no causation as to damages. *Id.* 478. After so holding, the *Barclae* panel then turned to a discussion of the merger clause and fraud in the procurement, referencing Corbin. *Id.* 480-481. The panel concluded that "while it appears that the merger clause may not stand as a bar to plaintiffs' claim, plaintiffs' claim fails for other reasons." *Id.* 483. In short, the discussion relied on by the majority was merely dicta. The reason that Corbin does not show any other Michigan support for its discussion is that there is none. Michigan permits parol to vitiate a contract only when there is fraud in the inducement, meaning specifically fraud that is extrinsic to the contract, not a "silent fraud" claim that is anything but.

Nothing in the remainder of the majority opinion matters after these mistakes concerning the merger/integration clauses, the contracts, and Abbo's acknowledgments. The opinion turns to Abbo's "fraud evidence" next (Tab A at 8-12), but properly understood there was no fraud evidence. The opinion tries to manufacture a duty from MCL 445.1505 (*id.* 9-10), but as already explained there is no MFIL duty to disclose operating expenses. MCL 445.1508. Moreover, the jury found no MCL 445.1505 violation. (The franchise cases discussed in Argument II show why there is no duty, which is why the Court may wish to grant leave to appeal to clarify matters of franchise law it has never addressed.) The majority next turns to the subject of reliance (Tab A at

12-14). The majority's error with regard to reliance will be addressed here because it is covered in the dissenting opinion (and thus also ripe for peremptory reversal) and because it is tightly connected to the merger clauses and what it means to have an integrated contract.

D. The dissent, not the majority, understood the meaning of and need for reasonable reliance

For purposes of a fraud claim—any fraud claim—reliance must be reasonable to count. A party claiming fraud who has relied on something that a reasonable person would not, has not been defrauded. The majority was incorrect in thinking that Wireless Toyz and the dissenting judge were focused solely on the inadequacy of Abbo's due diligence. The majority goes astray in its reading of this Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547, 557 (2012) (Tab A at 13).

The majority quotes from this Court's opinion in *Titan* to establish that a party asserting fraud need not prove that "the fraud could not have been discovered through the exercise of reasonable diligence." 491 Mich at 557. That is not to say that the reliance need not be reasonable; only that reasonable reliance does not require a plaintiff to prove that it could not have discovered the fraud, had it acted reasonably. There is a big difference, as the facts of this case illustrate and as the majority failed to grasp. A hypothetical may help explain this.

Assume I tell you when we meet that I have a car for sale in good running condition that just needs regular oil changes, and later I give you a 50-page formal offer to sell you the car that says (i) I make no representation about the running condition and you need to determine its running condition yourself, (ii) if you buy it, we will first sign a fully integrated contract that says I'm saying nothing about the running condition and that has a merger clause that says I'm not saying anything that's not in the contract and you're not relying on anything that's not in the contract, and (iii) I will also require you to sign an acknowledgment that says I never told you anything about the running condition and that you're not relying on anything I did say in deciding to buy the car. You buy the car and after you drive it for a while you decide it burns a lot of oil, so you sue me for silent fraud on the ground that I told you when we met that it only needed regular oil changes, which was incomplete and misleading.

The reason you cannot satisfy the reliance element in your silent fraud action is not your failure to act reasonably and have your own mechanic check out the car first. Perhaps there would have been an issue for the trier of fact if we had gone right from that first conversation to signing over the title at the Secretary of State office. But on the facts of this hypothetical, the situation is altered completely by everything that happened between the time I told you it just needed regular oil changes and the time you started changing the oil more frequently than you expected. Everything between those two points shouts loud and clear "YOU CANNOT RELY ON THAT STATEMENT ABOUT THE OIL CHANGES." You can buy the car without having your mechanic first check it, but it would be unreasonable in the extreme to think you knew anything about the car's oil usage. You do not. You have promised that you do not. You have promised that you won't say I told you any such thing, and now here you are saying it. You can't do that.

