S204543

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Taylor Patterson,

Plaintiff and Appellant,

v.

Domino's Pizza LLC, et al,

Defendants and Respondents.

Court of Appeal, Second Appellate District,
Division Six, Case No. B235099
Ventura County Superior Court
Case No. 56-2009-00347668-CU-OE-SIM
Honorable Barbara Lane

OPENING BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S204543 - PATTERSON v. DOMINOS PIZZA

Full Name of Interested Entity/Person	**Party / Non-Party**		**Nature of Interest**
NONE	[ ]	[ ]	
Re: Domino's Pizza, LLC, Domino's Pizza Franchising, and Domino's Pizza, Inc.			
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OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

Whether a franchisor can be held vicariously liable for the acts of a franchisee's employee where the franchisor did not exercise control over the day-to-day details concerning the type of conduct giving rise to the plaintiff's claims.

INTRODUCTION

This case provides the opportunity for this Court to adopt a bright line "instrumentality of the harm" standard for vicarious liability in the franchise area, one of the fastest growing forms of business in this state. (See King, *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees* (2005) 62 Wash. & Lee L.Rev. 417, 421 (hereafter, "Limiting Vicarious Liability") [as of 2003 there were "1500 franchise companies operating in the United States through more than 320,000 retail units" which accounted for "more than 40% of all retail sales" in this country; a new franchise opens every eight minutes in the United States]; International Franchise Association, The Economic Impact of Franchised Businesses; Volume III, Results for 2007 [franchises generated economic activity totaling almost $95 billion and created over 10 percent of private, nonfarm jobs in the state in 2007].)

Taylor Patterson claims that Domino's, as the franchisor of thousands of pizza stores across the nation, should be held responsible for sexual harassment she experienced from a fellow employee over a two-week period when she worked at a Thousand Oaks Domino's store owned and run by franchisee Sui Juris. The trial court granted summary judgment in favor of Domino's Pizza LLC, Domino's Pizza Franchising and Domino's Pizza, Inc. (collectively, Domino's), on the grounds that Domino's did not have the power to control day-to-day operations at Sui Juris; rather, Sui Juris, as the franchisee, had the power to hire,

fire, and train employees, and therefore Domino's could not be vicariously liable for the alleged harassment.

This Court should affirm the summary judgment and, in so doing, make clear that, before vicarious liability will be imposed on a franchisor, the franchisor must control, or have the right to control, the daily conduct or operation of the particular "instrumentality" or aspect of the franchisee's business that allegedly caused the harm. (See *Kerl v. Dennis Rasmussen, Inc.* (Wis. 2004) 682 N.W.2d 328, 340.) Such a bright line standard, focused on operational control of the type of conduct at issue in the case, will provide certainty for both franchisees and franchisors, comport with the policy underlying vicarious liability, and acknowledge the unique franchise business model and the need for franchisor control of trademark and brand-related aspects of the franchise.

At the very least, this Court should remand to the Court of Appeal to decide the remaining alternative grounds for summary judgment relied on by the trial court.

BACKGROUND: THE ROLE OF FRANCHISES

Franchises are "contractual arrangement[s] between two legally independent firms in which one firm, the franchisee, pays the other firm, the franchisor, for the right to sell the franchisor's product, the right to use its trademarks and business format in a certain location for a certain period of time, or both." (Lafontaine and Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States* (2009) 3 Entrepreneurial Bus.

L.J. 381, 382 (hereafter Lafontaine); see also Barkoff and Selden, *Introduction* in Fundamentals of Franchising (3d ed. 2008) p. xvii (hereafter Barkoff).)

Federal law requires the presence of three elements for a business relationship to constitute a franchise: "First, the franchisor must license a trade name and trademark that the franchisee operates under, or the franchisee must sell products or services identified by this trademark. Second, the franchisor must exert significant control over the [brand-related] operation of the franchisee or provide significant assistance to the franchisee. Third, the franchisee must pay [a certain amount] to the franchisor." (Lafontaine, *supra*, at pp. 382-383; see also Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors* (1989-1990) 45 Bus. Law. 289, 292-294.)

State franchise laws impose similar requirements. The California Department of Corporations, for example, provides that "the business in which the franchisee is granted the right to engage in must be operated under a marketing plan or system prescribed in substantial part by the franchisor," which gives rise to the requisite "appearance of some centralized management and uniform standards regarding the quality and price of the goods sold, services rendered, and other material incidents of the operation." (Cal. Dept. of Corp., Commissioner's Release 3-f: When Does an Agreement Constitute a "Franchise" (1994), at <http://www.corp.ca.gov/Commissioner/Releases/3-F.asp> [as of Nov. 30, 2012].) "The key idea behind the 'marketing

plan/community of interest' [or significant assistance] element is that the franchisor controls at least some dimensions of how the franchisee operates or conducts the franchised business." (Barkoff and Selden, *Introduction* in Fundamentals of Franchising (3d ed. 2008) p. xix.) The element of control is important for two reasons: the franchisor's need to maintain the value and ownership of its trademark and the need to maintain brand consistency across the franchise system.

Indeed, "[f]ranchising, in its simplest terms, is a . . . sophisticated form of trademark licensing." (See Finkelstein & Bussert, Trademark Law Fundamentals and Related Franchising Issues, in Barkoff and Selden, Fundamentals of Franchising (3d ed. 2008) at p. 4 (hereafter, "Finkelstein & Bussert").) "The Lanham Act allows the use of a trademark by someone other than the owner *only* when the owner exercises sufficient control over the nature and quality of the goods or services sold under the trademark by the other." (*Id.* at p. 38, emphasis added.) Thus, if a franchisor "fails to control the nature and quality of the goods or services sold by its franchisees," it may lose its ownership right in its trademark. (*Id.* at p. 39; see also Bus. & Prof. Code, §§ 14202, subd. (i), 14230 [California similarly requires a trademark owner to use and maintain its mark in a way that does not diminish or destroy its significance]; Doll, *Trademark Licensing: Quality Control* (2001) 12 J. Contemp. Legal Issues 203, 205, 208 [to avoid being deemed to have abandoned its mark, a trademark owner must actively enforce quality control standards for its mark].)

Franchises provide benefits to franchisees as well. As one Court has explained:

> For the franchisee, the arrangement mitigates the risk of starting a new business by enabling it to capitalize on the good will and established market associated with the franchisor's trademark or trade name. The burdens of starting and operating a business are eased considerably by the franchisor, which provides quality and operational methods and standards, and may offer management training programs to the franchisee.

(*Kerl v. Dennis Rasmussen, Inc.* (Wisc. 2004) 682 N.W.2d 328, 337.)

Franchises take two primary forms: (1) traditional product distribution systems (such as automobile dealerships), under which the franchised dealers "concentrate on one company's product line and to some extent identify their business with that company," and (2) business-format systems (such as fast food restaurants) which usually encompass "not only the product, service, and trademark, but the entire business format itself – a marketing strategy and plan, operating manuals and standards, quality control, and continuing two-way communication." (Lafontaine, *supra*, at pp. 384, 385.) "[B]usiness-format franchising has grown much more than traditional franchising in the last few decades." (*Id.* at p. 387.) Restaurants are one of the fastest growing forms of business-format franchises.

Today, more than one quarter of the business-format franchises in the United States are restaurants. (IHS Global Insight, The International Franchise Association Educational Foundation, The Franchise Business Economic Outlook: 2012 (2011) p. 14; see also Plaintiff's Request for Publication, p. 2 ["[m]ore and more corporations are doing business in California through franchises, and many of these franchises are restaurants" such as "Denny's, Buffalo Wild Wings, and Famous Dave's"].)

"[T]he strength of [these business-format restaurant] systems resides in their capacity to deliver a uniform product across locations and at a reasonable price. Customers know what to expect when they patronize an outlet in a successful franchise chain, and it is important for the chains to meet those expectations time after time." (Roger D. Blair & Francine Lafontaine, *Understanding the Economics of Franchising and the Laws that Regulate It* (2006-2007) 26 Franchise L.J. 55, 60; see also Shook & Shook, Franchising: The Business Strategy that Changed the World (1993) p. 139) This high level of consistency is only possible if franchisors maintain quality control through "meticulous operating procedures." (Shook & Shook, Franchising: The Business Strategy that Changed the World, supra, at pp. 155-156.) McDonald's, for example, provides franchisees with "[a] 750-page operations-and-training manual . . . [that] spells out all details relating to the chain's fundamentals of quality, service, cleanliness, and value." (*Id.*)

STATEMENT OF THE CASE[1]

A. Sui Juris, owned by Daniel Poff, purchases a Domino's Pizza franchise in Thousand Oaks.

In September 2008, Sui Juris, owned by Daniel Poff, entered into a Domino's Pizza franchising agreement for a store in Thousand Oaks. (1 JA 133, 240; 2 JA 402, 403.) Before operating the store, Poff attended a mandatory "comprehensive" five-day training seminar run by Domino's that covered a range of topics concerning franchise operations, including employment related issues. (3 JA 605-606; see also 3 JA 652-653.)

The franchise agreement between Sui Juris and Domino's Pizza Franchising LLC stated that the franchisor was "in the business of franchising retail outlets specializing in the sale of pizza and other authorized food and beverage products and featuring carry-out and delivery services . . . known as 'Domino's Pizza' stores" which "conduct business under a uniform business format, with specially designed equipment, . . . and specifications for the preparation and sale of pizza and certain authorized food products (the 'Domino's system')" using "certain valuable trademarks." (2 JA 402.) The parties "agree[d] that the terms and conditions contained in [the] agreement [were] necessary to

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[1] This statement of facts is presented consistent with the de novo review standard on summary judgment: we summarize "the facts from the record that was before the trial court when it ruled on that the motion," including "all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; see also *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1183-1184.

maintain [Domino's] high standards of quality and service and the uniformity of those standards at all Domino's Pizza stores." (2 JA 402.) As the franchisee, Sui Juris was solely responsible for training, supervising, and directing its employees. (1 JA 202-203, 204.)

Sui Juris agreed to comply with a variety of operating procedures prescribed by Domino's Pizza, from the manner of preparation of pizza to safety, maintenance, décor, and general appearance and demeanor of employees. (2 JA 417.) Many of these provisions were contained in a proprietary Operating Manual or Manager's Reference Guide. (2 JA 418.) The Manager's Reference Guide, which was designed to "provide greater brand consistency," set "minimum guidelines" (but not requirements) for the operation of all Domino's Pizza stores.[2] (2 JA 443, 451.) Sui Juris agreed to periodic inspections to ensure conformity with these and other terms of the franchise agreement. (2 JA 424.) Nonetheless, the agreement provided that "the parties to this Agreement are independent contractors and no training, assistance, or supervision which [the franchisor] may give or offer . . . shall be deemed to negate such independence . . . ." (2 JA 438.)

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[2] The Manager's Reference Guide, which was prepared in collaboration with franchisees, also contained information in other sections besides the "Standards" section, which were "not required to [be] adhere[d] to" and were "for informational purposes only." (2 JA 444.)

B. Sui Juris hires Taylor Patterson to work at the store. Within two weeks, Patterson complains about alleged sexual harassment by one of the store's assistant managers. Poff immediately suspends and agrees to fire the assistant manager.

With the purchase of the Thousand Oaks store, Sui Juris inherited from the prior franchisee 17 or 18 existing employees, including a man who served as assistant manager, Rene Miranda. (3 JA 609.) Poff subsequently interviewed and hired Taylor Patterson as a customer service representative; she began work in November 2008. (1 JA 247, 248.) The number of hours Patterson worked each week remained roughly the same throughout her tenure as an employee of Sui Juris. (1 JA 250-252; 3 JA 641.) Within two weeks of being hired, she told Poff and the police that Miranda had sexually harassed her. (1 JA 253, 254.) She left the job voluntarily a month or so later. (See 1 JA 7, 248.)

When Patterson and her father told Poff about the purported harassment, Poff immediately said he would fire Miranda. (1 JA 253.) Poff suspended Miranda pending investigation of the alleged harassment, but never had to terminate him because Miranda failed to return to work. (3 JA 617.) Poff's response to the harassment claim was consistent with that of Domino's area leader Claudia Lee,[3] who, when she learned of the alleged harassment (after Poff had already agreed

[3] Domino's area leaders help franchisees grow and assist franchisees in maintaining Domino's brand. (See post, p. 15.)

to fire Miranda), purportedly told Poff "you've got to get rid of [that] guy." (3 JA 618, 621-23.) According to Poff, there were no other sexual harassment incidents at the store, either before or after this incident. (1 JA 238.)

C. Patterson files a sexual harassment complaint.

Patterson sued Sui Juris,[4] Rene Miranda, and various Domino's corporate entities[5] for the sexual harassment she allegedly experienced. (1 JA 1-18.) She asserted claims ranging from sexual harassment and constructive discharge to intentional infliction of emotional distress and battery. (*Ibid.*) She asserted that she reported the harassment to the Domino's corporate office as well as Poff. (1 JA 6.)[6] She claimed she took a week off work after reporting the harassment and, when she returned, her hours were cut in retaliation for reporting the incident, and she was forced to resign. (1 JA 7.)

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[4] After the action was filed, Sui Juris filed for bankruptcy protection. (1 JA 81-84.)

[5] Patterson named as defendants Domino's Pizza, Inc., Domino's Pizza LLC, and Domino's Pizza Franchising LLC. (1 JA 1; see also 1 JA 99.) Domino's Pizza, Inc. is the parent corporation of Domino's Pizza LLC; Domino's Pizza Franchising LLC is an indirect subsidiary of both Domino's Pizza, Inc. and Domino's Pizza, LLC. (1 JA 132.) Domino's Pizza Franchising LLC entered into the franchise agreement with Sui Juris. (1 JA 133; see also 3 JA 673.) Domino's Pizza LLC services the franchises by offering advice and guidance. (3 JA 651, 674.)

[6] Patterson reported the alleged harassment to Domino's and Poff the same day. (See 1 JA 253-256.) Poff immediately decided to fire Miranda when Patterson brought the alleged harassment to Poff's attention. (1 JA 253; see also 4 JA 762.)

D. Domino's moves for summary judgment, arguing that Sui Juris was Patterson's employer, not Domino's, and that Domino's did not exercise substantial control over the franchisee's day-to-day hiring and firing.

Domino's filed a motion for summary judgment urging that Sui Juris was an independent contractor and there was no principal-agency relationship between Sui Juris and Domino's that could give rise to liability on Domino's part.[7] (1 JA 109-131; see also 1 JA 136-193 [Separate statement of undisputed facts in support of motion]; 1 JA 24-32 [demurrer to the complaint on the same grounds]; 1 JA 75, 105 [affirmative defenses on the same ground].) In support of the motion, Domino's submitted the franchise agreement, the declaration of Joseph Devereaux and the deposition testimony of Daniel Poff and Taylor Patterson. (See 1 JA 132-135, 197-257.)

Devereaux, the Director of Franchise Services for Domino's Pizza LLC, highlighted the key provisions of the franchise agreement that allocated to the franchisee the sole responsibility for recruiting, hiring, training, supervising, and scheduling the hours of employees. (1 JA 133.) He also explained that "[t]he foundation of the Domino's Pizza system is its intellectual property rights. The success of the system depends on its

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[7] Alternatively, Domino's argued that summary judgment should be granted because (1) the intentional infliction of emotional distress, assault and battery claims could not stand against Domino's because the conduct was outside the scope of employment and (2) the constructive discharge claim must fail because Patterson suffered no adverse employment consequences after reporting the harassment. (See 1 JA 110-111, 125-128.)

reputation as symbolized by its trademarks and trade names and valued by its goodwill." (1 JA 134.) "If quality and service vary too greatly between the franchisee stores, goodwill and customer acceptance earned at one store will be lost at another. As franchisor, the Domino's Pizza entities must impose certain controls over the franchisee or risk not only inconsistency . . . but also . . . potentially abandonment of intellectual property rights under the Federal Trademark Law. The control exercised over independent franchisees . . . does not include supervision of the day-to-day operations of the franchisees." (1 JA 135.)

Poff's deposition testimony submitted in support of the motion established that (1) Poff, and not the Domino's corporate entities, were responsible for hiring, training, and disciplining his employees; and (2) Poff provided his own sexual harassment training to his employees, and no one from Domino's corporate did so. (1 JA 233-234, 235-236, 240-241.) Taylor Patterson testified in her deposition that (1) Poff advised her that if she had any problems with sexual harassment she was to contact him right away; (2) she and her father spoke to Poff about Miranda's alleged harassment about two weeks after she started the job, and Poff told her he was going to fire Miranda; and (3) she voluntarily decided to leave the job after being there one month, and her hours remained roughly the same with the exception of one week where she worked three days instead of four. (1 JA 247, 248, 249-253, 254, 255.)

E. Patterson opposes the motion, urging that Domino's exercised substantial control over its franchisees.

Patterson argued that summary judgment was improper because, through the franchise agreement and Manager's Reference Guide, Domino's exercised substantial control over franchisees like Sui Juris. (2 JA 258-281.) At the very least, she argued that there were triable issues of material fact about the extent of Domino's control and whether it could be vicariously liable for Sui Juris's torts. (See 2 JA 262.) She pointed to the general oversight role of Domino's area leaders and Domino's response to a previous sexual harassment complaint made directly against a franchisee rather than a franchisee's employee. (*Ibid.*)

Patterson contended that summary judgment was not proper because of various purported indicia of control by Domino's over Sui Juris employees: (1) Domino's trained Poff and provided in-store training materials for employees on store operations, store safety, driving, and pizza making; (2) Domino's area leader Claudia Lee influenced the firing of two Sui Juris employees, Miranda and another assistant manager Dave Knight; (3) according to Poff, if he did not follow Lee's suggestions concerning Miranda and Knight, he would be out of business; and (4) Domino's had the power to require franchisees to attend additional training, including sexual harassment training. (2 JA 283-364; see also 2 JA 365-391.)

In support, Patterson submitted (1) the complete franchise agreement between Sui Juris and Domino's; (2) the introduction and "Standards" section of the Manager's Reference Guide; (3) various blank evaluation forms and default letters and a July 8, 2009 franchise termination letter sent to Poff by Domino's, which reflected that his franchise was being terminated for multiple failures to comply with the franchise agreement unrelated to the Patterson incident; and (4) excerpts of the depositions of Poff, Devereaux, and Lee. (2 JA 397-442, 443-523; 3 JA 524-564, 566-602, 604-642, 643-724, 725-750; 4 JA 751-795.)

In his deposition, Poff asserted that the initial training he received upon purchasing the franchise included "employment related issues" which he "believe[d]" included the "topic" of sexual harassment although he could not "give specifics." (3 JA 606.) Once he was in charge of the franchise, his area leader Claudia Lee inspected his store five times in the little under a year he owned it ("I really didn't see a lot of her"), while other Domino's inspectors visited on four other occasions. (3 JA 623-627.) Poff testified that, in general, area leaders were "just trying to help" franchisees but on two occasions – with the Patterson incident and another incident involving assistant manager Dave Knight, who delivered non-Domino's food out of area in a Domino's bag – Lee "gave instruction[s], in no uncertain terms, to do things or bad things would happen" to Poff's business; Lee also would not approve Poff buying pizza warmer equipment for a promotion he wanted to run. (3 JA 620-623, 636-638.) Poff also testified that although the Domino's PULSE computer system governed much

of what was to be done in the store, he was "not sure" whether the system provided sexual harassment training for employees. (1 JA 235; 4 JA 635.)

Domino's franchise area leader Claudia Lee testified that: (1) in 2008, she had 101 stores in her area, and she would visit 30-40 stores a week; (2) her job was to help franchisees grow and ensure that franchisees were following company guidelines pertaining to the brand; and (3) so long as franchisees were protecting the brand, how they conducted their businesses was "their business" and any suggestions she might make were "recommendations" only. (3 JA 727, 736-737, 742, 747; see also 4 JA 777, 780.) For example, she did not agree with Poff's pizza warmer idea because he wanted to pre-make pizzas and hold them in the pizza warmer cabinet, which could have adversely impacted the customer experience and was an unauthorized variance from the franchise agreement, which required pizzas to be freshly made. (4 JA 764-765.) She acknowledged it was not her job to recommend hiring or firing a franchisee employee, but that she had on five occasions during her years as area leader suggested that an employee "might not be right" for a franchisee; for example, she recommended that Poff not leave Dave Knight in charge of his store because Knight was damaging the Domino's brand and not following the franchise agreement. (4 JA 751-753, 788-791.) After the Patterson incident, Poff told Lee that he had taken Patterson and her father out to dinner and "everything was OK." (4 JA 762.)

Domino's longtime Director of Franchise Services, Joseph Devereaux, testified that Domino's has 9,000 stores worldwide, 500 of which are corporate-owned while the remainder are franchises, and that Domino's franchising system is an "internal" one – to become a franchisee, an individual would have to have been a manager at another Domino's pizza store for at least a year. (3 JA 645-647, 675.) Before they start operating the franchise, franchisees get some H.R. training in the franchise development program, "in a top level way," that includes sexual harassment training. (3 JA 652-653.) Franchisees, however, are responsible for developing their own training programs for their employees. (3 JA 685; see also 3 JA 707.) According to Devereaux, an area leader or anyone else at Domino's Pizza LLC could require a franchisee to attend supplemental training to ensure the success of that franchise and, "possibly," "depend[ing] on the specific circumstances," require the franchisee to attend a harassment prevention training program if one of his managers or employees were the perpetrator. (3 JA 669-670, 715, 717-718.) When a franchisee was alleged to have himself sexually harassed an employee, Domino's resolved the situation in part by requiring the franchisee to undergo additional harassment training and placing the franchisee in default (although the franchise was ultimately not terminated). (3 JA 693; see also 3 JA 691.)