Titan is an auto insurance case. Many provisions in auto policies are statutorily required to say what they say. Our no fault laws limit the ability of insurers to avoid all liability to third parties after an accident on the basis of an insured's application for coverage, even if it is infected with readily detected fraud, like claiming to have a valid driver's license when you do not. This Court was overruling something it called the "easily ascertainable rule" because it was a judicially created doctrine not required by the statute.

This Court's pertinent explanation of reliance in *Titan* is not in the passage quoted by the court of appeals majority (Tab A at 13), but in footnote four two pages earlier. Here the Court notes that "[i]gnoring information that contradicts a misrepresentation is considerably different than failing to affirmatively and actively investigate a representation." *Titan*, 491 Mich at 555 n.4, *citing Montgomery Ward & Co v Williams*, 330 Mich 275 (1951) and *Webb v First of Mich Corp*, 195 Mich App 470 (1992). Abbo cannot be allowed to complain that pre-offer information about hits and chargebacks was inaccurately incomplete, when he acknowledged in writing (Tab F) that he had received *no* information inconsistent with the UFOC (Tab D), which expressly denied any representations on operating costs and told him he had to investigate costs himself, and when he further disclaimed reliance as to operating costs in his contracts (Tabs E and G). The UFOC, contract documents, and his written acknowledgment all contained statements that contradicted the representation that hits ran about $50 and chargebacks about 5 to 7 percent.

That is why the dissenting opinion's use of the "bespeaks caution" cases (Tab B at 4) was apropos, contrary to what the majority thought (Tab A at 12 n.7). The cautionary language in the documents did not merely concern overall profitability, but focused also, and specifically, on operating expenses. The majority says that the "bespeaks caution" doctrine does not shield statements of present or past facts (*id.*), but even if Abbo could have relied on the Discovery Day conversation about hits and chargebacks—and he could not—those 2004 statements concerning earlier experiences in 2003 (and before) were never shown to be inaccurate. Abbo's evidence concerned a different place and time (2006 in Colorado). The key point, however, remains this: To permit Abbo to rely in any way on the Discovery Day conversation, as the dissent pointed out, "is to hold the written agreement[s] for naught" (Tab B at 4, *citing Adler v William Blair & Co*, 271 Ill App 3d 117, 127; 648 NE2d 226 (1995)). This Court should reverse on the application papers for the reasons stated by the dissent. MCR 7.302(H)(1).

II.

IN THE ALTERNATIVE, THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER THE IMPORTANT ISSUES OF MICHIGAN FRANCHISE LAW PRESENTED IN THIS CASE AND DEALT WITH INADEQUATELY AND INCORRECTLY BY THE COURT OF APPEALS

A. The standard of review is de novo

The propriety of a JNOV ruling is a question of law on appeal. *Reed, supra*, 473 Mich at 528; *Craig, supra*, 471 Mich at 77; *Forge, supra*, 458 Mich at 204.

B. Courts that have decided previous franchise cases in Michigan and elsewhere would uniformly affirm the JNOV granted as to Abbo's silent fraud claim

The majority's decision is potentially devastating to the franchise industry. It ignores the balance struck between franchisees and franchisors over decades of regulatory activity in arriving at the language of the UFOC, now standard in at least 15 states and the standard used by the FTC nationally, which has had a comprehensive Franchise Rule since 1979. The UFOC regulations are akin to the SEC regulatory structure for offerings in the securities context.

Operating costs are dependent on variables outside the control of the franchisor and the franchisee must assess them on his or her own, without relying on the franchisor. The perfect example is hits—discounts offered by franchisees in their sole discretion, as deemed desirable in light of nearby competitors. There are 23 standard "Items" covered in the UFOC, and operating expense is not one of them. Abbo understood that these were the rules and bound himself to these rules in multiple agreements. The jury should never have heard this claim and the trial court was right to correct that error after the verdict.

- The evidence adduced at trial did not—could not—support the required element of reasonable reliance for two reasons:
- First, with regard to alleged misrepresentations, Michigan law holds that a party cannot later contradict his signed agreement that he did not rely on prior statements. This legal principle is distinct from the merger clause argument.

- Second, with regard to alleged misleading silence, Abbo cannot contradict the consequences of his signed acknowledgments that Wireless Toyz did not provide actual, estimated, or projected information regarding operating costs or expenses.

Wireless Toyz cited several on-point franchise cases to the court of appeals, none of which the majority mentioned. Some of these cases come from other jurisdictions,[5] but remain significant because of their persuasive value and because franchise law is—and needs to be—uniform nationally. These cases set forth the proper analytical framework for considering Abbo's silent fraud claim, and it is not the framework used by the majority. In addition to the analysis of merger/integration clauses in the franchise context, these cases help explain why operating expenses cannot be disclosed and why a franchisee's express acknowledgments matter.

In *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145 *lv den* 477 Mich 912 (2006), cited earlier, the court of appeals upheld a grant of summary disposition for defendants on various claims, including silent fraud. As required by *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486 (1998), also cited earlier, the parties' merger/integration clause barred plaintiff's claims based on extra-contractual representations and omissions:

> [B]ecause the valid integration clause nullified all prior and contemporaneous agreements, understandings, representations, and warranties, plaintiff may not use parol evidence to contradict the explicit terms of the integration clause.... Likewise, the valid integration clause renders reliance upon the [extra-contractual] representation unreasonable as a matter of law. Therefore, plaintiff's claims based on silent fraud, fraudulent misrepresentation and innocent misrepresentation, all of which require reliance on a misrepresentation...must also fail. 271 Mich App at 171

Doty v CleanNet of Greater MI, Inc, 2003 WL 22956401 (Mich App 2003) (Tab K), involved the purchase of a commercial janitorial franchise. The franchisor and its officers

[5] *See Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004) (lower court federal decisions are not binding on Michigan courts, but may be persuasive); *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 42 n10 (2008) (a Michigan court "may follow an unpublished opinion if it finds the reasoning persuasive"); *Adams v Adams*, 276 Mich App 704, 716 (2007) ("federal decisions interpreting Michigan law are often persuasive").

appealed from a jury verdict in the franchisees' favor, arguing in part that the trial court erred when it denied their motion for summary disposition on the franchisees' fraud claims, a motion based in part on the merger/integration clauses in the franchise agreements. The court of appeals agreed:

> Here, the alleged misrepresentations were explained, contradicted or superseded by the written terms of the franchise agreements and the merger and integration clauses nullified any promises or representations made outside the agreements themselves....All of the agreements contain clauses stating that the agreement is complete, it supersedes any other agreements, any modifications must be in writing, and that no other representations or promises apply that are contrary to the terms of the written agreements.
>
> Because the franchise agreements contain clauses that address the particular statements allegedly made to induce plaintiffs to sign the agreements and because the agreements contain clear merger and integration clauses, defendants are correct—under Michigan law, it was unreasonable for plaintiffs to rely on alleged outside representations." (Tab K at *3-*4, *citing Novak v Nationwide Mut Ins Co*, 235 Mich App 675 (1999); and *UAW-GM, supra.*

The *Doty* panel held that even the "fraud in the inducement" claim made in that case had to give way before the parties' merger and integration clauses (Tab K at *4).