F. Domino's replies, and files objections to the evidence submitted in opposition to the motion.

In reply, Domino's argued that the control Domino's exercised over its franchisees was consistent with brand

protection, and that it did not control the hiring, firing, or supervision of employees in the store. (4 JA 796-804.) To the extent area leader Claudia Lee recommended that another assistant manager, Dave Knight, be relieved of management responsibilities, that was also consistent with maintaining consistency and brand protection: Knight had potentially adversely impacted the brand by permitting the delivery of non-Domino's food in a Domino's bag. (4 JA 796-804.)

Domino's also filed objections to Patterson's evidence and statement of disputed facts, including assertions that: Domino's could provide additional sexual harassment training after an incident; a sample sexual harassment policy could be obtained by franchisees during the franchise development program; and an area leader could recommend that a franchisee hire a manager from another store. (4 JA 805-827.)

G. The trial court grants summary judgment on multiple alternative grounds.

The trial court granted summary judgment in Domino's favor. The trial court observed that, "[l]ike a majority of jurisdictions, California courts look to whether the franchisor exercised control over the day-to-day operations of the franchisee, or controlled through the franchise agreement the instrumentality that caused the harm." (4 JA 831.) The court found that "[t]he Domino's defendants established that, as franchisor (and related entities), they have the right to and do impose controls over their franchisees to avoid inconsistency in operating the Domino's pizza stores and the loss of associated

goodwill; however, this control did not include hiring, firing and day-to-day personnel issues." (4 JA 833, citations omitted; see also 1 JA 132-135, 197-205, 232-234; 1 JA 236, 255 [Poff trained Plaintiff and other employees on sexual harassment issues].)

The court concluded that evidence presented by the plaintiff did not raise a triable issue of fact concerning Domino's vicarious liability because (1) it was undisputed that Poff, as the owner of Sui Juris, was responsible for hiring, firing and training (including sexual harassment training); (2) even where the Domino's area leader Claudia Lee made suggestions about firing or disciplining the assistant manager at issue, the termination was ultimately Poff's decision, and, as to the incident with Knight, encompassed concerns about brand protection. (4 JA 834.)[8]

The court also granted summary judgment in favor of Domino's on alternative grounds: (1) as to the intentional infliction of emotional distress, assault and battery claims, the conduct was outside the scope of Miranda's employment as a pizza store assistant manager and there was no prior notice to

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[8] The court partially sustained Domino's objections and struck items 37, 38, 101, 125, and 126 in Patterson's additional statement of disputed facts. These provisions concerned Domino's supposedly providing (during initial franchisee training) a sample sexual harassment policy as well as suggestions about setting up a policy; statements that area leaders could recommend the hiring of another store's manager; and the assertion that area leader Lee had "inspected" Poff out of business and was threatening to do the same with other franchisees. (4 JA 830; see 4 JA 805-827.)

Domino's of similar conduct by Miranda along these lines; and (2) as to the retaliation and constructive discharge claims, there was no evidence of Domino's prior knowledge of similar conduct by Miranda or ratification of such conduct by Domino's, and there was no constructive termination or retaliation because Patterson voluntarily decided to leave her job and suffered no adverse consequences before doing so. (4 JA 835-840.)

H. The Court of Appeal reverses. This Court grants review.

The appellate court took a different view. The court determined that the language in the franchise agreement itself raised inferences that Sui Juris was not an independent contractor because it reflected that Domino's retained substantial control of its franchisee's local operations – even though none of these provisions related to the type of conduct at issue in the case. (Typed opn., pp. 4-6.) The court further determined that there was other evidence of control based on Poff's testimony that he felt that his franchise would be in jeopardy if he did not follow Domino's guidelines and area leader Lee's "suggestions" concerning termination of assistant managers Miranda and Knight. (Typed opn., pp. 7-8.) The appellate court used a slightly different standard than that employed by the trial court: whether the franchisor "assume[d] substantial control over the franchisee's local operation, its management-employee relations or employee discipline." (Typed opn., p. 4.)

The Court of Appeal addressed one of the alternative grounds for summary judgment as well. The court observed:

"[t]he trial court found that even if Domino's is considered the employer, there are no triable issues of fact showing that it had notice of, ratified, or condoned Miranda's conduct. It ruled that there are no facts showing prior incidents of sexual harassment at the restaurant. It concluded that Patterson could not prevail. These issues are relevant where an employee claims harassment by another employee. But a different standard applies where the harasser is the employee's supervisor;" to the contrary, a single sexually offensive act may give rise to liability where the harasser is a supervisor. (Typed opn., pp. 8-9.) Finally, the appellate court observed, in a single line at the close of the opinion, that "[w]e have reviewed Domino's remaining contentions and conclude they will not change the result we have reached." (Typed opn., p. 9.)

Domino's petitioned for review of the opinion, which, at Patterson's request, was published. This Court granted review, limited to the first issue in the petition: "Whether a franchisor can be held vicariously liable for the acts of a franchisee's employee where the franchisor did not exercise control over the day-to-day details concerning the type of conduct giving rise to the plaintiff's claims."

LEGAL DISCUSSION

I

A FRANCHISOR IS NOT VICARIOUSLY LIABLE FOR THE ACTS OF A FRANCHISEE EMPLOYEE IN AN AREA OVER WHICH THE FRANCHISOR DOES NOT MAINTAIN DAY-TO-DAY CONTROL.

A. California case law reflects a narrowing of the control inquiry for vicarious liability in the franchise context.

"The common law of agency in the United States encompasses the principle of *respondeat superior*, which makes an employer, or a nonemployer principal who has the right to direct another's actions, vicariously liable for torts committed by an employee or agent while acting within the scope of employment or other engagement." (*Estate of Miller v. Thrifty Rent-A-Car Sys., Inc.* (M.D. Fla. 2009) 637 F.Supp.2d 1029, 1037 [citing and quoting Restatement (Third) of Agency § 7.07].) Specifically, a franchisor may be vicariously liable for the acts of a franchisee, and a franchisee's employees, when the actual relationship between the franchisor and franchisee is determined to be one of principal and agent. (See CACI 3705; Directions for Use, CACI 3704.)

Early California case law generally applied a simple agency analysis for determining when a franchisor may be held vicariously liable for the acts of its franchisees: if the franchisor had a right of substantial control over the franchisee, an agency relationship would be found to exist. (See, e.g., *Nichols v. Arthur*

Murray, Inc. (1967) 248 Cal.App.2d 610, 613; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 547.)

Subsequent decisions have lent more nuance to this analysis, and focused on whether a franchisor exercised or had the right to exercise complete or substantial control over the means and manner in which the franchisee conducted day-to-day operations. (See, e.g., *Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1295 [concluding that, as a matter of law, the franchisor did not have the right to completely or substantially control the means and manner of the franchisee's business where (1) the franchise agreement provided that the franchisee was an independent contractor who had the right to make all inventory, employment, and operational decisions, and (2) the franchisee testified that she had sole control over employment, inventory, marketing decisions, etc.]; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 746 [granting summary judgment to franchisor because franchisor did not control or have the right to control the day-to-day operations of the franchisee's office – franchisee hired and fired employees, set office wages and commissions and determined business hours]; *Juarez v. Jani-King, Inc.* (N.D. Cal. Jan. 23, 2012) No. 09-3495, 2012 U.S. Dist. LEXIS 7406, *12-13 [concluding that franchisor did not exercise sufficient control over the franchisee to render the franchisor an employer because, inter alia, franchisee had the discretion to hire, fire and supervise its employees]; *Singh v. 7-Eleven, Inc.* (N.D. Cal. 2007) 2007 WL 715488, *2-7 [holding that franchisor was not employer under federal and state wage and hour laws;

reasoning in part that "California courts have consistently recognized that the principle test for determining employment relationships is the right of control over the manner or means of accomplishing the result desired" and have "consistently held that a principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business"]; *Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 59 [affirming trial court's refusal of agency jury instruction in a franchise liability case that "did not relate the right to control to the manner and means of accomplishing the result desired," reasoning that "it is the right to control the means and manner in which the result is achieved that is significant in determining whether a principal-agency relationship exists"].)[9]

In *Cislaw v. Southland Corp.*, for example, the Court of Appeal affirmed a grant of summary judgment in favor of franchisor 7-Eleven in a wrongful death action brought by parents of a customer of a local 7-Eleven franchise who had purchased clove cigarettes which allegedly caused his death. The franchise agreement required franchisees to complete an operations training program, carry an inventory consistent with the 7-Eleven image, and operate the store from 7 a.m. to 11 p.m. 364 days a year, and submit to store inspections, but declared

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[9] The "means and manner" analysis is consistent with the approach reflected in the Restatement. See Restatement (Third) of Agency § 7.07(3)(a) (noting that an "employee" is a subspecies of agent "whose principal controls or has the right to control the manner and means of the agent's performance of the work").

franchisees to be independent contractors. (*Cislaw*, *supra*, 4 Cal.App.4th at p. 1294.) A manager at Southland provided a declaration attesting that the franchisor had no power to require or prevent the franchisees from carrying clove cigarettes, and the franchisee herself declared she maintained "full and complete control" over her choice of inventory as well as "hiring, firing, disciplining, and compensation." (*Id.* at pp. 1292-1293.) This evidence, the Court of Appeal determined, established that "Southland did not control the means and manner" of the franchisee's operation and that franchisees retained "control over the manner and means of the store's operation." (*Id.* at p. 1295.) The court rejected the suggestion that the franchisee's operational rights were illusory because the franchise agreement permitted Southland to control the "Financial, Executive, and Operational aspects of the franchised store." (*Id.*) The court reasoned that "'[e]ven one who is interested primarily in the result to be accomplished by certain work is ordinarily permitted to retain some interest in the manner in which the work is done without rendering himself [or herself] subject to the peculiar liabilities which are imposed by law on an employer.'" (*Id.*, citation omitted.)

California courts therefore appear to have recognized that "[a] franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and goodwill, without the risk of creating an agency relationship with its franchisees." (*Id.* at p. 1295.) "The franchisor's interest in the reputation of its entire [marketing] system allows it to exercise

certain controls over the enterprise without running the risk of transforming its independent contractor franchise into an agent." (*Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, *supra*, 59 Cal.App.4th at p. 745.)

Thus far, however, California courts have fallen short of adopting the instrumentality test adopted by modern courts in other states. This Court should do so now.

B. Modern cases in other jurisdictions overwhelmingly recognize an "instrumentality test" for franchisor vicarious liability that focuses on substantial control over the instrumentality of the harm, instead of on unrelated areas of control.

Like California has done thus far, many states have resolved the tension between franchisors' need to protect their trademark, trade name and good will and, at the same time, preserve the independent contractor relationship with their franchisees by applying a more focused agency analysis in the franchisor/franchisee context: an approach that is founded on analyzing day-to-day operational control, and not on treating general operational standards in franchise agreements as dispositive of vicarious liability. (See *Rainey v. Langen* (Me. 2010) 998 A.2d 342; *Pizza K, Inc. v. Santagata* (Ga. Ct. App.4th Div. 2001) 547 S.E.2d 405, 407; *Schlotzsky's, Inc. v. Hyde* (Ga. Ct. App. 2003) 538 S.E.2d 561, 563; *Hart v. Marriott Intl.* (2003) 304 A.D. 2d 1057, 1058, 758 N.Y.S. 2d 435; *Braucher v. Swagat Group LLC* (C.D. Ill. 2010) 702 F.Supp.2d 1032, 1043-1044; *Bass v. Gopal, Inc.* (2009) 384 S.C. 238, 248; *Allen v. Greenville Hotel*

Partners, Inc. (D.S.C. 2006) 409 F.Supp.2d 672, 679; *Folsom v. Burger King* (1998) 135 Wash.2d 658, 671-673; see also *Kerl v. Dennis Rasmussen, Inc.* (Wis. 2004) 682 N.W.2d 328, 338 ["the clear trend in the case law in other jurisdictions is that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter or for all purposes"].)

Other courts have gone further, however, and adapted "the traditional master/servant 'control or right to control' test to the franchise context" by requiring the franchisor to "control or have the right to control the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm before vicarious liability may be imposed on the franchisor for the franchisee's tortious conduct."[10] (*Kerl v. Dennis Ramussen, supra,* 682 N.W.2d at p.

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[10] In so doing, some courts note that the traditional master/servant agency and vicarious liability principals are ill-suited for the franchise model. See, e.g., *Kerl v. Dennis Ramussen, supra,* 682 N.W. at p. 337 (providing "the usual justifications for vicarious liability lose some force in the franchise context, and the 'control or right to control' test for determining the presence of a master/servant agency is not easily transferable to the franchise relationship); *Coworx Staffing Servs., LLC v. Coleman* (Mass. Super. Feb. 7, 2007) No. 2005-436F, 2007 WL 738913, *5-6 (declining to adopt the traditional master/servant analysis in the franchise context explaining that "[t]he franchise relationship is very different in nature from the traditional master/servant relationship applicable to a contract for employment"); King, *Limiting Vicarious Liability, supra,* 62

340 ["a franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm"]; *Viado v. Domino's Pizza LLC* (Or. Ct. App. 2009) 217 P.3d 199, 207- 212 [affirming summary judgment for franchisor because the franchisee "and not Domino's had the right to control the physical details of the manner of performance of [the franchisee employee's] driving"]; see generally Killer and Dickie, *Franchising: Evolution of the Agency Control Dilemma Broad Versus Narrow Approach to Franchisor Liability* (1993) 11 Midwest L. Rev. 30; King, *Limiting Vicarious Liability, supra*, 62 Wash. & Lee L.Rev. at pp. 431-433 & 432, fn. 58 [collecting cases from "a number of courts [that] have required that the control by the franchisor not merely relate to the day-to-day operations, but extend 'over the specific aspects of the franchisee's business operations from which the injury arose'"].)

In total, nearly a dozen states have adopted this modern approach to franchisor liability.[11] Before imposing liability, these

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Wash & Lee L. Rev. at p. 469 ("It quickly becomes manifest that traditional rules for vicarious liability—elusive and moving targets in their own right—are ill-suited for the franchisor-franchisee relationship.")

[11] See, e.g., Arizona [*Karnauskas v. Columbia Sussex Corp.* (S.D.N.Y. Jan. 24, 2012), Case No. 09-CV-7104 GBD, 2012 WL 234377]; Idaho [*Ketterling v. Burger King Corp.* (Idaho 2012) 272 P.3d 527, 533]; Indiana [*Helmchen v. White Hen Pantry, Inc.* (Ind. App. 1997) 685 N.E.2d 180]; Kansas [*In re Motor Fuel Temperature Sales Practices Litig.* (D. Kan. Apr. 30, 2012) MDL 1840, 2012 WL 1536161]; Kentucky [*Papa John's Int'l, Inc. v.*

courts require a level of control beyond that reflected in the "standardized provisions commonly included in franchise agreements specifying uniform quality, marketing, and operation requirements." (*Kerl, supra,* at p. 341; see also *In re Motor Fuel Temperature Sales Practices Litig., supra* 2012 WL 1536161 at *5 (providing that "rights such as the right to enforce standards, the right to terminate the agreement for failure to meet standards, the right to inspect the premises, the right to require that the franchisees undergo certain training, or the mere making of suggestions and recommendations does not amount to sufficient control.")

"[T]he right to terminate a franchise agreement should the franchisee not follow mandatory procedures is generally insufficient to establish the requisite control" under this test as well. (*Helmchen v. White Hen Pantry, Inc.* (Ind. App. 1997) 685

McCoy (Ky. 2008) 244 S.W.3d 44, 54]; Massachusetts [*Coworx Staffing Services, LLC v. Coleman, supra,* 2007 WL 738913]; New Hampshire [*VanDeMark v. McDonald's Corp.* (2006) 904 A.2d 627]; New York [*Hong Wu v. Dunkin' Donuts, Inc.* (E.D.N.Y. 2000) 105 F. Supp. 2d 83, 88; *Toppel v. Marriott Int'l, Inc.* (S.D.N.Y. July 22, 2008) 03 CIV. 3042 (DF), 2008 WL 2854302)]; [*Hart v. Marriott Int'l, Inc.* (2003) 304 A.D.2d 1057, 758 N.Y.S.2d 435; *Repeti v. McDonald's Corp.* (2008) 49 A.D.3d 1089, 855 N.Y.S.2d 281]; Oregon [*Viado v. Domino's Pizza, LLC* (Or. Ct. App. 2009) 217 P.3d 199, 207- 212]; Texas [*Exxon Corp. v. Tidwell* (Tex. 1993) 867 S.W.2d 19]; Wisconsin [*Kerl v. Dennis Rasmussen, Inc., supra,* 682 N.W.2d at p. 342]. Only one court to consider adopting the instrumentality test has declined to do so, on grounds that the day-to-day operational control standard was sufficient to cabin franchisor liability in that state. See *Rainey v. Langer, supra,* 998 A.2d 342.

N.E.2d 180, 182). Instead, liability is only imposed if the franchisor is shown to have "considerable day-to-day control over the specific instrumentality that is alleged to have caused the harm." (*Karnauskas v. Columbia Sussex Corp., supra,* 2012 WL 234377, at *3 ; see also *Ketterling v. Burger King Corp.* (Idaho 2012) 272 P.3d 527, 533 (providing "[a] franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm."); *Papa John's Int'l, Inc. v. McCoy* (Ky. 2008) 244 S.W.3d 44, 56 (same).)

This approach offers predictability and better allows franchisors and franchisees to structure their business relationships. It also simplifies the liability analysis: courts need only focus on indicia of franchisor control over the day-to-day operation of the specific aspect of the franchisee's business that allegedly caused the harm, without conducting an exhaustive survey of other areas in which the franchisor may have exercised control. (See *Ketterling v. Burger King Corp., supra,* 272 P.3d at p. 533.)

The instrumentality test also furthers the policy underlying the doctrine of vicarious liability: allocating liability to those who are in a position to control the tortfeasor's behavior. Vicarious liability is a form of liability without fault that imposes liability on an innocent party based upon the existence of a special relationship between the parties. (See *Strithong v. Total Inv. Co.*

(1994) 23 Cal.App.4th 721, 726; *Rodgers v. Kemper Constr.* Co. (1975) 50 Cal.App.3d 608, 617-18.) In the master/servant context, vicarious liability is based on a special relationship arising out of the master's ability to exercise significant control over the servant's behavior. (See, e.g., *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175; *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 983-84.)

Holding a franchisor liable for the tortious acts of its franchisee's employee in an area where the franchisor has no control over the employee does not further the policy behind imposing vicarious liability. (See generally *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 238; *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d. 438, 451 (Baxter, J., concurring); Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability* (1996) 69 S. Cal. L. Rev. 1739.) Moreover, holding the franchisor liable when it exercises significant general control over the franchisee, but is not in a better position than the franchisee to control the franchisee's employee's conduct, may have the unintended consequence of enticing franchisees to cut corners. (See *Coworx Staffing Srvs., supra,* 2007 WL 738913 at *6 [explaining how "[h]olding the franchisor liable when it is not in the most effective position to supervise or take the necessary precautions may even entice franchisees to cut corners"].) In such situations, the franchisor would become a virtual insurer of its franchisee's employee's behavior; absent a separate indemnity arrangement with the franchisor, franchisees would have little incentive to properly supervise their employees.

C. Here, there is no vicarious liability because the franchisee, not Domino's, had the responsibility to train and reprimand employees concerning sexual harassment.

Under the instrumentality test, this Court should affirm the trial court's grant of summary judgment in this case. It is undisputed that, while Domino's oversaw many aspects of its franchisee's businesses, it did not control the day-to-day training, hiring, and firing of franchisee employees. The franchise agreement declared the franchisee to be an independent contractor and made clear that the franchisee Sui Juris, and not Domino's, was responsible for hiring, training, and firing employees. (1 JA 202-203, 204; 2 JA 438.) Indeed, Poff himself testified that he was solely responsible for making these decisions for his staff and, as to Miranda, he independently decided to fire him in response to the allegations of sexual harassment by Patterson even before consulting with his Domino's area leader. (See 1 JA 233-234, 235-236, 240-241; 3 JA 617.) Because Domino's had no right to control the "instrumentality of the harm" in this case – sexual harassment by a franchisee's employee – it cannot, as a matter of law, be held liable for the actions of that employee.[12]

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[12] Agency determinations can be made as a matter of law where, as here, "the essential facts are not in conflict," and "the evidence is susceptible to a single inference." *Emery v. Visa Internat. Service Assn.* (2002) 95 Cal.App.4th 952, 960. Indeed, summary judgment is frequently the vehicle for resolving franchisor vicarious liability cases such as this. See, e.g., *Cislaw v. Southland Corp.*, *supra*, 4 Cal.App.4th 1284; *Ketterling v. Burger*

Indeed, even under the focused agency analysis for vicarious liability described earlier (page 25, ante), this Court should affirm the summary judgment. Despite the general indicia of control in the franchise agreement, Sui Juris still retained the power (and in the case of Miranda and Patterson exercised that power), to control day-to-day operations at the store, including hiring, firing, and training Sui Juris employees.

II

AT THE VERY LEAST, THIS COURT SHOULD REMAND TO THE COURT OF APPEAL TO DETERMINE WHETHER SUMMARY JUDGMENT IS WARRANTED ON THE ALTERNATIVE GROUNDS RULED ON BY THE TRIAL COURT.

The trial court granted summary judgment in favor of Domino's on the claims against it on various alternative grounds beyond vicarious liability. (See 4 JA 835-840.) Domino's briefed these alternative grounds before the Court of Appeal. (See RB 36-41.) The appellate court, having reversed the summary judgment on vicarious liability grounds, expressly addressed the merits of only one of these grounds (Typed opn., p. 8-9). In so doing, the Court of Appeal provided guidance on remand concerning liability for a single incident of sexual harassment by a supervisor that was primarily founded on dicta in *Dee v. Vintage Petroleum*

King Corp., supra, 272 P.3d 527; *Helmchen v. White Hen Pantry, Inc., supra*, 685 N.E.2d 180; *Rainey v. Langen, supra*, 998 A.2d 342; *Little v. Howard Johnson Co.* (Mich. 1990) 455 N.W.2d 390; *VandeMark v. McDonald's Corp., supra*, 904 A.2d 627; *Allen v. Greenville Hotel Partners, Inc., supra*, 409 F.Supp.2d at 678-679.

(2003) 106 Cal.App.4th 30, 35, 37, a case which involved other evidence of a hostile work environment beyond a single incident.

Should this Court affirm the Court of Appeal's determination on the vicarious liability aspect of the summary judgment motion, Domino's respectfully requests that the Court remand to the Court of Appeal to review each of the additional grounds for summary judgment relied on by the trial court. (See *Leone v. Medical Board* (2000) 22 Cal.4th 660, 670; *Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019, 1030.)

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment on vicarious liability grounds or, at the very least, remand for a determination whether summary judgment is required on alternate grounds.

December 28, 2012

Respectfully Submitted,

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Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 8,106 words, exclusive of the matters that may be omitted under rule 8.204(c)(3).

December 28, 2012

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22 Mass.L.Rptr. 166
Superior Court of Massachusetts,
Middlesex County.

COWORX STAFFING SERVICES, LLC
v.
Julie COLEMAN et al.[1]

No. 2005436F. | Feb. 7, 2007.

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

BONNIE H. MacLEOD-MANCUSO, Justice of the Superior Court.

***1** This matter is before the Court on Defendants,' Julie Coleman (Coleman), Express Services, Inc. (Express), William Stark d/b/a Express Personnel Services (Stark), and Cheryl Weagraff (Weagraff), motion for partial summary judgment, pursuant to Mass.R.Civ.P. 56, against Plaintiff Coworx Staffing Services LLC (Coworx). Coworx filed suit alleging four counts; breach of duty of loyalty against Coleman (count one); breach of contract against Coleman (count two); interference with advantageous business relations against all Defendants (count three); and violations of G.L.c. 93A against Express and Stark (count four). Express seeks summary judgment on counts three and four, Stark seeks summary judgment on count four, and all Defendants seek summary judgment for all of Coworx's claims that assert damages based on lost business from Injectronics.[2] For the reasons stated below, Express's motion for summary judgment is *ALLOWED* with respect to counts three and four, Stark's motion for summary judgment is *ALLOWED* with respect to count four, and Express, Stark, Coleman, and Weagraff's motion is *DENIED* with respect to the Injectronics claims.

BACKGROUND

Coworx is a temporary staffing company. Express is a temporary staffing company and a competitor of Coworx. Stark is a franchisee of Express. Through the Franchise Agreement, dated October 23, 2002 and amended February 14, 2005, Stark had permission to use Express's trademark and its system to operate a temporary staffing company. The Franchise Agreement stated that Express, the franchisor, would provide the following for Stark: accounting and bookkeeping records, insurance and employee liability accounts, employment manuals, supplies, sales programs to assist in the hiring process, and training programs.[3] The franchisee, Stark, was responsible for developing and managing the staffing business, implementing Express programs, and maintaining hours as directed by Express.[4] The Franchise Agreement also stated that with respect to temporary and contract staffing, Stark "must actively be involved in the day-to-day operation of the business or [Stark] must hire a [sic] Express Professional Staffing manager." Stark alleges that he controlled the hiring, firing, and supervision of his employees.

Coleman worked as an employee of Coworx from August 31, 1998 to January 3, 2005.[5] From August 31, 1998 to December 2003, Coleman worked in Hudson, Massachusetts as a branch manager where one of her responsibilities was to manage client accounts. In January 2004, Coleman began serving as the branch manager of the Marlborough office. On January 21, 2004, Coworx and Coleman executed a Confidentiality and Non-Competition Agreement (Agreement). The Agreement prohibited Coleman from working for a competitor of Coworx for a period of one year after leaving the company, and covered a fifteen-mile radius from the Marlborough and Hudson branches.[6]

Weagraff worked for Coworx from 1984 to December 2003. On or about December 31, 2003, Weagraff resigned from Coworx and began new employment with Employment Network of New England, LLC. On February 3, 2004, Weagraff began working for Stark. After Weagraff left Coworx, she maintained her friendship with Coleman and would speak to Coleman on the telephone. In November 2004, Weagraff invited Coleman to interview with Stark. Coleman accepted Stark's offer of employment on December 17, 2004, but she did not resign from Coworx until January 3, 2005. On January 10, 2005, Coleman began working for Stark who is her current employer. On April 15, 2005, Stark discharged Weagraff.

***2** Injectronics is a former customer of Coworx and a current customer of Stark. Since 2003, Carlo Bosco (Bosco) has served as the human resources director of Injectronics and he arranged for Injectronics' temporary staffing needs. Stancast is a subsidiary of Injectroncis and Bosco is also responsible for the temporary staffing needs of Stancast. As

employees of Coworx, Coleman and Weagraff handled the Injectronics account. Both worked with Bosco to arrange for the placement of temporary workers. Coworx did not have a contract with Injectronics.

Defendants argue that in December 2004, Bosco became dissatisfied with Coworx because of poor billing practices. Bosco testified, that in December 2004, Injectroncis became dissatisfied with Coworx because "service had gone downhill," Coworx provided non-English speaking employees which hindered business, and Bosco was not happy with Coleman's services. Coworx contends that Bosco was not dissatisfied with its services in December 2004 as evidenced by Injectronics's continued business with Coworx until October 2005.[7] Coleman testified that in December 2004 she told a co-employee, Pamela Raimo, that decreased business was due to a work slowdown, which was common for Injectronics.

On December 22, 2004, while Coleman was still employed by Coworx, she told Weagraff, then an employee of Stark, that Stancast had an opening for a clerical position. Weagraff telephoned Bosco and although the Stancast opening was not discussed, Bosco decided to use Stark to staff shift work at Injectronics. During their telephone conversation, Bosco and Weagraff discussed the mark-up arrangement between Injectronics and Coworx. That same day, Bosco emailed Weagraff to confirm that Stark would manage the Injectronics shift work and mentioned that he forgot to ask Weagraff about a clerical position at Stancast. Meanwhile, Injeckonics ended an assignment of 30 temporary employees with Coworx. This assignment was the staff shift work that Weagraff began to handle on behalf of Stark.

On February 8, 2005, Coworx filed the present action alleging four counts: Coleman breached her duty of loyalty to Coworx (count one); Coleman breached the Agreement (count two); Stark, Express, Coleman, and Weagraff intentionally interfered with Coworx's advantageous business relations with several of its clients including Injectronics (count three); and Express and Stark violated G.L.c. 93A (count four). On February 15, 2005, this Court (Houston, J.) entered a preliminary injunction against Stark, Express, and Coleman to enforce the Agreement.[8] Express now seeks summary judgment on count three and four, Stark seeks summary judgment on count four, and all Defendants seek summary judgment on all of Coworx's claims that assert damages based on lost business from Injectronics.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); *Cassesso v. Comm'r of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 716 (1991).

I. G.L.c. 93A

***3** General Laws, chapter 93A, section 11 provides in pertinent part: "Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, ... as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two ... may ... bring an action in the superior court ..." Claims by a former employer against his former employee for breach of duty as an employee are not within the scope of G.L.c. 93A. See *Manning v. Zuckerman*, 388 Mass. 8, 14 (1983); *Second Boston Corp. v. Smith*, 377 Mass. 918, 918 (1979). In *Informix, Inc. v. Rendell*, the Appeals Court held that a former employer's suit against a former employee for violation of a non-compete agreement fell outside the scope of G.L.c. 93A regardless of whether that violation occurred during or after the employment relationship. 41 Mass.App.Ct. 161, 162-63 (1996). The *Informix* court reasoned that "[e]mployment agreements between an employee and his employer do not constitute either 'trade' or 'commerce.' '[D]isputes arising from an employment relationship between an employee and the organization that employs him ... are not covered by the c. 93A remedies afforded in commercial transactions ... Contract disputes between an employer and an employee ... are principally private in nature and do not occur in the ordinary conduct of any trade or business as contemplated by the statute.' " *Id.* (internal quotations and citation omitted.)

Cf. *Peggy Lawton Kitchens, Inc. v. Hogan,* 18 Mass.App.Ct. 937, 940 (1984) (chapter 93A applicable to employer's suit against former employee where the employee used a ruse to discover the employer's secret recipe, the employee did not use the trade secret until after he left the employer's business, the parties did not enter into a non-compete agreement, and the employee's conduct was not within the scope of his employment).

While the Supreme Judicial Court and the Appeals Court have not directly considered whether a former employer can sue its former employee's current employer under c. 93A, this Court is guided by other Superior Court decisions. In *Intertek Testing Servs. v. Curtis-Strauss,* this Court held that a former employer did not have an actionable claim under c. 93A against a former employee's current employer for a willful breach of a non-compete agreement. Civil No. 98-903F (Middlesex Super.Ct. Aug. 7, 2000) (Gants, J.). Judge Gants stated: "If the actual willful breach of a non-compete agreement by an employee is not actionable under c. 93A because the claim arose from the employment relationship, then the conduct of a third party to induce such a breach must also not be actionable because this claim, too, arose from the employment relationship." *Id.* The *Intertek* court went on to examine the policy rationale behind non-compete agreements and the current employer's burden in litigating the enforceability of such agreements. *Id.* The court reasoned that "[i]f c. 93A applied to these disputes, with its provisions for treble damages and the allowance of attorneys fees, the delicate, uncertain balance that presently applies to these cases would be dramatically altered. A competitor who is contemplating hiring an employee with a non-compete agreement may find the financial risk of litigation so great that such employees may effectively be unable to find work in their field, regardless of the reasonableness of their non-compete agreements." *Id.*

***4** In *Oceanair, Inc. v. Katzman,* this Court reaffirmed that a former employer could not sue its former employee's current employer for a willful breach of a non-compete agreement under c. 93A because the claim arose from the employment relationship. Civil No. 00-3342 (Suffolk Super.Ct. Jan. 22, 2002) (van Gestel, J.) [14 Mass. L. Rptr. 414] (citations omitted). But see *Professional Staffing Group v. Champigny,* Civil No. 04-852A (Suffolk Super.Ct. Nov. 18, 2004) (Sikora, J.) (chapter 93A applied to a former employer's suit against its former employee's current employer for violation of a non-compete which occurred well after the termination of the employment relationship, and involved activity in the open marketplace, and not "intra-employment conduct"); *Junker Assocs. v. Enes,* Civil No. 00-2098C (Essex Super.Ct. Sept. 5, 2002) (Lauriat, J.) (upholding applicability of c. 93A claim to dispute between an employee's former and current employers because the dispute arose between "two discrete business entities," and occurred in trade or commerce that was "independent of the employment relationship").

Here, Coworx contends that Express and Stark should be held liable for unfair trade practices under c. 93A. This Court, however, agrees with the *Intertek* and *Oceanair* courts that c. 93A does not apply to disputes arising from the employment relationship, and Coworx's allegation that Express and Stark induced Coleman to breach her non-compete agreement with Coworx arises from an employment relationship. Therefore Coworx's c. 93A claim (count four) will be dismissed.

II. Intentional Interference with Advantageous Business Relations

To prove a claim of intentional interference with advantageous business relations, a plaintiff must show that: (1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions. *G.S. Enters., Inc. v. Falmouth Marine, Inc.,* 410 Mass. 262, 272 (1991), citing *United Truck Leasing Corp. v. Geltman,* 406 Mass 811, 812-17 (1990); *Pembroke Country Cub v. Regency Sav. Bank,* 62 Mass.App.Ct. 34, 38 (2004).

Express contends that Coworx has failed to identify or allege any intentional acts of encouragement to establish the third element of its claim. Express further argues that it is not vicariously liable for the acts of its franchisee, Stark, or Stark's employees. The Court finds both of Express's arguments convincing. In examining the facts in the light most favorable to the non-moving party, Coworx, this Court finds that Coworx has not alleged any facts that can be construed as intentional acts by Express either to urge Coleman to breach her non-compete agreement or to encourage her to use confidential information to solicit Coworx customers. Because Express is not directly liable for intentional interference with advantageous business relations, the Court must examine whether Express may be liable under an alternate theory.

***5** The principle of respondeat superior applies if it "could reasonably be found on the evidence together with all permissible inferences 'that the relation of master and servant

existed at the time the plaintiff was injured, whereby the ... act of the servant was legally imputable to the master. It is not necessary that there be any actual control by the alleged master to make one his servant or agent, but merely a right of the master to control. If there is no right of control there is no relationship of master and servant.' " *Cowan v. E. Racing Ass'n,* 330 Mass. 135, 141 (1953), quoting *Khoury v. Edison Elec. Illuminating Co.,* 265 Mass. 236, 238 (1928). Because the Supreme Judicial Court and the Appeals Court have not applied "the right to control test" to the franchisor-franchisee relationship, this Court will examine how other jurisdictions apply that test.

The franchise relationship is very different in nature from the traditional master/servant relationship applicable to a contract for employment. The franchisor must exert some degree of control over the franchisee to protect its trade or service mark. See The Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1127 (2000). As a consequence, the majority of courts look to whether the franchisor exercised control over the day-to-day operations of the franchisee or controlled through the franchise agreement the instrumentality which caused the harm. See *Kerl v. Dennis Rasmussen, Inc.,* 682 N.W.2d 328, 338-40 (Wis.2004) (restaurant franchisor not vicariously liable for franchisee's negligent supervision of employees where the franchisor had no control or right of control over the daily hiring and supervision of the franchisee's employees); see also *Evans v. McDonald's Corp.,* 936 F.2d 1087, 1090 (10th Cir.1991) (franchisor not liable as an employer under Title VII even though it provided the manner of the franchise's operations, frequent inspections, and training for employees, it did not have control over employment relations); *Wendy Hong Wu v. Dunkin' Donuts, Inc.,* 105 F.Sup.2d 83, 87-94 (E.D.N.Y.2000) (franchisor not vicariously liable for franchisee's security deficiencies because the franchise agreement did not give the franchisor "considerable control ... over the specific instrumentality at issue"); *Viches v. MLT, Inc.,* 127 F .Sup.2d 828, 832 (E.D.Mich.2000) (hotel franchisor not vicariously liable for franchisee's negligent use of pesticides where the franchise agreement only ensured "uniformity and standardization ... of services"); *Jones v. Filer, Inc.,* 43 F.Sup.2d 1052, 1056-58 (W.D.Ark.1999) (franchisor not vicariously liable for franchisee or its employees even though franchise agreement addressed training programs, advertising, hours of the franchisee's operation, and decor; franchisor did not exercise control over hiring, firing, and supervising of employees); *Hatcher v. 7-Eleven and Southland Corp.,* 956 F.Sup. 387, 392 (E.D.N.Y.1997) (franchisor not franchisee's employer under Title VII eyen though it provided an administrative payroll service, checks, unemployment benefits, workers' compensation insurance, payroll insurance, and social security contribution, because franchisor did not hire, fire, or supervise the franchisee's employees); *Perry v. Burger King, Corp.,* 924 F.Sup. 548, 554 (S.D.N.Y.1996) (restaurant franchisor could not be held vicariously liable for race discrimination by franchisee because the franchise agreement did not allow the franchisor control over employment issues); *Vandemark v. McDonald's Corp.,* 904 A.2d 627, 636 (N.H.2006) (restaurant franchisor not vicariously liable for attack on franchisee's employee because the franchisor established uniformity and standardization of products and services and did not exercise control over security operations); *Pizza K., Inc. v. Santagata,* 547 S.E.2d 405, 406-07 (Ga.Ct.App.2001) (pizza franchisor not vicariously liable for franchisee delivery driver's accident because franchisor did not supervise the day-to-day activities of the franchisee's employees); *Little v. Howard Johnson Co.,* 455 N.W.2d 390, 393-94 (Mich.Ct.App.1990) (restaurant franchisor not vicariously liable for injuries of franchisee patron who slipped on ice because franchise agreement provided for "uniformity and standardization of products," and did not give the franchisor control over daily operations). But see *Butler v. McDonald's Corp .,* 110 F.Sup.2d 62, 67-68 (D.R.I.2000) (court held franchisor vicariously liable for franchisee's negligent failure to repair the premises because of indicia of general control); *Miller v. McDonald's Corp.,* 945 P.2d 1107, 1111 (Or.Ct.App.1997) (court held franchisor could be vicariously liable where franchisee's patron bit into a Big Mac sandwich that contained a sapphire stone because the franchise agreement provided "precise methods" of food handling and preparation); *Greil v. Travelodge Int'l, Inc.,* 541 N.E.2d 1288, 1292-94 (Ill.App.Ct.1989) (franchisor liable for franchisee under enterprise theory because franchisor benefitted in profits and goodwill from the franchise and should bear the burdens).

***6** In *Kerl,* the Wisconsin Supreme Court discussed the policy concerns behind vicarious liability and stated that applying strict liability to a franchisor for the acts of its franchisee would be unfair because the franchisor's control usually "does not consist of routine, daily supervision and management of the franchisee's business, but, rather, is contained in contractual quality and operational requirements necessary to the integrity of the franchisor's trade or service mark." *Kerl,* 682 N.W.2d at 338. Further, imposing vicarious liability prevents the parties from enumerating in the franchise agreement the benefits and burdens each should enjoy, which is an essential component inherent to the franchise relationship. *Id.* at 336-37. Holding the franchisor

liable when it is not in the most effective position to supervise or take the necessary precautions may even entice franchisees to cut corners. *Id.*

Here, Coworx argues that Express is vicariously liable for the actions of Stark and Stark's employees because of the franchisor-franchisee relationship. Under the "right to control" test, Coworx claims that Express exercises control over every aspect of Stark's business. Coworx points to the Franchise Agreement which provides Express with rights over employee training programs, employee handbooks, supplies such as computers, payroll supervision, and insurance coverage and liability. These provisions, however, establish a system of uniformity and standardization for the franchisee to run a temporary staffing agency. Absent from the Franchise Agreement is an explicit provision giving Express the right to control Stark's employees on a day-to-day basis. In fact, the language of the agreement states that Stark "must be actively involved in the day-to-day operation of the business or [Stark] must hire, a[sic] Express Professional Staffing manager." Furthermore, Coworx has not offered evidence disputing that Stark maintained exclusive control over the hiring, firing, and supervision of his employees.

For the reasons stated, this Court finds that there is no genuine issue of material fact concerning whether an agency relationship exists between Express and Stark.[9] Express is not vicariously liable for the acts of Stark or Stark's employees; therefore, Express's motion for summary judgment will be allowed as to count three.

III. Injectronics

All Defendants seek summary judgment as to all claims that assert damages based on lost business from Injectronics. Defendants contend that Weagraff was permitted to solicit business from Injectronics so long as she did not use improper means because Injectronics was not contractually obligated to Coworx. Further, the information relating to the Stancast clerical opening was not a trade secret, and even if it was, Weagraff did not utilize this information in her communications with Bosco. Lastly, Defendants argue that Coworx cannot show that their conduct caused Coworx's loss of the Injectronics business. Defendants assert that the lost business is not attributable to their conduct but rather a direct result of Bosco's dissatisfaction with Coworx's poor billing practices.

*7 In viewing the facts in the light most favorable to Coworx, this Court must accept the following as true: Injectronics was satisfied with Coworx's services through at least December 2004, Injectronics continued to use Coworx until October 2005, and Injectronics decreased its business with Coworx in 2005 because of a work slowdown which was not unusual for the company. As a result, there is a genuine issue of material fact concerning the cause of Injectronics' conclusion of its business relationship with Coworx. Therefore, summary judgment is inappropriate at this time.

ORDER

For the reasons stated above, it is hereby *ORDERED* that Express's motion for summary judgment is *ALLOWED* with respect to counts three and four, Stark's motion for summary judgment is *ALLOWED* with respect to count four, and Defendants' motion for summary judgment is *DENIED* with respect to the remaining claims that assert damages based on lost business from Injectronics.

Parallel Citations

2007 WL 738913 (Mass.Super.)

Footnotes

1 Express Services, Inc., William Stark d/b/a Express Personnel Services, and Cheryl Weagraff.

2 Injectronics is a former customer of Coworx and a current customer of Stark.

3 This list is not exhaustive of all the provisions that are contained within the Franchise Agreement.

4 The Franchise Agreement also stated that Stark could use Express "names, trademarks, and service marks on forms, brochures, signs, or advertising materials only as approved by [Express] ..." The Franchise Agreement required Stark to keep accurate business records and provided that Express had the right to inspect those records and audit the accounts at all reasonable times. Stark also had to "adhere to the rules, regulations, standards, and business ethics as established in [Express] training course[s] and manuals, or as they are amended or modified."