In *Siemer v Quizno's Franchise Co, LLC*, 2008 WL 904874 (ND Ill, 2008) (Tab L), UFOC Item 19 presented average gross earnings figures, but like the present case did ***not*** disclose or itemize corresponding costs and expenses, expressly noting that all costs and expenses must be deducted from the gross earnings figures to calculate income. The UFOC also expressly stated that the franchisor's sales representatives were not authorized to make any such representations, and both the UFOC and the franchise agreement cautioned that potential franchisees could not rely upon any representations regarding profitability, except as set forth in the UFOC and the franchise agreement. The court dismissed the franchisees' misrepresentation and omission claims because the franchisees' claimed reliance was unreasonable:

> [T]he UFOC and the Franchise Agreement each contain disclaimers and non-reliance clauses that are repetitive and easily seen by any party who takes the time

> to read them. Faced with these "unambiguous" clauses, [the franchisees] cannot have reasonably relied upon any oral statements concerning likely profits and expenses in deciding whether to invest in a Quizno's franchise....[The franchisees] reviewed and even signed representations affirming that they would not rely on any statements outside the four corners of the contractual documents. In fact, the UFOC explicitly warned [the franchisees] not to rely on any representations not contained in the document itself. (Tab L at *8; *see also* *7)

In *Rocky Mtn Chocolate Factory, Inc v SDMS, Inc*, 2009 WL 579516 (D Colo, 2009) (Tab M), a case with virtually the same UFOC Item 19 disclaimers, the court entered judgment against the franchisee on its misrepresentation and omission claims due to a lack of reasonable reliance in light of the express representations, disclaimers and acknowledgements (*id.* at *11). The franchisee's alleged reliance on extra-contractual misrepresentations and omissions was unreasonable and unjustified (*id.* at *12).

In *Sherman v Ben & Jerry's Franchising, Inc*, 2009 WL 2462539 (D Vt, 2009) (Tab N), the court reached the same result for the same reasons on essentially the same facts. The franchise agreement contained a valid and binding merger/integration clause, along with express representations of the franchisee disclaiming reliance upon any representations except for those set forth in the UFOC and the franchise agreement. Item 19 of the UFOC presented gross sales figures and some variable cost percentages, but did not present complete or itemized data regarding corresponding costs and expenses. The court stressed that the documents, as in the present case, covered the very claims later brought by the franchisee:

> Where a seller ***expressly*** disclaims any express or implied warranty concerning ***specific*** representations, and a buyer ***expressly*** acknowledges the disclaimer and the need to conduct an independent investigation, that party may not sue on a claim she was defrauded into entering the contract in reliance upon those very representations." (Tab N at *4; emphasis by the court; *see also* *5).

In *Cook v Little Caesar Enterprises, Inc*, 210 F3d 653 (CA 6, 2000), the Sixth Circuit, citing Michigan law, including *NAG Enters, Inc v All State Indus, Inc*, 407 Mich 407, 410 (1979) and *UAW-GM, supra*, 228 Mich App at 502, affirmed a ruling in favor of a franchisor on various grounds, including the effect of the merger/integration provisions in the franchise agreements. 210 F3d at 656-657. When it turned to the MFIL, the *Cook* Court found a dearth of on-point law in Michigan—which indeed is why this Court may wish to grant leave to appeal here—so it turned to jurisdictions with the same franchise rules, Illinois and Indiana. *Id.* at 659. It rejected the argument, accepted by the majority here, that reliance need not be reasonable. *Id.* And it cited approvingly the observation of the Seventh Circuit that "it is simply unreasonable to continue to rely on representations after stating in writing that you are not so relying." *Id., citing Hardee's of Maumelle, Ark, Inc v Hardee's Food Systems, Inc*, 31 F3d 573, 576 (CA 7 1994). The majority ignored the *Cook* decision.