5 To minimize confusion, this Court will refer to Coworx and its predecessor in interest, Agentry Staffing, as Coworx.

6 The Agreement stated in section 2.2(a):

> The Employee shall not, during the term of the Employee's employment, and for a period of one (1) year commencing the date of the Employees' termination of employment with the Company, compete with the Company, either as an individual for his or her own account, or as a partner, joint venturer, employee, agent, salesman, consultant, officer, director, or shareholder of a corporation, or otherwise, within a fifteen (15) mile radius of any of the Company's offices at which the Employee worked when employed by the Company ...

7 Coworx offers evidence that Injectronics increased its business with Coworx throughout the fall of 2004 with orders of $34,174 in September, $45,450 in October, $51,822 in November, and $69,973 in December. While business escalated throughout the fall, this evidence is irrelevant to Coworx's argument that Injectronics was satisfied with Coworx's performance because Bosco did not claim any dissatisfaction until December 2004.

8 The preliminary injunction states:

> 1. Defendant Julie Coleman is preliminarily enjoined until further Order of the Court from:
> (i) disclosing any or all of the confidential and trade secret business information of ... Coworx Staffing Services LLC ("Coworx") to her present employer or any other person or entity or utilizing the same for her own benefit at any time;
> (ii) soliciting business, directly or indirectly, from any Coworx customers, including but not limited to Injectronics, with which she placed a referral while employed by Coworx; and
> (iii) contacting or communicating with any CoWorx employee who she placed with a customer while employed at Coworx, with the intent, purpose, or effect of inducing or encouraging said employee to leave his or her employment with Coworx or to breach his or her employment agreement with or other obligations to Coworx.
> 2. Defendants Express Personnel Services and William Stark are hereby preliminarily enjoined until further Court Order from: (i) utilizing any Coworx trade secret or confidential information disclosed or utilized by Coleman; or (ii) encouraging, soliciting, permitting or requiring Julie Coleman to engage in any of the activities prohibited in paragraph 1 above.

9 Coworx argues that even if Express and Stark do not have an agency relationship, Express is still liable because of its failure to ensure compliance with the preliminary injunction. This argument is irrelevant to Coworx's claim for intentional interference with advantageous business relations. If Coworx seeks to enforce the preliminary injunction, its proper recourse is to file a contempt action with this Court.

End of Document

2012 WL 1536161
Only the Westlaw citation is currently available.
United States District Court,
D. Kansas.

In re MOTOR FUEL TEMPERATURE SALES PRACTICES LITIGATION.
This Document Relates To:
Wilson, et al. v. Ampride, Inc., et al., Case No. 06–2582–KHV.

MDL No. 1840. | Nos. 06–2582–KHV, 07–1840–KHV. | April 30, 2012.

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Opinion

MEMORANDUM AND ORDER

KATHRYN H. VRATIL, District Judge.

*1 Plaintiff Zachary Wilson brings suit against Circle K and others whom he alleges own, operate or control retail motor fuel stations in Kansas. He seeks money damages and injunctive relief under the Kansas Consumer Protection Act ("KCPA"), Kan. Stat. Ann. §§ 50–623 through 50–643, for willfully concealing, suppressing, omitting or failing to state a material fact, *id.* § 50–626(b)(3), and for unconscionable acts and/or practices, *id.* § 50–627, in connection with a consumer transaction. With respect to his claims for injunctive relief, Wilson represents a class of Kansas consumers who purchased motor fuel from defendants. This matter is before the Court on *Circle K Stores Inc.'s Motion For Summary Judgment Due To No Retail Sales In Kansas* (Doc. # 2418) filed October 31, 2011 and *Plaintiffs' Motion To Strike, Or, In The Alternative, For Leave To File A Sur–Reply In Response To Defendant Circle K Stores Inc.'s Reply In Support Of Its Motion For Summary Judgment Due To No Retail Sales In Kansas* (Doc. # 3200) filed January 17, 2012. For the following reasons, the Court sustains in part Wilson's motion and sustains Circle K's motion.

I. Plaintiff's Motion To Strike

Plaintiff moves to strike a Circle K franchise agreement that Circle K disclosed for the first time as an attachment to its reply brief. *See* Ex. B, Doc. # 3188 filed January 10, 2012. Other than stating that this is "unfair and highly prejudicial," he does not cite any authority or make specific arguments to support striking the document. *See Plaintiffs' Motion To Strike* (Doc. # 3200) at 3. The Court will not come up with those arguments for him. *See Triple–I Corp. v. Hudson Assocs. Consulting, Inc.*, 713 F.Supp.2d 1267, 1274 n. 5 (D.Kan.2010). Alternatively, plaintiff moves for leave to file a surreply to respond to the new evidence. Circle K thought that it produced the franchise agreement during discovery, but concedes that it evidently did not. *Circle K Stores Inc.'s Reply In Support Of Its Motion For Summary Judgment Due To No Retail Sales In Kansas* (Doc. # 3811) at 9.

Surreplies are typically not allowed. *C.T. v. Liberal Sch. Dist.*, 562 F.Supp.2d 1324, 1329 n. 1 (D.Kan.2008) (citing D. Kan. Rule 7.1(b); *Metzger v. City of Leawood*, 144 F.Supp.2d 1225, 1266 (D.Kan.2001)). But they are allowed where a movant improperly raises new arguments or evidence in a reply and the nonmoving party needs an opportunity to respond. *See id.; Stevens v. Deluxe Fin. Servs., Inc.*, 199 F.Supp.2d 1128, 1130 (D.Kan.2002). Because Circle K disclosed the franchise agreement for the first time in its reply, and because it directly

bears on plaintiff's argument that Circle K had actual authority over its franchisees, plaintiff should have an opportunity to respond. The Court therefore sustains plaintiff's motion to file a surreply. *Plaintiffs' Sur–Reply Memorandum In Further Opposition To Circle K Stores, Inc.'s Motion For Summary Judgment Due To No Retail Sales In Kansas,* Ex. 1, Doc. # 3201 filed January 17, 2012.[1] In accordance with D. Kan. Rule 15.1(a)(2), plaintiff filed a proposed surreply, Ex. 1 to Doc. # 3200 (unsealed) and Doc. # 3203 (sealed), which the Court considers as though filed.[2]

II. Circle K's Motion For Summary Judgment

***2** Circle K seeks summary judgment on plaintiff's claims because it does not own or operate any retail motor fuel stations in Kansas—it only franchises Circle K-branded convenience stores in the state. Plaintiff argues that Circle K is vicariously liable based on actual or apparent authority over motor fuel sales practices at Circle K-branded stations. Generally, whether an entity may be held vicariously liable for the acts of another is a question of fact for the jury. *Lowe v. Surpas Res. Corp.,* 253 F.Supp.2d 1209, 1231–32 (D.Kan.2003); *Barbara Oil Co. v. Kan. Gas Supply Corp.,* 250 Kan. 438, 446–47, 827 P.2d 24, 31–32 (1992); *Falls v. Scott,* 249 Kan. 54, 64, 815 P.2d 1104, 1112 (1991). When the facts are undisputed or the evidence is susceptible of only a single conclusion, however, the Court may resolve the question as a matter of law. *Lowe,* 253 F.Supp.2d at 1232; *Falls,* 249 Kan. at 64, 815 P.2d at 1112; *see also Wayman v. Accor N. Am., Inc.,* 45 Kan.App.2d 526, 533, 251 P.3d 640, 646 (2011).

A. Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Vitkus v. Beatrice Co.,* 11 F.3d 1535, 1538–39 (10th Cir.1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Liberty Lobby,* 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hicks v. City of Watonga,* 942 F.2d 737, 743 (10th Cir.1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial as to those dispositive matters for which he carries the burden of proof. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.,* 912 F.2d 1238, 1241 (10th Cir.1990); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.,* 939 F.2d 887, 891 (10th Cir.1991). The nonmoving party may not rest on his pleadings but must set forth specific facts. *Applied Genetics,* 912 F.2d at 1241.

The Court views the record in the light most favorable to the nonmoving party. *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.,* 938 F.2d 1105, 1110 (10th Cir.1991). It may grant summary judgment if the nonmoving party's evidence is merely colorable or is not significantly probative. *Liberty Lobby,* 477 U.S. at 250–51. In response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith,* 853 F.2d 789, 794 (10th Cir.1988). The heart of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby,* 477 U.S. at 251–52.

B. Factual Background

***3** The following facts are either uncontroverted, deemed admitted or where controverted, viewed in the light most favorable to plaintiff, the non-movant.[3]

At certain times since January 1, 2001, Circle K franchisees have operated Circle K convenience stores in Kansas. Franchisees with Circle K-branded stores also sold motor fuel in Kansas during this time. The franchisee convenience stores are owned and operated by independent third parties. Since October 24, 2011, all Kansas franchise sites were owned and operated by PCF Sale Co., LLC, which aside from its contractual relationship with Circle K, is unrelated to Circle K. The Circle K franchises in Kansas do not indicate that the franchise is owned, operated or controlled by a franchisee.

A franchise agreement is the only agreement that governs the relationship between Circle K and its franchisees. Circle K franchise agreements are standard and non-negotiable. Potential franchisees must seek location approval from Circle K to open a Circle K-branded franchise location. Before a

franchisee may use Circle K marks and logos, the retailer must pay a franchise fee. Circle K oversees construction, development, operation, marketing and advertising of its franchisees.

Circle K sets appearance standards for franchisees and their hours of operation. It also provides its franchisees a training manual.

Circle K contends that it has no involvement in the sale of motor fuel at any franchisee locations, as opposed to the operations and marketing of the Circle K-branded store itself. Franchisees who sell motor fuel in addition to operating a convenience store determine their own prices, disclosures and dispensing practices.[4] Circle K may have an indirect pecuniary interest in fuel sales by franchisees because customers who purchase fuel from a franchisee may also purchase items from the Circle K store. It does not, however, have a direct pecuniary interest in the sale of fuel by franchisees. The point-of-sale software at all Kansas franchisee convenience store locations distinguishes between fuel sales and other sales, even in the same transaction (*i.e.* on the same receipt), and Circle K receives no benefit from the franchisee's sale of fuel. Circle K's franchise fee is based on the franchisee's convenience-store-related sales—not the franchisee's fuel sales. Circle K receives no fee based on the franchisee's fuel sales.

Most (if not all) of the Kansas franchisees that sell motor fuel, employ the "Phillips 66" brand. The Kansas franchisee sites are under no obligation to purchase, and to the best of Circle K's knowledge have not purchased, fuel from Circle K for resale to customers. Since January 1, 2001, Circle K has not set prices or otherwise influenced prices or volumes of motor fuel sold at Circle K-branded stores in Kansas or any other retail locations in Kansas.[5] Since January 1, 2001, Circle K has not influenced in any way the motor fuel dispensing practices, including disclosures to consumers, at Circle K-branded stores in Kansas or any other retail locations in Kansas. For instance, Circle K has not required or prohibited the use of any type of motor fuel dispensing equipment used in Kansas.

***4** Customers who pre-pay for fuel with cash must enter the Circle K store to do so. The employee who takes the customer's money offers no indication, by clothing or otherwise, that the employee works for any company other than Circle K. The receipt fuel customers receive states: "WELCOME TO CIRCLE K 66," CIRCLEK6321" and "COMPLETE A SURVEY WWW.GASVISIT.COM REGISTER TO WIN!!!" The website—www.gasvisit.com—takes the customer to a ConocoPhillips website.

Circle K franchises display signs bearing the Circle K logo. Of the Circle K franchisees that operated a Circle K-branded store and sold motor fuel, at least some of them displayed signs bearing the Circle K logo directly above the advertised price of motor fuel. On the same sign, directly next to the Circle K logo and price of fuel, was an even larger Phillips 66 logo that included the name "ConocoPhillips." The fuel pump which plaintiff photographed and attached to his affidavit displayed the Phillips 66 logo and bore the name "ConocoPhillips" directly next to the words "Quality PROclean Gasolines." The pump also displayed an advertisement for pumpkin spice coffee which contained the Circle K logo.[6] In at least one of the images attached to plaintiff's affidavit, a Phillips 66 logo appears on the awning over the fuel pumps. *Affidavit Of Zachary T. Wilson,* Ex. D, Doc. # 3118 at 24 (Ex. 8).

Circle K's website, http://www.circlek.com, shows a map of Circle K store locations and lists the Circle K stores in Kansas that sell motor fuel. The "Store Detail" page for each of the Kansas locations states that the "Facility Type" is "Convenience Store" and "Gas" is "PHILLIPS 66." The header of Circle K's website, which is displayed on each of the web pages which plaintiff has provided, has several links including one for "Franchises." The "Store Detail" pages which plaintiff attached to his response contain an advertisement for Circle K gift cards and to "TOUR CircleK Franchise."

The Circle K website does not state or otherwise indicate that a particular Circle K store is owned and operated by a franchisee. The web page for each Kansas location does not state or otherwise indicate that the Circle K store is owned and operated by PCF Sale Co. Circle K does not state or otherwise indicate on its website that PCF Sales Co. controls motor fuel sales. Circle K does not state or otherwise indicate on its website that any Circle K franchisee controls motor fuel sales.

Circle K offers gift cards that can be used to purchase fuel and fleet cards that offer rebates on fuel purchases. The Circle K home page shows an image of a gift card bearing a Circle K emblem, under which it states, "Gift Cards Purchase yours today." After clicking on the Circle K gift card emblem on the Circle K homepage, the website directs the user to a page explaining Circle K gift cards. That web page states, "The Circle K Gift Card can be used for nearly anything, including fuel, at over 2,700 locations!"

*5 The Circle K homepage shows an image of the Circle K fleet card. After clicking on the Circle K fleet card emblem, the website directs the user to a page explaining the Circle K fleet cards. That web page states, among other things: "Volume fuel rebates up to 2.5¢/gal" and that "drivers must provide their unique Driver ID number and the vehicle's odometer reading when they use the card." It advertises "[c]onvenient nationwide fuel acceptance" and states that "[f]riendly, knowledgeable representatives are available 24/7 to answer questions."

In response to plaintiff's first set of interrogatories, Circle K answered that "it entered into franchise agreements in various states, but those franchise agreements pertained only to the operation of a convenience store, not the retail sale of motor fuel." In plaintiff's consolidated first set of requests for production of documents to defendants, he asked Circle K to produce "[a]ll DOCUMENTS IDENTIFIED in YOUR responses to Plaintiffs' First and Second Set of Interrogatories" and "all documents upon which YOU relied or referred to when answering in YOUR responses to Plaintiffs' First Set of Consolidated Interrogatories or Second Set of Consolidated Interrogatories propounded on YOU." Circle K did not produce any franchise agreements in response to plaintiff's requests.

C. Actual Authority

Plaintiff argues that Circle K controlled or had the right to control its franchisees and is therefore vicariously liable for its alleged violation of the KCPA. Circle K counters that it does not control or have any right to control the manner in which franchisees sell fuel in Kansas.

To hold Circle K vicariously liable for the acts of its franchisees on a theory of actual authority, plaintiff must show that Circle K controlled or had the right to control franchisees in the particular instrumentality that harmed plaintiff, *i.e.* in the details of selling motor fuel. *Thompson v. Jiffy Lube Int'l, Inc.*, No. 05–1203–WEB, 2006 U.S. Dist. LEXIS 39113, *38–39 (D. Kan. June 13, 2006); *Fisher v. Triplett, Inc.*, No. 83–4040, 1986 U.S. Dist. LEXIS 21423, at *8 (D.Kan. Aug. 18, 1986).

> As a general rule, when a person (a contractee) lets out work to another and reserves no control over the work or workmen, the relation of contractee and independent contractor exists, and not that of master and servant, and the contractee is not liable for the negligence or improper execution of the work by the independent contractor.

Falls, 249 Kan. at 59, 815 P.2d at 1109 (citing *Balagna v. Shawnee Cnty.*, 233 Kan. 1068, 668 P.2d 157 (1983)); *see also Lowe*, 253 F.Supp.2d at 1231–32; *see also Thompson*, 2006 U.S. Dist. LEXIS 39113, at *42 (Kansas courts would apply general agency principles to determine whether franchisor liable for franchisee).

The existence of a franchisor-franchisee relationship does not by itself render the franchisor vicariously liable for the acts of its franchisee. *Thompson*, 2006 U.S. Dist. LEXIS 39113, *38–39; *see also Greiving v. La Plante*, 156 Kan. 196, 131 P.2d 898, 900 (1942). Courts are "mindful that a franchisor ... ha[s] a legitimate interest in retaining some degree of control in order to protect the integrity of its marks." *Thompson*, 2006 U.S. Dist. LEXIS 39113, at *41–42. Thus retaining "rights such as the right to enforce standards, the right to terminate the agreement for failure to meet standards, the right to inspect the premises, the right to require that franchisees undergo certain training, or the mere making of suggestions and recommendations does not amount to sufficient control." *Id.* at 42.

*6 Plaintiff argues that Circle K had actual authority over the sale of motor fuel by its franchisees because (1) Circle K franchisees must pay a franchise fee before using Circle K marks and logos; (2) Circle K controls the location of its franchise locations and oversees the operations of its franchises, including those that sell motor fuel; (3) once Circle K establishes a franchise relationship, it oversees construction, development, marketing and advertising for the store and provides franchisees a training manual; (4) Circle K sets the business hours of its franchised stores; (5) Circle K's control over in-store merchandise sales is inextricably intertwined with fuel sales because some consumers pay for fuel inside Circle K's franchised store; (6) Circle K controls the marks on fuel receipts which state "WELCOME TO CIRCLE K 66," "CIRCLEK6321 ASM KC," and "COMPLETE A SURVEY WWW.GASVISIT.COM REGISTER TO WIN!!!"; (7) Circle K sells gift cars that can be used to purchase fuel; (8) Circle K has a fleet card program that offers volume rebates on fuel purchases and requires the customer to show their unique Driver ID and vehicle odometer reading when purchasing fuel; (9) Circle K maintains significant control over the day-to-day operations of its franchised stores and

the premises; (10) Circle K's uniformity requirements and inspection rights apply to the store and to the entire premises; and (11) Circle K has access to each franchisee's electronic point of sale system and may view all data stored on it.

As noted above, these are precisely the types of controls that a franchisor may legitimately exercise over its franchisee without incurring vicarious liability. Plaintiff has not produced evidence—direct or circumstantial—that would permit a reasonable jury to find that Circle K had actual control over the decisions of its franchisees with respect to the price of fuel or the method of selling it. He has shown that Circle K exercises control over its franchised convenience stores, its marks and the premises on which the stores are located. But this does not raise a genuine issue of material fact with respect to whether Circle K controls the particular instrumentality that allegedly harmed plaintiff, i.e. the manner of selling motor fuel. *See Thompson,* 2006 U.S. Dist. LEXIS 39113, *38–39; *Fisher,* 1986 U.S. Dist. LEXIS 21423, at *8. Indeed the uncontroverted facts show that Circle K has no actual control over the motor fuel sales of its franchisees.

D. Apparent Authority

Plaintiff argues that Circle K holds out its franchisees as its agents for selling fuel and is therefore vicariously liable for their acts under a theory of apparent authority. Circle K counters that plaintiff relies solely on Circle K signage and other general indicia of a franchise relationship, which are insufficient to show apparent authority.

A principal is vicariously liable for the acts of its apparent agents. *Cole v. Am. Fam. Mut. Ins. Co.,* 333 F.Supp.2d 1038,1043 (D.Kan.2004) (citing *Kan. City Heartland Constr. Co. v. Maggie Jones Southport Café, Inc.,* 250 Kan. 32, 41, 824 P.2d 926, 932–33 (1992)). An "apparent agent is one who, with or without authority, reasonably appears to third persons to be authorized to act as the agent of another." *Ford v. Guarantee Abstract & Title Co.,* 220 Kan. 244, 268, 533 P.2d 254, 272 (1976). Apparent agency is "based on intentional actions or words of the principal toward third parties which reasonably induce or permit third parties to believe that an agency relationship exists." *Mohr v. State Bank of Stanley,* 241 Kan. 42, 46, 734 P.2d 1071, 1076 (1987).

*7 A franchisee's use of a franchisor's marks alone is insufficient to establish apparent agency. *See Pona v. Cecil Whittaker's, Inc.,* 155 F.3d 1034, 1036 (8th Cir.1998) (that franchisor's sign appears on building and employees wear uniforms bearing franchisor's logo does not clothe franchisee with apparent power to act on franchisor's behalf); *Fisher,* 1986 U.S. Dist. LEXIS 21423, at *10–11 (even if plaintiffs attracted to station because of Amoco signs, insufficient to establish apparent agency); *Greiving,* 156 Kan. 196, 131 P.2d at 900 (fact that seller of goods marketed under trade name of owner insufficient to show that retailer is agent of owner). At least in part, this is based on the fact that "[a]lmost everyone knows that chain outlets, whether restaurants, motels, hotels, resorts, or gas stations, are very often franchised rather than owned by the owner of the trademark that gives the chain its common identity in the marketplace." *Carris v. Marriott Int'l, Inc.,* 466 F.3d 558, 562 (7th Cir.2006).

Plaintiffs argue that Circle K's conduct would lead a reasonable consumer to believe that it had authority over the sale of motor fuel by its franchisees because (1) the display signs at the entrance of its Kansas locations bear the Circle K logo; (2) at locations that sell motor fuel, the display signs advertise the price of fuel directly below the Circle K logo; (3) the signs at these locations do not indicate that the Circle K store is owned, operated or controlled by a franchisee; (4) the signs suggest that the price of fuel is set by Circle K—not Phillips 66 or a franchisee; (5) at some locations where a Circle K franchisee also sells fuel, Circle K places advertisements for Circle K-branded merchandise directly on the fuel pumps; (6) customers who purchase fuel with cash must do so inside the Circle K store; (7) the employees in the store give no indication, by clothing or otherwise, that they work for any company other than Circle K; (8) the receipts given to customers who purchase fuel state: "WELCOME TO CIRCLE K 66," "CIRCLEK6321 ASM KC," and "COMPLETE A SURVEY WWW.GASVISIT.COM REGISTER TO WIN!!!"; and (9) Circle K's website shows a map of Circle K locations, lists the Circle K stores in Kansas that sell fuel and advertises gift cards that can be used to purchase fuel and fleet cards that offer rebates on fuel purchases.

To show apparent authority, plaintiff essentially relies on the fact that Circle K's name and logo appear adjacent to the advertised price of fuel, and appear on receipts for fuel purchases, gift cards and fleet cards that can be used to purchase fuel. As noted above, this is not enough to permit a reasonable jury to infer that the franchisee is Circle K's agent for selling fuel. And plaintiff cites no case where the use of a franchisor's name and logo in this manner create apparent authority. *See Gonzalez v. Walgreens Co.,* 878 F.2d 560, 562 (1st Cir.1989). Moreover plaintiff greatly exaggerates the purported evidences of Circle K's apparent authority by taking them out of context.

*8 For example, the undisputed facts reveal as follows. On the display signs where the Circle K logo appears directly above the advertised price of fuel, a much larger Phillips 66 logo appears directly adjacent to both the Circle K logo and the fuel price. The fuel pump which plaintiff photographed displayed the Phillips 66 logo and bore the name "ConocoPhillips" directly next to the words "Quality PROclean Gasolines." In at least one of the images attached to plaintiff's affidavit, a Phillips 66 logo appears on the awning over the fuel pumps. *Affidavit Of Zachary T. Wilson,* Ex. D, Doc. # 3118 at 24 (Ex. 8). The only place the Circle K logo appeared on any pumps which plaintiff photographed was on an advertisement for coffee.

In addition to showing a map of Circle K locations, listing the Circle K stores in Kansas that sell fuel and advertising gift cards and fleet cards, the Circle K website contains a prominent link for "Franchises," refers to Circle K locations as "Circle K Stores," and in describing store details states "Facility Type: Convenience Store" and "Gas: Phillips 66." The "Store Detail" pages also contain an advertisement that says "TOUR Circle K Franchise." The receipts similarly indicate that the Circle K influence is limited to the convenience store. They state "WELCOME TO CIRCLE K 66" and the website on the receipt—www.gasvisit.com—leads to a ConocoPhillips website. That customers can purchase fuel with Circle K gift cards and can get fuel discounts with Circle K fleet cards does not permit an inference that Circle K controls the price and method of selling Phillips 66 fuel.

For these reasons, no genuine issue of material fact exists with respect to whether Circle K's franchisees were its apparent agents with respect to selling motor fuel. Plaintiff therefore cannot hold Circle K vicariously liable for the acts of its franchisees in selling fuel.[7]

IT IS THEREFORE ORDERED that *Plaintiffs' Motion To Strike, Or, In The Alternative, For Leave To File A Sur–Reply In Response To Defendant Circle K Stores Inc.'s Reply In Support Of Its Motion For Summary Judgment Due To No Retail Sales In Kansas* (Doc. # 3200) filed January 17, 2012 be and hereby is **SUSTAINED in part.** The Court sustains the motion for leave to file a surreply, considers plaintiff's proposed surreply as though filed and directs plaintiff to file the surreply.

IT IS FURTHER ORDERED that *Circle K Stores Inc.'s Motion For Summary Judgment Due To No Retail Sales In Kansas* (Doc. # 2418) filed October 31, 2011 be and hereby is **SUSTAINED.**

Footnotes

1 In response to defendant's motion for summary judgment, plaintiff states that he is unable to controvert a number of facts because Circle K had not disclosed an exemplar franchise agreement. Because the Court sustains plaintiff's motion to file a surreply, and considers his proposed surreply as though filed, the Court disregards plaintiff's then-existing inability to respond.

2 The Court hereby directs plaintiff to file his proposed surreply.

3 Plaintiff argues that the declaration of Cheryl Hughes, the Director of U.S. Finance for Circle K, contains sweeping conclusory statements with few supporting details. The Court disregards any conclusory statements, as opposed to specific facts, offered by either party. *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1382 (10th Cir.1994). Plaintiff also comments in a footnote that Circle K has not identified Hughes as a potential witness in this case, so he has not had a chance to depose her. Plaintiff has not, however, moved to strike Hughes' declaration.

4 Plaintiff attempts to controvert this fact, but does not meet the substance of it. *See* D. Kan. Rule 56.1(e). His citations to the record indicate that Circle K may have control over advertising and the use of its brand at franchisee stores that also sell motor fuel, but do not controvert that Circle K does not control the price or method of sale of the motor fuel.

5 Plaintiff attempts to controvert this fact by pointing to photographs and labels on receipts, but as noted above, this does not meet the substance of defendant's contention. *See* D. Kan. Rule 56.1(e).

6 The pump displayed another advertisement for Coca–Cola stating "top it off for a buck," but it does not bear a Circle K logo.

7 In addition, although the parties' briefs have not raised this issue, apparent authority under Kansas law seems to require an element of reliance. See *Mulholland v. Metro. Life Ins. Co.*, 546 F.Supp.2d 1231, 1237 (D.Kan.2008). No genuine issue of material fact exists with respect to whether plaintiff relied on Circle K controlling the price and method of selling fuel.

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ALEJANDRO JUAREZ, MARIA JUAREZ, LUIS A. ROMERO and MARIA PORTILLO, individually and on behalf of all others similarly situated, Plaintiffs, v. JANI-KING OF CALIFORNIA, INC., a Texas corporation, JANI-KING, INC., a Texas corporation, JANI-KING INTERNATIONAL, INC., a Texas corporation, and DOES 1 through 20, inclusive, Defendants.

Case No. 09-3495 SC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2012 U.S. Dist. LEXIS 7406

January 23, 2012, Decided
January 23, 2012, Filed

SUBSEQUENT HISTORY: Motion granted by, Stay granted by *Juarez v. Jani-King of Cal., Inc., 2012 U.S. Dist. LEXIS 19766 (N.D. Cal., Feb. 16, 2012)*

PRIOR HISTORY: *Juarez v. Jani-King of Cal., Inc., 2011 U.S. Dist. LEXIS 138923 (N.D. Cal., Dec. 2, 2011)*

COUNSEL: [*1] For Alejandro Juarez, Maria Juarez, Maria Portillo, individually and on behalf of all others similarly situated, Plaintiffs: James C. Sturdevant, LEAD ATTORNEY, The Sturdevant Law Firm, San Francisco, CA; Hillary Schwab, PRO HAC VICE, Shannon Liss-Riordan, PRO HAC VICE, Lichten & Liss-Riordan, P.C., Boston, MA; Jennifer Abby Reisch, Mark Andrew Talamantes, Talamantes Villegas Carrera, LLP, San Francisco, CA; Monique Olivier, Duckworth Peters Lebowitz Olivier LLP, San Francisco, CA.

For Jani-King of California, Inc., a Texas corporation, Jani-King, Inc, a Texas corporation, Jani-King International, Inc., a Texas corporation, Defendants, Counter-claimants: Aaron Van Oort, Christopher J. Diedrich, Eileen M. Hunter, Faegre & Benson LLP, Minneapolis, MN; Benjamin Kneeland Riley, Bartko, Zankel, Tarrant & Miller, San Francisco, CA; Kerry L. Bundy, Faegre Baker Daniels LLP, Minneapolis, MN.

For Alejandro Juarez, Maria Juarez, Maria Portillo, individually and on behalf of all others similarly situated, Luis A. Romero, Counter-defendants: James C. Sturdevant, LEAD ATTORNEY, The Sturdevant Law Firm, San Francisco, CA; Hillary Schwab, Shannon Liss-Riordan, Lichten & Liss-Riordan, P.C., Boston, [*2] MA; Jennifer Abby Reisch, Mark Andrew Talamantes, Talamantes Villegas Carrera, LLP, San Francisco, CA; Monique Olivier, Duckworth Peters Lebowitz Olivier LLP, San Francisco, CA.

JUDGES: Samuel Conti, UNITED STATES DISTRICT JUDGE.

OPINION BY: Samuel Conti

OPINION

ORDER RE: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court are two motions for summary judgment brought by Defendants Jani-King of California, Inc., Jani-King, Inc., and Jani-King International, Inc. (collectively, "Jani-King"). ECF No. 149 ("MSJ"). First, Jani-King moves for summary judgment on all claims brought by Plaintiffs Alejandro and Maria Juarez ("the Juarezes") and Maria Portillo ("Portillo") (collectively, "Plaintiffs"). Second, Jani-King moves for partial summary judgment on its counterclaims against the Juarezes. Plaintiffs filed an Opposition, and Jani-King filed a Reply. ECF Nos. 159 ("Opp'n"), 164 ("Reply"). Pursuant to *Civil Local Rule 7-1(b)*, the Court finds the Motion suit-

able for determination without oral argument. For the following reasons, the Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment on Plaintiffs' claims and DENIES Jani-King's motion for partial summary judgment on its [*3] counterclaims.

II. BACKGROUND

A. Factual Background

The Court has already set forth much of the factual background of this case in its prior order denying class certification. ECF No. 130 ("Class Cert. Order"). Jani-King provides cleaning and janitorial services to commercial clients in California and other states. Id. at 2. It specializes in serving larger commercial clients, including commercial office buildings, healthcare facilities, and retail outlets. Id.

Jani-King's business model involves selling franchises to individuals or entities, who then perform janitorial work for Jani-King's clients. Id. Jani-King claims to have more than twelve thousand franchisees throughout the United States. Id.

Under the franchise agreement between Jani-King and its franchisees, franchisees pay an Initial Franchise Fee and an Initial Finder's Fee. Id. Both fees are paid in installments over the life of the franchise agreement, with a down payment due on purchase. Id. In return, Jani-King must offer each franchisee a certain amount of centrally generated business -- the "Initial Business Offering" ("IBO") -- during the franchisee's "Initial Offering Period." Id. The amount of business Jani-King is obligated [*4] to offer is proportional to the size of the Initial Finder's Fee paid by the franchisee. Id. Jani-King offers fifteen franchise plans which are identical in all respects except the amount of initial investment required by the franchisee and the amount of centrally generated business promised by Jani-King. Id. These franchise plans range in cost from $8,600 to $46,500. Id. at 2-3.

Franchisees do not receive an exclusive territory; rather, each franchise agreement designates a specific non-exclusive geographic territory. Id. at 3. Franchisees agree to clean, interact with clients, and perform other business tasks according to standardized procedures established by Jani-King. Id. For example, franchisees must purchase specific cleaning equipment, carry insurance, and report customer complaints to Jani-King. Id. Franchisees also solicit clients directly, although they must comply with Jani-King's procedures in doing so. Id. In addition to the two above-mentioned fees, franchisees must pay Jani-King a number of other fees, including an accounting fee and an advertising fee. Id.

In addition to centralized bidding, Jani-King centrally performs accounting, data management, and franchise training. [*5] Id. As a franchiser, Jani-King is subject to California's franchise regulations, as well as the regulations of other states. It must provide each prospective franchisee with a Franchise Disclosure Document ("FDD") disclosing, among other things, its litigation history, its business experience, the fees the franchisee is required to pay under the agreement, and the estimated total investment that the franchisee must make to open the franchise. *Cal. Corp. Code § 31114*; *Cal. Code. Regs. tit. X, § 310.114.1.*

Plaintiffs in this case are four individuals who purchased franchises from Jani-King and have performed janitorial work under the Jani-King franchise agreement. Id. Plaintiffs are Spanish speakers and have limited proficiency in speaking or reading English. The Juarezes jointly purchased a Plan "D" franchise for $13,500 in May 2005. Id. Portillo and Luis A. Romero ("Romero") both purchased Plan "C" franchises for $12,000. Id. at 4. The Juarezes and Portillo have testified that they used employees to perform cleaning work on many of their accounts. See JK Ex. 5 at 89-91, 94-97, 104; Ex. 6 at 111-13; Ex. 7 at 57-59.[1] The Juarezes and Portillo also operated their own independent cleaning [*6] businesses while they operated their Jani-King franchise. The Juarezes founded Nano's Janitor ("Nano's") in 2007, and Portillo owned Tidy Maids for several years before she bought her Jani-King franchise. JK Ex. 20; Ex. 9 ("A. Juarez 2nd Dep.") at 55-72; Ex. 7 at 10-13; 57-59.

1 Eileen Hunter ("Hunter"), Jani-King's attorney, submitted two declarations in support of Jani-King's motions for summary judgment. ECF Nos. 149-2 ("Hunter Decl."); 164-2 ("Hunter Supp. Decl."). Exhibit numbers 1 through 37 were attached to the Hunter Declaration and exhibit numbers 38 through 50 were attached to the Hunter Supplemental Declaration (hereinafter, "JK Exs. 1-50"). Shannon Liss-Riordan ("Liss Riordan"), Plaintiffs' attorney, submitted a declaration in opposition to Jani-King's motion. ECF No. 157 ("Liss-Riordan Decl."). Forty-nine exhibits were attached to the Liss-Riordan Declaration (hereinafter, "Pls.' Exs. 1-49").

B. Procedural Background

This action was initially filed as a putative class action in California Superior Court and was removed to federal court by Jani-King on July 30, 2009. ECF No. 1. The Court granted Jani-King's motion to dismiss certain claims in the Initial Complaint on October [*7] 5, 2009. ECF No. 25. On November 4, 2009, Plaintiffs filed their FAC, which Jani-King answered. ECF Nos. 32 ("FAC"), 35 ("Answer").

The FAC alleges fourteen causes of action: (1) & (2) violations of *California Corporations Code §§ 31201, 31202*; (3) & (4) deceit by intentional misrepresentation and concealment; (5) negligent misrepresentation, (6) breach of contract; (7) breach of the implied covenant of good faith and fair dealing ("breach of the implied covenant"); (8) failure to pay overtime in wages; (9) failure to pay minimum wage for all hours worked; (10) failure to provide accurate itemized wage statements; (11) failure to indemnify employees for expenses; (12) unlawful deductions for wages; (13) compelling employees to patronize employer; (14) unfair competition in violation of *California Business and Professions Code § 17200.*

On July 8, 2010, Jani-King sought leave from the Court to file a counterclaim against the Juarezes, which the Court granted. ECF Nos. 47, 112. In its counterclaim, Jani-King alleges that, without first seeking termination of their Jani-King franchise, the Juarezes formed Nano's and induced Jani-King customers to terminate their cleaning agreements and transfer [*8] their business to the competing firm. ECF No. 115 ("Countercl."). Jani-King brings action for (1) breach of contract, (2) tortious interference with contract, and (3) tortious interference with prospective economic advantage. Id.

The Court denied Plaintiffs' amended motion for class certification on March 4, 2011 and ordered that the case proceed as an action on behalf of the Juarezes, Portillo, and Romero. ECF No. 130 ("Class Cert. Order"). On September 27, 2011, Romero and Jani-King stipulated to the entry of judgment against Jani-King and in favor of Romero in the amount of $50,000. ECF No. 148.

Jani-King now moves for summary judgment on all fourteen claims brought by the remaining plaintiffs. Jani-King argues that it is entitled to summary judgment on Plaintiffs' labor code claims because Plaintiffs are independent contractors, not employees. MSJ at 4-5. As to Plaintiffs' contract and fraud-based claims, Jani-King argues that it disclosed all required information and fulfilled its obligations under the franchise agreements. Id. at 8-22. Jani-King also moves for partial summary judgment on its contract counterclaim against the Juarezes because the Juarezes purportedly used Nano's [*9] to siphon business away from Jani-King in violation of the franchise agreement. Id. at 23-24.

III. LEGAL STANDARD

Entry of summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. Summary judgment should be granted if the evidence would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Thus, "*Rule 56*[] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, 477 U.S. at 255*. However, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id. at 252*. "When opposing parties tell two different stories, one of which is [*10] blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*. "Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the movant." *Dias v. Nationwide Life Ins. Co., 700 F. Supp. 2d 1204, 1214 (E.D. Cal. 2010)*. "Where the non-moving party will have the burden of proof on an issue at trial, the movant may prevail by presenting evidence that negates an essential element of the non-moving party's claim or by merely pointing out that there is an absence of evidence to support an essential element of the non-moving party's claim." Id.

IV. DISCUSSION

A. Plaintiffs' Labor Code Claims (Claims 8-13)

The legal theory underlying Plaintiffs' labor code claims (claims 8-13) is that Jani-King's common policies and practices so tightly controlled the franchisees' actions as to create an employer-employee relationship between Jani-King and Plaintiffs. Jani-King argues that no trial is required to decide these labor [*11] claims because the undisputed facts show that Plaintiffs were independent contractors. The Court agrees.

In California, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *S. G. Borello & Sons, Inc. v. Department of Indus. Relations, 48 Cal. 3d 341, 350, 256 Cal. Rptr. 543, 769 P.2d 399 (Cal. 1989)* (internal quotations and citations omitted). While the principal's right to control is the most important consideration, California courts consider a number of additional factors, including: the right of the principal to discharge at will, without cause; whether the one performing services is engaged in a distinct occupation or business;

whether the work is usually done under the direction of the principal; whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time for which the services are to be performed; the method of payment; whether the work is a part of the regular business of the principal; and whether the parties believe they are creating an employer-employee relationship. *Id. at 351.*

In most cases, [*12] "once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." *Narayan v. EGL, Inc., 616 F.3d 895, 900 (9th Cir. 2010)* (applying California law). However, this presumption does not apply in the franchise context. A franchisee must show that the franchisor exercised "control beyond that necessary to protect and maintain its interest in its trademark, trade name, and good will" to establish a prima facie case of an employer-employee relationship. *Cislaw v. Southland Corp., 4 Cal. App. 4th 1284, 1296, 6 Cal. Rptr. 2d 386 (Cal. Ct. App. 1992).* [2]

> 2 Plaintiffs argue that Cislaw is inapposite and that the Court should instead apply the standard enunciated in Narayan. Opp'n at 4-6. This argument was addressed and rejected in the Court's prior order denying class certification. See Class Cert. Order at 18-23.

The Court finds that Jani-King did not exercise sufficient control over Plaintiffs to render them employees. Plaintiffs had the discretion to hire, fire, and supervise their employees, as well as determine the amount and manner of their pay. See JK Ex. 5 21-26, 89-108; Ex. 7 at 10-13, [*13] 60-61, 65-66. Plaintiffs had the contractual right to decline accounts and, in practice, they did so. JK Ex. 1 at 7506; Ex. 5 at 101; Ex. 7 at 82-89. Jani-King could not terminate Plaintiffs' franchise without cause. See *Cal. Bus. & Prof. Code. § 20020.* Plaintiffs purchased their own cleaning supplies and equipment. JK Ex. 5 at 116-19; Ex. 7 at 77-80. Plaintiffs could bid their own accounts and sell their businesses. See JK Ex. 6 at 114-115; 148-149. Plaintiffs decided when to service certain accounts, subject to timeframes set forth by their clients. JK Ex. 5 at 88-89; Ex. 7 at 126-27. Instead of an hourly wage, Plaintiffs' compensation came in the form of gross revenues, less fees paid to Jani-King. JK Ex. 5 at 126-127; Ex. 7 at 112-13. Finally, Plaintiffs' franchise agreements expressly state that franchisees are independent contractors. JK Ex. 3 § 12.7; Ex. 4 § 12.7.

As Plaintiffs point out, Jani-King imposed a number of controls on franchisees. See Opp'n at 7-11. However, these controls were no more than necessary to protect Jani-King's trademark, trade name, and good will and, accordingly, did not create an employer-employee relationship between Jani-King and Plaintiffs. For example, [*14] to protect its customer relationships, Jani-King retains sole ownership of all contracts with cleaning clients. See Pls.' Ex. 9 § 14.9.2. While all contracts for provision of services are drafted by Jani-King, id., franchise owners may "freely set [their] own prices for services and products . . . provided such actions do not affect the business of the franchisor," id. § 12.1. Jani-King also protects its goodwill by retaining the power to terminate a franchisee's right to service a particular client when the franchisee fails to comply with Jani-King's policies and procedures. Id. § 4.17.2. Jani-King performs billing and accounting for franchisees' cleaning services to maintain consistency across the franchise. Id. § 4.7. There is no evidence that this practice limited the business opportunities available to franchisees. Jani-King also communicated directly with some of Plaintiffs' clients to address complaints and ensure customer satisfaction. [3] Pls.' Ex. 6 at 90, 140-141; Ex. 7 at 95-96.

> 3 Jani-King did not have a monopoly on such communications, Plaintiffs often talked directly with clients about their accounts. See JK Ex. 6 at 41; Ex. 7 at 85-87.