In *Aron Alan, LLC v Tanfran*, 240 Fed Appx 678 (CA 6, 2007) (Tab O), a tanning salon franchisee claimed fraud and violations of the MFIL. The district court granted the franchisor's summary judgment motion, and the Sixth Circuit affirmed, noting Michigan law requiring that reliance be reasonable, both in general and specifically with respect to MFIL claims. *Id.* 682, citing several Michigan precedents, including *Novak, supra,* and *Nieves v Bell Indus, Inc*, 204 Mich App 459 (1994). In the present case, the majority's misuse of *Titan* to excuse Abbo from any obligation to double check what he recalls being told on Discovery Day about hits and chargebacks, is completely inconsistent with the MFIL and Abbo's agreement to investigate himself the operating costs and expenses incurred by other past and present franchisees, using the contact information supplied by Wireless Toyz in the UFOC:

> The terms of the written [franchise] agreement bolster this conclusion. Though the misrepresentations find no express contradiction in the written agreement, [the franchisees] did agree to bear an important investigative responsibility. The terms of the agreement impose an affirmative duty upon [the franchisees] to enter the relationship with their eyes open and with the assurance that they are satisfied with the due diligence they undertook. While the terms of the agreement pursuant to the above analysis do not of their own accord render [the franchisees'] reliance unreasonable, they do inform the context in which [the franchisees] operated.

Aron Alan, 240 Fed Appx at 683-684 (Tab O).

All of these cases were presented to and ignored by the majority below. There are more such cases being decided all the time, of course, and the message they consistently send is that the majority in the present case erred. *See, e.g., Joseph McSweeney Enterprises, LLC v Mister Softee Sales and Mfrg, LLC*, 2013 WL 4588569 (D NJ, 2013) (Tab P).

The majority's decision in this case is irreconcilable with all of these franchise decisions. Some are from other jurisdictions, some of them are from federal courts, and some are unpublished decisions of the court of appeals. There are binding, published, precedential cases in Michigan that are also irreconcilable with the majority's decision, but they are not specifically franchise cases interpreting the MFIL. By granting leave to appeal in this case and addressing the MFIL issues, this Court can fill what currently is a void in Michigan case law.

As will often be the case in franchise situations, both merger clauses and disclaimer statements are at issue here. Abbo's acknowledgment (Tab F) is a disclaimer statement. The majority never deals with the fact that Abbo disclaimed the existence of the statements he later alleged were made but were misleadingly incomplete or inaccurate. The majority does note, near the end of its "reliance" section (Tab A at 14), that the trial court considered disclaimer clauses as well as merger/integration clauses, but never considers the disclaimer clauses itself.

This was error. Abbo affirmatively, repeatedly asserted that there had been silence—*i.e.*, that he had not received information concerning operating costs. At trial, of course, he testified that he *had* received information, but that it was misleadingly incomplete. As a matter of law, however, he cannot contradict his own formal, written, signed statements to the contrary. He cannot have been reasonably relying on things he was or was not told at the same moment that he signed his name to documents asserting that he did not so rely. Under precedents like *Hamade*, *Novak*, and cases like *Doty*, Abbo's silent fraud claim was barred by his own acknowledgments and disclaimers.

C. The MFIL preempts Abbo's "silent fraud" claim

Although the issue was not presented to the trial court, MFIL preemption is a purely legal question that should be addressed by this Court. *Tingley v Kortz*, 262 Mich App 583, 588 (2004) (appellate courts have the discretion to review a legal issue not raised by the parties in the trial court). The court of appeals chose not to address preemption, which was fully briefed by Wireless Toyz, but this Court may make its own decision.

State statutes may preempt common law claims. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 543-544 (2004), *citing Millross v Plum Hollow Golf Club*, 429 Mich 178, 181 (1987). Whether a statutory scheme preempts, changes or amends the common law is a question of legislative intent. *Millross*, 429 Mich at 183. This Court recently reaffirmed that "[w]here legislation is comprehensive, providing in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, then there is a legislative intention that a statute preempt common law." *Kyser v Kasson Twp*, 486 Mich 514, 539 (2010) (internal quotations and citations omitted); *Kraft*, 261 Mich App at 545. To ascertain this intention, courts look to the statute itself. *House Speaker v State Admin Bd*, 441 Mich 547, 567 (1993). Furthermore, "where a statute creates a new right and prescribes a particular remedy, the remedy is exclusive and must be strictly construed." *Millross*, 429 Mich at 184.