Plaintiffs make much of the fact that [*15] Jani-King collected payments directly from customers and then remitted "what resembles a paycheck to workers." Opp'n at 8. Regardless of how payments were collected and distributed, it remains undisputed that Plaintiffs were entitled to the revenues generated by their franchises, less franchise fees. Plaintiffs also argue that "[w]orkers are not free to choose their own clients; they may only accept or reject a proposed assignment." Opp'n at 7. Plaintiffs offer no facts to support this conclusion and their own deposition testimony indicates that they were permitted and encouraged to seek out and bid their own commercial cleaning accounts, independent of Jani-King's sales staff. See JK Ex. 6 at 148-49; Ex. 7 at 84-89.

Plaintiffs have failed to raise a triable issue that Jani-King exercised control beyond that necessary to protect and maintain its interest in its trademark, trade name, and good will. Accordingly, the Court GRANTS Jani-King's motion for summary judgment with respect to Plaintiffs' labor code claims.

B. Plaintiffs' Fraud and CFIL Claims (Claims 1-5)

Jani-King argues that Plaintiffs claims for fraud and violations of the California Franchise Investment Law ("CFIL") fail because [*16] (1) they are time-barred; and (2) Plaintiffs could not have reasonably relied on Jani-King's alleged misrepresentations. The Court agrees.

Plaintiffs' claims for fraud and CFIL violations are predicated on nine categories of fraudulent actions. Specifically, Plaintiffs allege that Jani-King: (1) made false earnings promises; (2) misrepresented the amount of work available for franchisees; (3) misrepresented the geographic location of available accounts; (4) failed to fully disclose Jani-King's fees and costs; (5) failed to provide Plaintiffs with the Uniform Franchise Offering Circular ("UFOC") before they signed their franchise agreements; (6) misrepresented that Plaintiffs' franchise down-payment was the exclusive purchase price; (7) failed to disclose Plaintiffs' right to seek a refund if their franchise failed to secure a certain amount of business within the "Initial Offering Period"; (8) misrepresented that Plaintiffs were required to purchase supplies from Cole Supplies, which is owned by Jani-King; and (9) failed to provide Plaintiffs with Spanish language translations of key documents, including their franchise agreements.

As Defendants argue, these alleged omissions and oral [*17] misrepresentations are directly contradicted by written agreements received and signed by Plaintiffs. Accordingly, evidence of these misrepresentations is barred by the parol evidence rule. See *Duncan v. McCaffrey Grp., Inc., 200 Cal. App. 4th 346, 369, 133 Cal. Rptr. 3d 280 (Cal. Ct. App. 2011)* ("[A]n integrated contract establishes the terms of the agreement between the parties, and evidence suggesting the terms are other than those stated in the agreement is irrelevant."). Plaintiffs argue that, under the fraud exception to the parol evidence rule, they are permitted to introduce evidence of oral promises to show that their agreements with Jani-King were induced by fraud. Opp'n at 11-13. However, the fraud exception does not apply where, as here, the alleged oral promises directly contradict the terms of a written agreement. See *Cobbs v. Cobbs, 53 Cal. App. 2d 780, 784, 128 P.2d 373 (Cal. Ct. App. 1942)*. To be admissible, parol evidence "must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." [4] *Bank of Am. Assn. v. Pendergrass, 4 Cal. 2d 258, 263, 48 P.2d 659 (Cal. 1935)*.

> 4 "This [*18] interpretation has been widely criticized, but has never been overruled." *Scott v. Minuteman Press Int'l, No. 94-15140, 1995 U.S. App. LEXIS 30130 (9th Cir. Oct. 13, 1995)*.

Specifically, the omissions and oral misrepresentations alleged by Plaintiffs are contradicted by the Franchise Agreement, UFOC, and various other documents signed by Plaintiffs. The Franchise Agreement included terms concerning profits and earnings, the down-payment and total purchase price, the geographic location of accounts, fees and costs, and refund rights, among other things. See JK Ex. 3 at 1, §§ 4.3, 6.1.1, 6.5, 6.8; Ex. 4 §§ 6.1.1, 6.5., 6.8; Ex. 11 at 45. When Plaintiffs purchased their franchises, they signed a written form acknowledging that they had not received any representation regarding any "sales, income, or profit levels." JK Ex. 10; Ex 11. Plaintiffs also signed written documents acknowledging that they received the UFOC before signing their franchise agreements and Portillo subsequently testified that she received the UFOC. [5] Id.; JK Ex. 7 at 42-43. The UFOC expressly states that Jani-King does not promise any amount of profits or earnings. JK Ex. 1 at Item 19; 2 at Item 19. The UFOC also states [*19] that franchise owners "may purchase" supplies and equipment from Jani-King, but they have "no obligation to purchase or lease" required items "from any designated supplier." Id. at Item 8. Pre-contractual oral representations concerning any of these terms are inadmissible. Accordingly, Plaintiffs' statutory fraud claims must fail.

> 5 Alejandro Juarez testified that Jani-King gave him a "big white book to read over the rules" during his first meeting at the Jani-King office, but does not remember whether that book was the UFOC. JK Ex. 9 at 137-38. In light of his testimony and his signed acknowledgment, the Court finds there is no issue of triable fact as to whether the Juarezes received the UFOC before signing the franchise agreement.

Plaintiffs' statutory fraud claims are also time barred as Plaintiffs should have discovered the truth or falsity of most of the alleged misrepresentations before the statute of limitations had run. The limitations period for an "untrue statement" under CFIL is two years after the violation or one year "after the discovery by the plaintiff of the facts constituting such violation," whichever is sooner. *Cal. Corp. Code. §§ 31201, 31304*. For willfully untrue [*20] statements, the period is four years after the violation or one year after its discovery, whichever is sooner. Id. *§§ 31300, 31303*. The limitations period for Plaintiffs' remaining statutory fraud claims is three years from discovery. *Cal. Civ. Proc. Code § 338*. "The statute commences to run only after one has notice of circumstances sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry." *Briskin v. Ernst & Ernst, 589 F.2d 1363, 1367 (9th Cir. 1978)* (quoting *Schaefer v. Berinstein, 140 Cal. App. 2d 278, 294-95, 295 P.2d 113 (Cal Ct. App. 1956))*.

Plaintiffs' suit was not filed until June 22, 2009, and Plaintiffs should have discovered the facts constituting the violation soon after they opened their franchises in 2005. During that time, they had "notice of circumstanc-

es sufficient to make a reasonably prudent person suspicious" based on their earnings, the amount of work made available to them, the geographic location of their clients, and the fees and costs charged by Jani-King. These are fundamental aspects of Plaintiffs' businesses. Accordingly, it is implausible that Plaintiffs were unaware of these facts before the statute of limitations had run. [6]

> 6 Plaintiffs [*21] argue that they were unaware of Jani-King's misrepresentations until after this suit was filed. This argument is unpersuasive. Opp'n at 14-15. First, the relevant inquiry is not whether Plaintiffs had knowledge of the fraud, but whether a reasonably prudent person would have been put on notice. Second, the deposition testimony relied on by Plaintiffs is too vague to support their assertion. See Pls.' Ex. 5 at 121; Ex. 7 at 90; Ex. 21 at 170-73. Third, Plaintiffs concede in their opposition brief that they were aware of some of the alleged misrepresentations before the statute had run. See, e.g., Opp'n at 14 ("Mr. and Ms. Juarez complained to [Jani-King] about the fact that documents were not translated into Spanish . . . . [Portillo] did not know, until after she attended training, that more fees were to be charged.").

For the foregoing reasons, the Court GRANTS Jani-King's motion for summary judgment with respect to Plaintiff's causes of action for fraud and violations of CFIL.

C. Plaintiffs' Claim for Breach of Contract (Claim 6)

In the FAC, Plaintiffs allege that Jani-King breached its Franchise Agreements with the Juarezes and Portillo in a variety of ways. See FAC ¶¶ 74, 81, 119, [*22] 112, 182. In responding to Jani-King's motion for summary judgment, Plaintiffs appear to abandon all of these claims but one -- that Jani-King failed to meet its IBO requirement and provide Plaintiffs with refunds required by the contract. See Opp'n at 15-16. The Court finds that triable issues of fact exist as to Portillo's claim for breach, but Jani-King is entitled to summary judgment on the Juarez's claim for breach.

Under the franchise agreement, Jani-King was required to offer Portillo $2,000 in business during a 120-day initial offering period, which began on May 4, 2005. JK Ex. 3 at 1. If Jani-King failed to meet its IBO, it was required to refund three times the amount of the shortfall. Id. § 4.3.3. Jani-King concedes that, considering the facts in a light most favorable to Portillo, it satisfied only $686.29 of Portillo's $2000 IBO during the initial offering period. MSJ at 16. Jani-King also concedes that Portillo is entitled to $3,941 -- three times the unsatisfied amount. [7] Id. In its Motion, Jani-King offers, apparently for the first time, to pay the refund amount of $3,941, in compliance with the Franchise Agreement. Id.

> 7 Plaintiffs argue that there are factual disputes [*23] about the exact amounts Portillo would be owed under the refund provision. Opp'n at 16. Portillo disputes which accounts Jani-King offered and whether those accounts were actually offered to satisfy the IBO. Id. In light of these and other factual disputes, Portillo may be entitled to more or less than $3,941.

Jani-King argues that it is not liable for breach because Portillo never requested a refund and because the Franchise Agreement does not specify that a refund must be made within a specified time period. Id. The Court disagrees. First, the Franchise Agreement does not require that Portillo request a refund in order to trigger a breach. Second, Jani-King's delay is sufficient to constitute a breach. Jani-King failed to meet its IBO as of September 2005 and, over six years later, it has yet to provide Portillo with a refund. While the Franchise Agreement is silent as to the time-frame for refunds, it is highly unlikely that either party contemplated a six-year period at the time of contract formation. Third, in light of Jani-King's delay, it is uncertain that Portillo would ever receive her refund absent Court action. Finally, if Portillo was to prevail on her contract claim at [*24] trial, she may be entitled to additional relief, including interest and costs.

Plaintiffs also claim that Jani-King fell $190 short of meeting its $3000 IBO requirement for the Juarezes. Opp'n at 16. The Court finds Plaintiffs' argument unpersuasive. Maria Juarez testified that Jani-King met its initial business obligation and Alejandro Juarez signed a statement acknowledging the same. [8] JK Ex. 9 at 140-41; Ex. 45. In light of these facts, Plaintiffs cannot plausibly contend that Jani-King failed to satisfy its IBO requirement for the Juarezes.

> 8 Jani-King also argues that Plaintiff's calculation of Jani-King's IBO is based on mistaken initial business period. Reply at 11. The Franchise Agreement provides that the initial business period begins on the date after the franchisee (1) obtains all required equipment, (2) completes all required training, and (3) obtains the required insurance. JK Ex. 4 § 6.1.1. Plaintiffs contend that the initial business period began to run after the Juarezes completed their training on June 23, 2005. Opp'n at 16. Jani-King responds that the initial business period did not commence until one month later, when the Juarezes obtained all required equipment. Reply [*25] at 11 (citing JK Ex. 46). It is unclear from the documentation

submitted by the parties when the initial business period actually commenced.

For the foregoing reasons, the Court DENIES in part Jani-King's motion for summary judgment with respect to Plaintiffs' breach of contract claim. Plaintiffs' claim that Jani-King breached the Franchise Agreement by failing to provide Portillo with an IBO refund may proceed to trial. Jani-King's motion for summary judgment on Plaintiffs' breach of contract claim is GRANTED in all other respects.

D. Plaintiffs' Claims for Breach of the Implied Covenant (Claim 7)

Plaintiffs assert that Jani-King breached the implied covenant by, among other things, offering Plaintiffs accounts that generate little or no income due to underbidding. Opp'n at 17-18. The Court agrees and finds that Plaintiffs' claim for breach of the implied covenant may proceed to trial.

"There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Kransco v. American Empire Surplus Lines Ins. Co., 23 Cal. 4th 390, 400, 97 Cal. Rptr. 2d 151, 2 P.3d 1 (2000)* (quotations omitted). This [*26] covenant exists to "prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." *Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 349-50, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 (2000)*. However, "the scope of the conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." *Carma Developers v. Marathon Dev. Cal., Inc., 2 Cal. 4th 342, 373, 6 Cal. Rptr. 2d 467, 826 P.2d 710 (1992)*. The implied covenant may not be read "to prohibit a party from doing that which is expressly permitted by an agreement." *Id. at 374*.

In the instant action, there is a triable issue of fact as to whether Jani-King breached the implied covenant by underbidding accounts serviced by Plaintiffs. The Jani-King policies and procedures manual shows that Jani-King exerted a substantial amount of control over bids made to clients. See Pls.' Ex. 31 at 8183-84. Plaintiffs have testified that a significant number of these bids were too low and that Jani-King often underestimated the amount of time necessary to service an account. For example, Portillo testified that she spent 24 hours per month servicing a Jani-King account which only paid $86 per month after Jani-King [*27] fees were deducted. Pls.' Ex. 7 at 102-04. Portillo also testified that another account took significantly longer to service than Jani-King had represented, id. at 94-95, that she was forced to turn down several accounts because they were underbid, id. at 88-89, and that Jani-King underbid almost all of the accounts she serviced, id. at 98. The Juarezes offered similar testimony. Alejandro Juarez stated that Jani-King miscalculated the time it would take to clean "the vast majority of accounts" and that only "three or four" of his accounts were profitable. Pls. Ex. 21 at 166. Maria Juarez stated that some of her accounts paid only $5 to $6 per hour. Pls.' Ex. 6 at 132.

Jani-King argues that this evidence fails to show that Jani-King's bids fell below an "objective standard" that would identify a properly bid account. Reply at 12. The Court disagrees. Plaintiffs' testimony suggests that Jani-King often underestimated the time it would take to service an account and that Plaintiffs serviced certain Jani-King accounts for $3.58 to $6 per hour. This evidence, which Defendants do not dispute, is sufficient to create a genuine issue of material fact for trial.

Jani-King also argues that Plaintiff's [*28] claim for breach of the implied covenant fails because "Plaintiffs identify no contractual provisions that were frustrated by Jani-King's bidding practices[.]" MSJ at 17. The Court is unaware of any authority that would require a plaintiff to identify "contractual provisions that were frustrated" in order to state a claim for breach of the implied covenant. As Jani-King states, "the [implied] covenant prohibits one party from injuring the other's right to receive 'the benefits of the agreement.'" Id. (quoting *Barrous v. BP P.L.C., No. 10-CV-2944-LHK, 2010 U.S. Dist. LEXIS 108933, at *15 (N.D. Cal. Oct. 13, 2010))*. In the instant action, Plaintiffs assert that Jani-King interfered with their right to receive the benefits of the Franchise Agreement by offering them unprofitable accounts. This is sufficient to state a claim for breach of the implied covenant.

Accordingly, the Court DENIES Jani-King's motion for summary judgment with respect to Plaintiffs' claim for breach of the implied covenant.

E. Plaintiffs' UCL Claim (Claim 14)

The UCL prohibits businesses from engaging in "any [1] unlawful, [2] unfair or [3] fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. Plaintiffs [*29] bring claims under all three prongs of the UCL. The Court addresses each in turn.

1. Unlawful Practices

The parties agree that Plaintiffs' claims under the unlawful prong of the UCL rise and fall with Plaintiffs' labor code, statutory fraud, and contract claims, addressed in Sections IV.A-D above. See MSJ at 21; Opp'n at 20. Accordingly, Plaintiffs' UCL claim for unlawful acts fails to the extent it is derivative of Plaintiffs' labor code and statutory fraud claims, but may proceed to trial

to the extent it is derivative of Plaintiffs' undisturbed claims for breach of contract and breach of the implied covenant.

2. Fraudulent Practices

Plaintiffs now assert that their claim for fraudulent practices under the UCL is predicated on Jani-King's "practice of not providing translations of documents - even when there is repeated, ongoing need for such translations - and of having [Jani-King] agents 'describe' the contents of these documents in a cursory, incomplete, and misleading manner[.]" Opp'n at 21. As Defendants point out, Plaintiffs' position is inconsistent with California law. "The care and diligence of a prudent man in the transaction of his business would demand an examination of the [*30] instrument before signing, either by himself or by someone for him in whom he had the right to place confidence." *Hawkins v. Hawkins, 50 Cal. 558, 560 (1875)*. The California legislature has not required franchisors to provide translations of disclosure documents or agreements to prospective franchisees. See generally *Cal. Corp. Code § 31000 et seq.* Accordingly, the Court declines to impose such a requirement on Jani-King.

3. Unfair Business Practices

In the FAC, Plaintiffs allege that Jani-King engaged in eight unfair business practices. FAC ¶ 24. The Court has already found that no triable issues of fact exist as to the five unfair business practices alleged in paragraphs 24c and 24e through 24h of the FAC. Specifically, the Court has already addressed and rejected Plaintiffs' contention that Jani-King violated the California Labor Code by improperly classifying Plaintiffs as independent contractors rather than employees. See Section IV.A supra. The Court has also addressed and rejected Plaintiffs' contention that Jani-King was required to provide them with Spanish language translations of various disclosure documents. See Section IV.E.2 supra. Accordingly, these practices cannot form [*31] the basis of Plaintiff's UCL claim.

The three remaining unfair business practices alleged by Plaintiffs are: (1) Jani-King induced Plaintiffs to purchase illusory franchise contracts using high pressure sales tactics and failing to disclose material information; (2) Jani-King uses a variety of tactics to keep Plaintiffs from leaving their employment with Jani-King, including underbidding accounts, charging excessive fees, and taking accounts from Plaintiffs without notice or justification; and (3) Jani-King's franchise agreements are filled with unconscionable terms. FAC ¶¶ 24a, b, d. Jani-King's motion for summary judgment does not coherently address the first of these allegedly unfair business practices. With respect to the second set of practices, the Court has already found that triable issues of fact exist as to whether Jani-King underbid accounts. See Section IV.D supra. Accordingly, Plaintiffs' UCL claim for unfair practices may proceed to trial to the extent it is based on these unfair practices.

With respect to the third practice, Plaintiffs claim that the Franchise Agreement is unconscionable because of its "unfair" noncompetition provisions, "oppressive" and "confusing" IBO [*32] refund provision, and "excessive" and "unfair" fee provisions. Opp'n at 22-23. As discussed in Section IV.F infra, the noncompetition provision is overly restrictive and contrary to California law. Accordingly, Plaintiffs' UCL claim for unfair practices may proceed to trial with respect to this claim. [9] However, Plaintiffs may not state a claim for unfair practices based on the Franchise Agreement's IBO refund and fee provisions. Plaintiffs have cited no authority to suggest that these provisions constitute unfair practices under the UCL. Further, Plaintiffs could have reasonably avoided the alleged injuries by not entering the Franchise Agreement. See *Davis v. Ford Motor Credit Co. LLC, 179 Cal. App. 4th 581, 597-98, 101 Cal. Rptr. 3d 697 (Cal. Ct. App. 2009)*.

> 9 Jani-King argues that Plaintiffs cannot base their unfairness claim on the noncompetition provision because Plaintiffs have introduced no evidence that the non-compete provision was enforced. Reply at 14. This argument lacks merit as Jani-King has filed a counterclaim to enforce the noncompetition provision against the Juarezes. Countercl. ¶ 6.

For the foregoing reasons, the Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment [*33] with respect to Plaintiffs' UCL claims.

F. Jani-King's Counterclaim for Breach of Contract

Jani-King argues that the Juarezes violated their Franchise Agreement by secretly creating their own cleaning company, Nano's, and using it to siphon business away from Jani-King. MSJ at 23.

Jani-King's argument turns on the noncompetition provisions of the Franchise agreement. The Franchise Agreement provides, in relevant part:

> Franchisee . . . agrees during the term of this Agreement [20 years] not to engage in or have any financial interest in, either as an officer, agent, stockholder, employee, director, owner, or partner, any other business which performs cleaning management services franchising or con-

> tracting cleaning management sales or any related business anywhere, except as otherwise approved in writing by Franchisor.

Pls.' Ex. 9 § 4.14.1. In the event that the franchise is sold, assigned, or terminated, the non-competition provision remains in force for two years within the territory covered by the agreements and for one year in any other territory covered by a Jani-King Franchise agreement. Id. § 4.14.2. The Franchise agreement also provides that the Juarezes would pay Jani-King a fee [*34] equal to ten percent of monthly gross revenues by the fifth day of each month. Id. § 4.5.1. Gross revenues are defined as:

> All revenue invoiced by anyone for any contract services . . . and any other revenue related to or derived from the provision of any cleaning and maintenance services . . . in connection with the conduct and operation of Franchisee's business or otherwise directly or indirectly . . . performed . . . for the benefit of you . . . regardless of the entity or business name used.

Id. (emphasis added). Owners must pay a non-reported business fee of $25 for "each day [the] Franchisee fails to report all gross revenue," and also pay the missing royalty, advertising, and accounting fees when the hidden revenue is discovered. Id.

Jani-King contends that, under the express terms of the Franchise Agreement, it is entitled to a percentage of all revenues earned by Nano's as well as non-reported business fees of $25 per day. MSJ at 24. Jani-King points specifically to the Juarezes' deposition testimony. Id. The Juarezes admitted that they formed Nano's and that Nano's serviced at least three clients that Jani-King had bid on or that the Juarezes had first serviced as Jani-King [*35] franchise owners. See, e.g., JK Ex. 6 at 10-15; Ex. 5 at 18-29. The Juarezes also admitted not reporting revenue earned by Nano's and not sharing Nano's gross revenue with Jani-King. See JK Ex. 6 at 13, 20.