The MFIL provides a comprehensive statutory scheme governing the offer and sale of franchises, and expressly establishes exclusive statutory causes of action, remedies and limitations periods. It establishes statutory causes of action for misrepresentations and omissions under MCL 445.1505, for improper delivery of disclosure documents under MCL 445.1508, and for the liability of officers for underlying violations of Section 5 or Section 8 under MCL

445.1532, as well as the four-year statute of repose prescribed in MCL 445.1533. The statute also establishes alternative statutory remedies of either actual damages or rescission for underlying violations of Sections 5, 8 and 32 under MCL 445.1531(1). Section 34 of the statute reveals that conduct violative of the MFIL is to be dealt with under the MFIL:

> Except as explicitly provided in this act, civil liability in favor of any private party shall not arise against a person by implication from or as a result of the violation of a provision of this act or a rule or order hereunder. 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. MCL 445.1534.

In *R&B Communications, Inc v Wireless Toyz Franchise, LLC*, Oakland Circuit Case No. 10-113623-CK (Hon. Colleen A. O'Brien) (Tab Q, 4/13/11 Tr), the court held that the MFIL preempts all common law claims relating to and arising from the offer and sale of another Wireless Toyz franchise (*id.* at 19-21). The court was persuaded by *Samica Enterprises, LLC v Mail Boxes Etc USA, Inc*, 637 F Supp 2d 712 (CD Cal, 2008), a case interpreting the California Franchise Investment Law's analogue to MCL 445.1534. Because the MFIL "provides the exclusive cause of action, remedies, and limitation periods for specific types of misconduct relating to the offer and sale of franchise[s]," it "preempt[ed certain] common law misrepresentation and omission, rescission, and concert of action claims (Tab Q at 21). Section 34 preempts all claims established and covered under the MFIL (misrepresentation and omission, improper delivery, liability of officers and rescission claims), whereas the savings clause at the end merely ensures that claims beyond the MFIL's sphere, like breach of contract, may be brought separately (*id.* at 20-21). *But see Toyz, LLC v Wireless Toyz, Inc*, 799 F Supp 2d 737, 744-45 (ED Mich, 2011) (District Judge Victoria Roberts, disagreeing with Circuit Judge O'Brien). Judge Roberts focused only on the savings clause at the end, perhaps forgetting that "[a] general 'remedies' saving clause cannot be allowed to supersede the specific substantive provision." *Morales v Trans World Airlines, Inc*, 504 US 374, 385 (1992).

Here, Abbo's "silent fraud" claim is simply a differently stated version of its fraud claim under §5 of the MFIL, a claim that was raised, tried in full, and submitted to a jury that ruled against Abbo. Section 5 provides, in part, that "[a] person shall not, in connection with the filing, offer, sale, or purchase of any franchise, directly or directly," among other things, "[m]ake any untrue statement of 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.*" MCL 445.1505(b) (emphasis added). Abbo's "silent fraud" claim plainly was duplicative of his §5 fraud claim. Abbo also alleged a §8 claim (statutory disclosure requirements) and again the jury ruled in favor of Wireless Toyz. Section 8, specifically MCL 445.1508(2), negates any possible duty of a franchisor with regard to disclosing the operating costs and expenses of doing business. If this Court decides to give plenary consideration to the MFIL issues presented in this case, it should consider whether common law fraud claims are preempted by the statute.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Wireless Toyz asks this Court to grant peremptory relief under MCR 7.302(H)(1) and reverse for the reasons stated in the court of appeals dissenting opinion (Tab B) and reinstate the JNOV entered by the trial court (Tab H).

In the alternative, Wireless Toyz asks this Court to grant leave to appeal from the May 13, 2014 majority decision of the court of appeals (Tab A) to consider the important questions of Michigan franchise law presented but inadequately addressed by the majority.

Respectfully Submitted:

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