Plaintiffs do not dispute any of these facts. However, they argue that there is a triable issue of fact as to whether the noncompetition provisions in the Franchise Agreement are enforceable. The Court agrees. Noncompetition clauses are governed by *California Business and Professions Code § 16600*, which states: "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." [10] "California courts have repeatedly held that *section 16600* should be interpreted as broadly as its language reads." *Scott v. Snelling & Snelling, Inc., 732 F. Supp. 1034, 1042 (N.D. Cal. 1990)*. Accordingly, courts applying *Section 16600* have refused to enforce noncompetition clauses, regardless of whether those clauses are "reasonable." See *Aussie Pet Mobile, Inc. v. Benton, NO. SACV 09-1407 AG, 2010 U.S. Dist. LEXIS 65126, *17 (C.D. Cal. June 28, 2010)*; *Snelling, 732 F. Supp. at 1042-43*. The California [*36] Supreme Court has recognized an exception to *Section 16600* where a noncompetition clause is necessary to protect a franchisor's trade secrets or proprietary information. *Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147 (Cal. 1965)*.

> 10 The chapter provides exceptions for non-competition agreements in the sale or dissolution of corporations, *Cal. Bus. & Prof. Code § 16601*, partnerships, id. *§ 16602*, and limited liability corporations, id. *§ 16602.5*.

Several courts have refused to enforce similar non-competition clauses in the franchise context. For example, in Aussie Pet Mobile, the Court addressed an Exclusive Relationship Clause that prohibited the franchisee from "having any direct or indirect interest as a disclosed or beneficial owner in any Similar Business located anywhere" and "from performing services for any Similar Business located anywhere." *2010 U.S. Dist. LEXIS 65126, at *18* (internal quotations omitted). The Court found that the clause was unenforceable since "[t]he broad language and lack of restrictions on the scope . . . show that the intent was not merely to protect trade secrets, but also to restrict competition." *Id. at *18-19*; see also *Snelling, 732 F. Supp. at 1043-45* [*37] (declining to enforce a noncompetition clause in a franchise agreement since franchisee did not utilize franchisor's trade secrets).

Defendants insist that *Dayton Time Lock Service, Inc. v. Silent Watchman Corp., 52 Cal. App. 3d 1, 124 Cal. Rptr. 678 (Cal. App. 2d Dist. 1975)* is controlling. MSJ at 24. The Court disagrees. In Dayton, the court found that a non-competition provision was enforceable against a franchisor during the term of the franchise agreement. *52 Cal. App. 3d at 6*. Relying on federal anti-trust case law, the Court stated that "[exclusive dealing contracts] are proscribed when it is probable that performance of the contract will foreclose competition in a substantial share of the affected line of commerce." Id. This standard is inconsistent with later court decisions directly applying *Section 16600*. See, e.g., *Aussie Pet Mobile, 2010 U.S. Dist. LEXIS 65126, at *18*; *Snelling, 732 F. Supp. at 1043-45*.

In the instant action, it is unclear how prohibiting Plaintiffs from having any financial interest or employ-

ment in any "contract cleaning" or "any related business" "anywhere" is necessary to protect Jani-King's trade secrets or proprietary information. Nor is it clear that the Juarezes misappropriated [*38] trade secrets in operating Nano's or in soliciting Jani-King's former clients. The non-competition provision in the Franchise Agreement effectively prevents Plaintiffs from working as janitors for any other company during (and for some time after) the term of the franchise. Even under the more lenient standard enunciated in Dayton, such restrictions may not be unenforceable.

For the foregoing reasons, the Court concludes that triable issues of fact exist as to whether the noncompetition clause in the Franchise Agreement is enforceable. Accordingly, the Court DENIES Jani-King's motion for summary judgment on its counterclaim for breach of contract. At trial, Jani-King may present additional evidence that the non-competition provision in the Franchise Agreement is necessary to protect its trade secrets or proprietary information.

V. CONCLUSION

The Court GRANTS in part and DENIES in part Defendant Jani-King's motion for summary judgment on claims brought by Plaintiffs Alejandro and Maria Juarez and Maria Portillo. Specifically:

- o The Court GRANTS Jani-King's motion for summary judgment with respect to Plaintiffs' labor code claims (claims 8-13).
- o The Court GRANTS Jani-King's motion for summary [*39] judgment with respect to Plaintiffs' statutory fraud claims (claims 1-5).
- o The Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment with respect to Plaintiffs' claim for breach of contract (claim 6).
- o The Court DENIES Jani-King's motion for summary judgment with respect to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing (claim 7).
- o The Court GRANTS in part and DENIES in part Jani-King's motion for summary judgment with respect to Plaintiffs' UCL claim (claim 14).

As to Plaintiffs' claims, the following issues may proceed to trial: (1) whether Jani-King breached the Franchise Agreement by failing to provide Portillo with an IBO refund; (2) whether Jani-King breached the implied covenant of good faith and fair dealing; (3) whether Jani-King violated the UCL by engaging in unlawful business practices; (4) whether Jani-King engaged in the actions alleged in paragraph 224a of the FAC and whether those actions constitute unfair business practices under the UCL; (5) whether Jani-King underbid accounts and took accounts away from Plaintiffs without notice or justification and whether those actions constitute unfair business practices [*40] under the UCL; and (6) whether the non-competition provision of the Franchise Agreement constitutes an unfair business practice under the UCL.

Additionally, the Court DENIES Jani-King's motion for summary judgment on its counterclaim for breach of contract. Jani-King's counterclaims for breach of contract, tortious interference with contract, and tortious interference with prospective economic advantage may proceed to trial.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: January 23, 2012

/s/ Samuel Conti

UNITED STATES DISTRICT JUDGE

2012 WL 234377
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Kristopher KARNAUSKAS, Plaintiff,
v.
COLUMBIA SUSSEX CORP., Marriott International Incorporated, and Sunbeam Products, Incorporated, Defendants.

No. 09–cv–7104 (GBD). | Jan. 24, 2012.

Opinion

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge.

*1 This case arises out of personal injuries sustained by plaintiff Kristopher Karnauskas when he severed a tendon in his hand while using a coffee maker at the Phoenix Arizona Marriott Airport Hotel. The glass carafe of the coffee maker shattered and shards of glass drove into his hand, injuring plaintiff. Defendant Marriott International, Inc. ("Marriott") licensed the hotel to Columbia Properties Phoenix LP ("Columbia Properties") for operation as a Marriott hotel. At the time of the accident, defendant Columbia Sussex Corporation ("Columbia Sussex") was under agreement with Columbia Properties to manage the hotel. Plaintiff alleges claims in negligence against Columbia Sussex and Marriot, as well as products liability claims, including strict liability based on design defect, against Sunbeam. All defendants move for summary judgment. Sunbeam also moves to exclude the testimony of plaintiff's expert witness, George Pecoraro.

Columbia Sussex's motion for summary judgment is DENIED. Marriott's motion for summary judgment is GRANTED. Sunbeam's motion to exclude plaintiff's expert witness and for summary judgment is GRANTED,

BACKGROUND

On January 11, 2009, plaintiff, a twenty-seven year old climate scientist, traveled to Phoenix, Arizona and checked into the Phoenix Arizona Marriott Airport Hotel. Karnauskas Dep. at 15. Shortly after plaintiff woke up the next morning, he went to use the coffee maker located on the desk of his hotel room. *Id.* at 16:18–24. Plaintiff removed the glass carafe from the coffee maker and walked to the bathroom to fill it with water. *Id.* at 16:22–25. Standing over the bathroom sink, plaintiff tried to remove the plastic lid from the carafe. *Id.* at 17:2–3. The lid fell into the carafe. *Id.* Holding the carafe with his left hand, plaintiff reached into the carafe with his right hand and tried to remove the lid. *Id.* at 17:7–11. Plaintiff alleges that, as he reached into the carafe, the glass shattered along the metal band near the handle of the carafe. *Id.* Plaintiff sustained a cut to his left hand, severing the flexor tendon between his thumb and forefinger. Pl. Am. Compl. ¶ 13. Plaintiff called for assistance and was placed in a cab by hotel staff and taken to a nearby hospital for treatment. Kamauskas Dep. at 20:7–21. Later that day, a hand surgeon at a different hospital reattached the severed tendon in plaintiffs left hand. Pl. Am. Compl. ¶ 13.

While plaintiff was being treated for his injury, Maria Otero, a housekeeper at the hotel, entered plaintiff's hotel room to conduct a routine cleaning. *See* Otero Dep. at 17:12–14. Otero testified that she observed broken glass and blood on plaintiff's bathroom floor. *Id.* at 17:15–21. Otero called her supervisor, Rosa Garcia, to notify her of the situation. *Id.* at 24–25. Otero cleaned the bathroom and disposed of the glass. *Id.* at 27:19–28.

The hotel was operated by Columbia Properties pursuant to a licensing agreement with Marriott dated October 16, 1997. *See* Marriott Licensing Agreement. The license agreement set forth that Columbia Properties would retain all operating control of the hotel as part of the "Marriott System." *Id.* at ¶¶ 2.1–11.3. The hotel was managed by Columbia Sussex pursuant to a management agreement between Columbia Sussex and Columbia Properties dated December 18, 1998. *See* Columbia Management Agreement. Under the management agreement, Columbia Sussex was responsible for the day-to-day management of the hotel. *Id.* at ¶¶ 5.1–5.3.

*2 At the time of the accident, the hotel had 347 rooms. Bhatti Dep. at 12. Each room was equipped with a Sunbeam Model 3225 coffee maker—the model involved in plaintiff's accident—or a similar model. *Id.* at 12. Hotel management had certain procedures in place for inspecting and replacing coffee carafes. Garcia, who was executive housekeeper at the hotel, testified that she held meetings instructing staff to, among other things, clean and inspect the coffee carafes in each room. Garcia Dep. at 18–19. Housekeepers were also responsible for disposal and

replacement of chipped or cracked carafes. Otero Dep. at 11–12. At their depositions, hotel General Manager Jeff Bhatti and housekeeping supervisor Garcia testified that they were unaware of any past incidents in which guests or hotel employees were injured by carafes. *See* Bhatti Dep. at 19; Garcia Dep. at 25; Otero Dep. at 36.

STANDARD OF REVIEW

Summary judgment is appropriate where the evidence, viewed in the light most favorable to the non-moving party, shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Vacold, L.L.C. v. Cerami,* 545 F.3d 114, 121 (2d Cir.2008). The burden rests upon the moving party to show that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is "material" only where it will affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). For there to be a "genuine" issue about the fact, the evidence must be such "that a reasonable jury could return a verdict for the nonmoving party." *Id.* In determining whether there is a genuine issue of material fact, the Court is required to resolve all ambiguities and draw all inferences in favor of the non-moving party. *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.,* 391 F.3d 77, 83 (2d Cir.2004). Where there is no evidence in the record "from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact," summary judgment is appropriate. *Catlin v. Sobol,* 93 F.3d 1112, 1116 (2d Cir.1996).

NEGLIGENCE CLAIM AGAINST MARRIOTT AND COLUMBIA SUSSEX

A. *Choice of Law*

Because jurisdiction in this case is predicated on diversity of citizenship, New York's choice of law rules apply. *Bakalar v. Vavra,* 619 F.3d 136, 139 (2d Cir.2010) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 85 E.Ed. 1477 (1941)). Columbia Sussex and Marriott contend that Arizona law applies. Plaintiff does not contest choice of law in his brief, and cites both Arizona and New York law in support of his premises liability claim. Because the parties do not dispute choice of law, and both apply Arizona law in their briefs, the Court will apply Arizona law to plaintiff's premises liability claim.

B. *Liability of Marriott*

*3 Plaintiff alleges Marriott should be held vicariously liable based on its licensing agreement with Columbia Properties. The majority of courts apply a degree-of-control analysis to determine whether a licensor is liable for the negligent operation of a licensee. Licensors, like franchisors, may be held liable for injuries occurring on the premises of the licensee if the licensor has considerable day-to-day control over the specific instrumentality that is alleged to have caused the harm. *See, e.g ., Wendy Hong Wu v. Dunkin' Donuts, Inc.,* 105 F.Supp.2d 83 (E.D.N.Y.2000) (restaurant franchisor not vicariously liable for security lapses because franchise agreement did not give franchisor considerable control over instrumentality at issue); *Viches v. MLT, Inc.,* 127 F.Supp.2d 828, 832 (E.D.Mich.2000) (hotel franchisor not liable for franchisee's negligent use of pesticides where franchise agreement does nothing more than insure "uniformity and standardization ... of services"); *Pizza K., Inc. v. Santagata,* 249 Ga.App. 36, 547 S.E.2d 405, 406–07 (2001) (pizza franchisor not liable for auto accident caused by franchisee delivery driver because franchisor was "not authorized under the agreement to exercise supervisory control over the daily activities of [franchisee's] employees"); *Hart v. Marriott Intern., Inc.,* 304 A.D.2d 1057, 758 N.Y.S.2d 435 (3d Dep't 2003) (hotel franchisor not liable for alleged negligence of franchisee because franchise agreement did not give franchisor day to day control); *Kerl v. Dennis Rasmussen, Inc.,* 2004 WI 86, 273 Wis.2d 106, 682 N.W.2d 328 (2004) (finding franchisor not liable because "[c]onsistent with the majority approach ... standardized provisions commonly included in franchise agreements specifying uniform quality, marketing, and operational requirements and a right of inspection do not establish a franchisor's control or right to control the daily operations of the franchisee sufficient to give rise to vicarious liability").

Arizona courts have not addressed specifically the area of licensor liability, but have applied concepts similar to the degree of control test employed by the majority of jurisdictions in cases involving franchisor liability. The Court of Appeals of Arizona has held that a franchisor could be held liable in negligence for an injury that occurred at a franchisee location because the franchisor owned and leased the property and also selected, recommended, and inspected the instrumentality alleged to have caused the harm. *See Papasthatis v. Beall,* 150 Ariz. 279, 723 P.2d 97 (App.1986) (franchisor recommended and inspected soda machine involved in harm at franchise location). [1] In sum,

courts, including Arizona, consistently hold that franchisors and licensors, like defendant Marriott, must exercise more than a right to control uniformity of appearance and products to create a duty of care.

Marriott did not have a duty of care to plaintiff because it did not have any day-to-day control over the hotel and did not select, recommend, or inspect the coffee carafe at issue. Marriott entered into a licensing agreement with Columbia Properties that set forth, in pertinent part, "Licensee shall retain and exercise full operating control of the Hotel ... [and] shall have the exclusive authority for the day-to-day management of the Hotel." License Agreement at 19. Marriott does not own the hotel, nor does it have any management or operational responsibilities for the hotel. *Id.* at First Amendment to Agreement. While the agreement set forth Marriott's interest in insuring that Columbia Properties operated the hotel in a manner consistent with the Marriott brand, Marriott played no part in the day-to-day operation of the hotel. *Cf. Carpiglione v. Radisson Hotels Intern., Inc.*, 2011 WL 4736310 at *2 (D.N.J.2011) (finding defendant franchisor not liable because the franchisor of a hotel did not own or control hotel on day-to-day basis). In fact, Columbia Sussex managed the hotel pursuant to a separate management agreement with Columbia Properties; Marriott did not manage any aspect of the hotel. Plaintiff has provided no evidence that Marriott created, was responsible for, or should have been aware of a dangerous condition for which it may be held liable.[2] Liability cannot exist where, as here, the licensor did not exercise any control over the instrumentality at issue. *See Gipson v. Kasey,* 214 Ariz. 141, 150 P.3d 228, 231 (Ariz.2007) ("[A]bsent some duty, an action for negligence cannot be maintained"). Because Marriott did not have control over the day-to-day operations of the hotel or the instrumentality at issue in this case, it owed no duty of care to plaintiff, and summary judgment for Marriott is appropriate.

C. *Liability of Columbia Sussex*

***4** Defendant Columbia Sussex moves for summary judgment on plaintiff's cause of action for premises liability. Under Arizona law, a business "has an affirmative duty to make and keep [its] premises reasonably safe for customers." *Chiara,* 152 Ariz. At 399, 733 P.2d at 284. The owner of property has a duty to discover and warn an invitee about or protect an invitee from an unreasonable risk of harm on the property. *Bellezzo v. State,* 174 Ariz. 548, 551, 851 P.2d 847, 850 (App.1992). The duty also entails reasonable inspection for dangerous conditions. *Nicoletti v. Westcor,* 131 Ariz. 140, 142, 639 P.2d 330, 332 (1982). The owner must have actual or constructive notice of the dangerous condition in order to be found liable. *Preuss v. Sambo's of Ariz., Inc.,* 130 Ariz. 288, 289, 635 P.2d 1210, 1211(1981). Constructive notice may be established by proof " 'the condition existed for such a length of time that in the exercise of ordinary care the proprietor should have known of it and taken action to remedy it.' " *Chiara,* 152 Ariz. at 400, 733 P.2d at 285 (quoting *Walker v. Montgomery Ward & Co.,* 20 Ariz.App. 255, 258, 511 P.2d 699, 702 (1973)). Arizona law recognizes the mode of operation rule, which relieves plaintiff from having to prove notice if the proprietor "could reasonably anticipate that hazardous conditions would regularly arise." *Id.* Regularly has been defined as "[c]ustomary, usual, or normal" for purposes of applying the mode of operation rule. *Borota v. Univ. Med. Ctr.,* 176 Ariz. 394, 396, 861 P.2d 679, 681 (App.1993) (internal citations omitted).

Defendant Columbia Sussex argues, and the record reflects, that aside from the testimony of hotel staff, there is little evidence of past problems with the carafes. The hotel did not keep records of the number of carafes it replaced, and there were no reported incidents of its hotel guests suffering injuries from broken carafes in the past.

Plaintiff argues that summary judgment is inappropriate because there is evidence that defendants had constructive notice of the dangers of the glass coffee carafes based on the hotel staffs' room inspection and carafe replacement policies. Specifically, plaintiff points to the depositions of the general manager of the hotel, Bhatti, and the executive housekeeper, Garcia, who separately testified that the hotel staff replaced a couple of dozen broken glass coffee carafes each year. Bhatti also estimated that the hotel ordered approximately "a couple dozen or a little less" replacement carafes each year. Bhatti Dep. at 15. Garcia testified similarly, explaining that the staff discarded and replaced approximately a dozen carafes each year. Garcia Dep. at 14–16. The evidence shows that certain procedures were in place that could have put hotel staff on notice of possible broken or damaged carafes. Hotel staff members were responsible for inspecting the glass carafes in each room for damage and replacing broken carafes when necessary. *Id.* at 18, 861 P.2d 679. The staff replaced, on average, "one a month, maybe two." *Id.* Plaintiff also points to a similar injury involving a coffee carafe suffered by a Marriott hotel guest in northern Virginia, as well as a trade publication advocating hotels to start using one cup coffee-makers, as evidence that defendant had constructive notice. Pl. Br. 12, May 5, 2011; Aff. of Richard N. Shapiro.

*5 Plaintiff argues, alternatively, that summary judgment is not appropriate because the doctrine of *res ipsa loquitur* applies to plaintiffs claim. Defendant argues plaintiff is foreclosed from bringing forth this claim because it was not pleaded specifically in plaintiff's amended complaint. Under Arizona law, *res ipsa loquitur* is "a theory of circumstantial evidence under which the jury may reasonably find negligence and causation from the facts of the accident and the defendant's relation to the accident." *Jackson v. H.H. Robertson Co.,* 118 Ariz. 29, 31, 574 P.2d 822, 824 (1978). The doctrine requires the court to ask "whether a reasonable man could reach the conclusion from the evidence offered that it was more likely than not the injury involved was the result of negligence on the part of the defendant." *Ward v. Mount Calvary Lutheran Church,* 178 Ariz. 350, 354 873 P.2d 688 (Ct.App.1994) (quoting *Fowler v. Seaton,* 61 Cal.2d 681, 39 Cal.Rptr. 881, 394 P.2d 697, 700 (1964). Arizona requires the plaintiff to establish four elements in *res ipsa loquitur* cases: (1) the accident was of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the accident was caused by an agency or instrumentality within the exclusive control of the defendant; (3) it was not due to any voluntary action on the part of the plaintiff, and (4) plaintiff is not in a position to show the particular circumstances which caused the accident. *Jackson,* 118 Ariz., at 31–32, 574 P.2d 822. Because *res ipsa loquitor* is not a separate cause of action, but rather an alternative theory of negligence, plaintiff has satisfied the pleading requirements in Federal Rule of Civil Procedure 8. Plaintiff is not barred from proving Columbia Sussex was negligent under a theory of *res ipsa loquitor*.

Drawing all inferences in favor of the non-moving party, summary judgment is inappropriate. The testimony of Bhatti and Garcia, hotel trade publications discussing safer alternatives to glass carafes,[3] along with the evidence of a similar injury in the Virginia Marriott hotel, if admissible, could be enough evidence for a rational jury to conclude that defendants are liable under a theory of premise liability. While plaintiff's evidence is certainly not overwhelming, a material issue of fact does exist with regard to whether or not defendants had constructive notice of a dangerous condition involving the use of the glass coffee carafes, a matter appropriate for a jury to decide.

D. *Strict Liability of Columbia Sussex and Marriott*

Defendants Columbia Sussex and Marriott argue that plaintiff is not entitled to relief under a theory of strict liability because he failed to assert the claim in his amended complaint. Federal Rule of Civil Procedure 8(a)(2) requires the plaintiff to make a short and plain statement of his claims in addition to the relief sought. "While 'specific facts are not necessary,' the statement must 'give the defendant fair notice of what the claim is and the grounds upon which it rests.' " *DiPetto v. U.S. Postal Service,* 383 F.App'x 102, 103 (2d Cir.2010) (quoting *Erickson v. Pardus,* 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)). Plaintiff's amended complaint sets forth one cause of action in negligence against Columbia Sussex and Marriott, a second cause of action in negligence against Sunbeam, a third cause of action for breach of warranty against Sunbeam, a fourth cause of action in strict products liability against Sunbeam, and a fifth cause of action for lack of informed consent against all defendants. Because plaintiff did not specifically plead a cause of action in strict liability against Columbia Sussex and Marriott in his amended complaint, he cannot bring forth such a distinct legal claim at this stage.

*6 In plaintiff's reply brief, he asserts that Columbia Sussex and Marriott are strictly liable to plaintiff even though "the Amended Complaint does not plead a discrete cause of action for strict liability." Pl. Br. at 4, n. 3, May 5, 2011. Plaintiff contends that the lack of a specific statement of the claim for strict liability is irrelevant because "all of the factual elements of strict liability are amply pleaded." *Id.* This argument fails. While it is true that "in a design defect case, there is almost no difference between a prima facie case in negligence and one in strict liability," the amended complaint in this case sets forth one theory of negligence for Columbia Sussex and Marriott, and a separate and distinct theory of strict liability against Sunbeam alone. *American Guaran tee & Liability Insurance Co. v. Cirrus Design Corp.,* 2010 WL 5480775 at *3 (S.D.N.Y. Dec.30, 2010) (quoting *Searle v. Suburban Propane Div. of Quantum Chem. Corp.,* 263 A.D.2d 335, 700 N.Y.S.2d 588, 591 (3d Dep't 2000). Plaintiff's first cause of action in negligence against Columbia Sussex and Marriott is based on a theory of premises liability for "the carelessness, negligence, gross negligence, wantonness and recklessness of the Defendants ... in the ownership, management, control and maintenance of said premises." Pl. Am. Compl. ¶ 40. On the other hand, plaintiff's cause of action in strict products liability against Sunbeam is based on a theory of design defect. *Id.* at ¶ 74, 700 N.Y.S.2d 588. In his brief, plaintiff claims Columbia Sussex and Marriott are strictly liable as sellers or distributors of a defectively designed product, but this claim does not appear anywhere in plaintiff's amended complaint. Plaintiff has not made a short and plain statement giving Columbia Sussex and Marriott fair notice of a cause of

action for strict liability and is therefore not entitled to now seek relief on the basis of such a claim.

PLAINTIFF'S PRODUCTS LIABILITY CLAIM AGAINST SUNBEAM

Defendant Sunbeam moves to exclude plaintiffs expert testimony and grant summary judgment. Federal Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise ..." But even if "a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields." *Nimley v. City of N.Y.*, 414 F.3d 381, 399 n. 13 (2d Cir.2005) (citing *United States v. Roldan–Zapata*, 916 F.2d 795, 805 (2d Cir.1990)). Although Rule 702 "embodies a liberal standard of admissibility for expert opinions," *id.* at 395, the Court must "ensure that 'any and all scientific testimony or evidence admitted is not only relevant, but reliable," *id.* at 396 (quoting *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). On a motion to exclude expert testimony and for summary judgment, "[a]n expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion," *Riegel v. Medtronic, Inc.*, 451 F.3d 104, 127 (2d Cir.2006) *aff'd on other grounds*, 522 U.S. 312, 128 S.Ct. 999, 169, 169 L.Ed.2d 892 L.Ed2s 892 (2008).

*7 The Supreme Court articulated four factors relevant to determining the reliability of an expert's reasoning or methodology: (1) whether the theory or technique relied on has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or method has been generally accepted by the scientific community. *Daubert*, 509 U.S. at 593–94. These factors are not an exclusive checklist. *Id.* at 593. The factors should be applied flexibly, according to the particular circumstances of the case at issue. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). The court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

A. *Plaintiff's Expert Report and Testimony*

Plaintiff's expert holds a masters degree in ceramic engineering and has been involved with the science and practice of glass technology for over 50 years. Pecoraro Rept. p. 2. He is the sole member of Pecoraro Consulting, LLC, a business he founded in 2003 that specializes in glass fracture analysis and forensic studies for glass related injuries. *Id.* Prior to starting his consulting business, Pecoraro worked for PPG Industries, Inc., for forty years in the Glass Technology Center as a Senior Research Engineer. Pecoraro Dep. 20:2–18. PPG Industries is a manufacturer of sheet and flat glass products. *Id.* Pecoraro was not involved in the design of glass products at PPG Industries. *Id.* at 21:19–22. While his experience with the glass coffee carafe at issue is limited, Pecoraro has sufficient experience in glass science and technology to qualify as an expert.[4] The admissibility of Pecoraro's opinion thus depends on the reliability of the methodologies and testing he used in reaching his conclusions.

In his report, Pecoraro opined that the negligent design of the carafe weakened the glass over time and eventually caused it to shatter when plaintiff attempted to remove the lid from inside the carafe. Specifically, Pecoraro opined that the design was defective because when the screw in the handle of the carafe was tightened during the manufacturing process, fissures form around the lip of the carafe, weakening the glass by up to seventy-five or eighty percent, and eventually causing the glass to fail. Pecoraro Rept. p 8 ¶¶ 2–3. Pecoraro also opined that the lid of the carafe was designed defectively because it is possible for an unattached lid to fall into the carafe. *Id.* Pecoraro added that alternative designs, such as a handle better fit to the shape of the carafe or a carafe shaped to match the handle, would have prevented the fissures from developing and weakening the strength of the glass. *Id.* p. 8.

*8 To illustrate his defective design theory, Pecoraro and an assistant performed a multi-step test on an exemplar carafe, which they recorded on video. First, Pecoraro instructed his assistant to use a screw driver to loosen and tighten the handle screw on the carafe. Pecoraro's assistant unscrewed the handle screw to a point at which "stress in the glass dropped by 650 psi," then re-tightened the handle screw to a point at which the stress in the glass increased by 1400psi. Pecoraro Rept. at p. 6, ¶ 31; *see also* Video at 11:43–11:50. Based on this, Pecoraro estimated that "the increase of stress at the lip of the

carafe would be 4 to 5 times higher." Pecoraro Rept. p. 6, ¶ 31. Following the loosening and retightening of the handle screw, Pecoraro's assistant used a magnifying lens to examine the carafe for cracks or fissures—he could not find any. Video at 11:11.

Next, under Pecoraro's instruction, Pecoraro's assistant, wearing protective gloves, cut the carafe with a glass cutter six times, creating a fracture in the carafe visible through a microscope. *Id.* at 11:56–12:18. After observing small microscopic vents in the glass, Pecoraro's assistant picked up the carafe and gripped it with his hand—the carafe did not break. *Id.* at 12:50. Pecoraro's assistant then placed one hand inside the carafe in an attempt to recreate plaintiff's alleged accident—the carafe still did not break. *Id.* at 13:19. Finally, Pecoraro's assistant, still wearing protective gloves, twisted on the glass rim of the carafe and the carafe handle for approximately thirty seconds, causing a piece of glass to crack along the lip. Video at 13:18–13:25. After this procedure, Pecoraro's assistant removed the broken piece of glass from the top edge of the carafe. *Id.* at 13:26.

B. ***Admissibility***

Defendant Sunbeam argues plaintiff's expert should be precluded from testifying because his theory of design defect is unreliable under *Daubert*. In design defect cases, testing, although not an absolute perquisite for expert testimony to be admissible, "is usually critical to show that an expert 'adhere [d] to the same standards of intellectual rigor that are demanded in their professional work.' " *Colon,* 199 F.Supp.2d at 76 (quoting *Cimmins v. Lyle Indus.,* 93 F.3d 362, 269 (7th Cir.1996)). Courts have repeatedly rejected expert testimony where a proposed theory or alternative design was not properly tested. *See, e.g., American & foreign Ins. Co. v. General Electric Co.,* 45 F.3d 135, 139 (6th Cir.1995) (rejecting expert evidence where expert lacked protocol for tests and took no notes during testing); *Brooks v. Outboard Marine Corp.,* 234 F.3d 89, 92 (2d Cir.2000) (expert evidence excluded where expert did not test theory in defective motor boat engine case); *Oddi v. Ford Motor Co.,* 234 F.3d 136, 156–57 (3d Cir.2000) (excluding expert evidence where engineer failed to design or test safer design for truck bumper); *Peitzmeier v. Hennesy Indus., Inc.,* 97 F.3d 293 (8th Cir.1996) (excluding expert evidence of alternative design where expert did not design or test any proposed devices he claimed were missing from defendant's machine). While not a requirement, "[t]he failure to test a theory of causation can justify a trial court's exclusion of the expert's testimony." *Brooks,* 234 F.3d at 91 (citing *Daubert,* 509 U.S. at 589).

***9** The Court's analysis of expert opinion "is tempered by the liberal thrust of the Federal Rules of Evidence and the 'presumption of admissibility.' " *Bunt,* 962 F.Supp. at 317 (quoting *Borawick v. Shay,* 68 F.3d 597, 610 (2d Cir.1995)); *Boucer v. United States Suzuki Motor Corp.,* 73 F.3d 18, 21 (2d Cir.1996). Even with this standard in mind, Pecoraro's opinion fails to meet the test for reliability set forth in *Daubert*.

After considering Pecoraro's theory and testing, it is clear that his testimony does not meet the reliability prong of the *Daubert* test. Pecoraro's theory of design defect is based on speculation, and is not supported by his testing. In the video of Pecoraro's test on the exemplar carafe, Pecoraro's assistant loosened and retightened screws into the handle of the carafe, more than doubling the amount of strain on the carafe.[5] Pecoraro Dep. 70:7–71:10. No fissures were observed around the lip of the carafe. Even after doubling the stress of the glass, the glass did not shatter or break. *Id.* When that failed, Pecoraro told his assistant that if he "probably [sic] that with a wheel cutter, it would probably break."[6] Video at 11:11. Pecoraro's assistant went along, stating "[l]et's try it," and cut the carafe six times using a glass cutter. *Id.* at 11:11–12:18. Pecoraro's assistant then observed microscopic vents in the glass through a magnifying lens. *Id.* at 12:18. Pecoraro's assistant declared that "if I tap that, that thing'd fall apart." He did more than tap the glass—he picked it up and gripped it in his hand—but nothing happened. Finally, after having doubled the strain on the glass and scored the glass six times, Pecoraro instructed his assistant to "put your glove on and put your hand inside, like [plaintiff] did, and see if it breaks." *Id.* at 13:17. Pecoraro's assistant placed his gloved hand into the carafe. Again, the carafe did not break. Pecoraro's assistant then gripped the rim of the carafe tightly and twisted on it for approximately 30 seconds, causing a small piece of glass to break along the lip. *Id.* at 13:37. No simulation of the alleged accident created a similar result. As Pecoraro admitted at the end of testing, "we didn't exactly duplicate what happened in this case ..." *Id.* at 14:06.

In sum, plaintiffs expert's test demonstrated that squeezing the rim of the glass, over-tightening the handle screws, cutting the glass six times with a glass cutter, and then physically ripping a piece of glass off of the lip of the carafe, broke the carafe. This test amounts to little more than an experiment involving a glass carafe, a screw driver, a glass cutter, requiring physical strength. It does not prove the sequence of events plaintiff

alleges in his complaint, and does not support Pecoraro's theory of causation he sets forth in his report. *See Brooks,* 234 F.3d at 92 ("The failure to test a theory of causation can justify a trial court's exclusion of the expert's testimony"). No other tests were conducted.

***10** Pecoraro offers little else in support of his opinion. Pecoraro did not attempt to reconstruct the accident, and did not perform any other tests that would support his theory that the design of the glass carafe is inherently dangerous. He did not test or inspect any coffee carafes before the handles were applied to determine whether fissures were created by the application of the handle to the carafe. He did not attempt to simulate the weakness in the glass that he opines occurs over time due to the defective design of the carafe. He did not base his theory on publications or studies that fissures can occur during the manufacturing process. He did not consider or rule out alternate causes of the accident. He did not have available to him any other defective carafes or other similar recorded accidents or failures. He did not observe any fissures in any Sunbeam carafe. Instead, his theory of design defect is based on one test that fails to recreate the accident plaintiff alleges. He attempted to bolster his theory by arguing that it was unnecessary to recreate the accident because the exemplar used for his experiment had not been subject to the same amount of water as the carafe in the accident, and was therefore stronger. This is baseless speculation.

Pecoraro's methodology and evidence do not substantiate his conclusion that a design defect caused the carafe to weaken, fail, and cause injury to plaintiff. *Riegel,* 451 F.3d at 127. Here, "there is simply too great an analytical gap between [the expert's] unreliable methodology and untested theories and the conclusions he reaches in his report." *Kass,* 2004 WL 2475606 at *10 (citing *Amorgianos v. National Railroad Passenger Corp.,* 303 F.3d 256, 266 (2d Cir.2006)). His opinion is speculative, unsupported, and unreliable. He is therefore precluded from testifying under Federal Rule of Evidence 704.

In light of this exclusion, there is no other evidence, or material issue of fact for a jury to decide, with regard to plaintiffs claim of strict products liability against defendant Sunbeam for a design defect. Plaintiff offers no evidence of inherent defects noted in other manufactured carafes or reviews of similar accidents. Plaintiff offers no alternative proof in support of his design defect theory, or any evidence that Sunbeam was otherwise negligent. Accordingly, summary judgment is granted in favor of defendant Sunbeam.

CONCLUSION

Columbia Sussex's motion for summary judgment is DENIED. Marriott's motion for summary judgment is GRANTED. Sunbeam's motion to exclude plaintiff's expert witness and for summary judgment is GRANTED.

SO ORDERED.

Footnotes

1 The *Papasthatis* court reasoned because the franchisor selected, recommended and inspected equipment at issue, it functioned as a gratuitous supplier within the meaning of Section 324(a) of the Restatement and could therefore be held liable for injury involving the equipment. 732 P.2d at 99–100.

2 The license agreement between Marriott and Columbia Sussex contains a clause covering furnishings and fixtures, but plaintiff has produced no evidence showing that Marriott selected, recommended, or inspected the coffee maker at issue in this case.

3 Plaintiff points to one article discussing a hotel industry trend of replacing glass carafes with safer alternatives, such as a model called the One–Cup Coffeemaker. In the article, Tom Trent, of Sunbeam Hospitality, explains the benefits of the One–Cup model: "You stay away from breakage and replacement of the glass carafe and lessen liability [from injuries as a result *of the* carafe breaking]." *See One–Cup Coffeemakers Gaining Wider Acceptance in Lodging Industry: Upscale, Full–Service And Gaming Hotels Lead Latest In–Room Beverage Trend,* HOTEL BUSINESS, August 2006; Koshetz Dec, Ex. 4.

4 Sunbeam takes issue with Pecoraro's experience because Pecoraro was not involved in glass design at PPG Industries and has limited experience working with glass coffee carafes. Sunbeam's concerns in this regard, however, do not disqualify Pecoraro as an expert in the relevant field. Because Pecoraro has extensive experience in science and glass technology, as well as glass fracture analysis, he "possess[es] skill or knowledge greater than the average layman" concerning the glass product at issue in this case. *Lappe,* 857 F.Supp. at 227 (quoting *Aloe Coal Co. v. Clark Equip. Co.,* 816 F.2d 110, 114 (3d Cir.1987).

5 At deposition, Pecoraro testified that he over-tightened the screw to "demonstrate how the screw is tightened or not tightened affects the stress in the top of the carafe." Pecoraro Dep. 77:7–13.

6 Pecoraro explains in the video that a wheel cutter is a glass cutter. Video at 11:53.

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United States District Court, N.D. California,
San Jose Division.

Baljinder SINGH; Rajinder Kaur, Plaintiffs,
v.
7-ELEVEN, INC.; Cindy Duong;
Larry Duong, Defendants.

No. C-05-04534 RMW. | March 8, 2007.

Attorneys and Law Firms

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Lee Ellen Potter, Karen Rosenthal, James Severson, Eric A. Welter, for Defendants.

Opinion

ORDER GRANTING 7-ELEVEN'S MOTION FOR SUMMARY JUDGMENT

RONALD M. WHYTE, United States District Judge.

***1** Plaintiffs Baljinder Singh and Rajinder Kaur seek to recover unpaid overtime and meal break compensation under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") and the California Labor Code §§ 204, 510, and 1194. Defendant 7-Eleven, Inc. ("7-Eleven") moves for summary judgment on all of plaintiffs' claims. For the reasons set forth below, the court grants the motion.

I. BACKGROUND

7-Eleven, Inc. owns, operates, and franchises retail food stores under the trademarked name "7-Eleven." Decl. Christine Carr Supp. Mot. Summ. J. ("Carr Decl.") ¶ 2. During the relevant time period of 1999 to 2005, Cindy Duong ("Duong") was the franchise owner of Store No. 17208, located at 3961 Snell Avenue, San Jose, California ("the Store"). Decl. Eric Welter Supp. Mot. Summ. J. ("Welter Decl."), Ex 1, Cindy Duong Dep. ("Duong Dep.") at 10:13-19. The relationship between 7-Eleven and Duong was governed by a written franchise agreement. Welter Decl., Ex. 4, 7-Eleven, Inc. Individual Store Franchise Agreement ("Franchise Agreement"). According to the Franchise Agreement, Duong and 7-Eleven share the profits from the store. Duong Dep. at 22:12-14. Each month, 7-Eleven provides Duong a financial statement, which shows gross sales less costs of merchandise. *Id.* at 18:1-7. 7-Eleven pays the lease, the water, and the electricity, after which the difference is split between 7-Eleven and Duong. *Id.* at 23:2-15. Then the monthly expenses such as payroll, payroll tax, EDD insurance, trash, telephone, maintenance, and miscellaneous expenses are deducted from Duong's share of the gross profit. *Id.* at 23:8-17, 46:15-25. The remaining net profit is then applied to Duong's equity account with 7-Eleven, from which Duong may withdraw funds at her discretion. *Id.* at 29:6-10, 49:7-25.

The relationship further involved weekly visits by a 7-Eleven field consultant, who was the only employee of 7-Eleven that came to the Store on a regular basis. Duong Dep. at 54:19-55:8. Jennifer Anistik ("Anistik") was the field consultant assigned to the Store, and she provided Duong with merchandising ideas and recommendations, evaluation of the condition of the Store, and other advice on increasing sales and profits. Duong Dep. at 51:6-54:18.

Plaintiffs Singh and Kaur were employees at the Store. *Id.* at 13:1-3. Kaur was interviewed and hired by Duong in 1999. Welter Decl., Ex 3, Rajinder Kaur Dep. ("Kaur Dep.") at 10:18-11:13. After she was hired, Kaur provided Duong a copy of her California identification, social security card, and work permit. *Id.* at 27:7-16. Duong determined Kaur's starting rate of pay as $7.50 per hour, and after several 25-cent-per-hour raises, Kaur's pay rate reached $9 per hour. *Id.* at 14:22-15:23. In March 2005, Kaur quit working at the Store after giving a resignation notice to Duong. *Id.* at 12:11-23. Singh was interviewed and hired by Duong in March 2002. Welter Decl., Ex 2, Baljinder Singh Dep. ("Singh Dep.") at 10:14-22. Singh did not meet with anyone else regarding the job. *Id.* at 11:24-25. Duong determined Singh's starting rate of pay as $8.50 per hour and subsequently gave Singh two raises, each of 25 cents per hour. *Id.* at 13:1-5. Duong also maintained a copy of Singh's driver's license, social security card, and work permit in the Store. *Id.* at 36:1-10. Prior to resigning his employment, Singh notified Duong of his intention to do so. *Id.* at 33:3-10.

***2** During plaintiffs' employment, Duong instructed them on their specific job duties. Duong Dep. at 117:3-10. Duong informed plaintiffs that their duties included unloading the deliveries, stocking the cooler, and cleaning. Singh Dep. at 18:6-25; Kaur Dep. at 13:2-5, 16:12-22. Plaintiffs also

filled out daily paperwork and counted their cash drawer for Duong's review. Singh Dep. 36:17-37:25. In addition, Duong scheduled plaintiffs' work shifts. Duong Dep. at 117:24-118:8. Duong initially scheduled Singh to work the night shift and, at Singh's request, rescheduled him to work the "swing shift," from 12 noon to 11 p.m. Singh Dep. at 13:16-25, 51:9-25. Duong called Singh if she needed extra work hours from Singh. *Id.* at 60:9-25. Duong also requested Singh to fill in when an employee did not show up for a scheduled shift. *Id.* at 29:14-21. Kaur was scheduled by Duong to work from 6 a.m. to 6 p.m., and Duong similarly requested Kaur to fill in for absent employees. Kaur Dep. at 16:10-11, 13:9-25, 28:17-24.

For each pay period, Duong sent information about the plaintiffs' hours worked and rate of pay to 7-Eleven accounting in Dallas, Texas. Duong Dep. at 118:9-25, 25:4-24. The following Thursday, 7-Eleven deducted the payroll expense from Duong's equity account and sent payroll checks via courier to Duong. *Id.* at 26:9-14, 28:15-29:10. The checks were subsequently distributed to plaintiffs. *Id.* at 32:12-15. When plaintiffs noticed missing hours worked from their paycheck, they would ask Duong to correct the problem. Singh Dep. at 62:2-23. Duong would then adjust the amount of the following paycheck to reflect the additional hours. *Id.* at 62:8-63:22.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper when the pleadings, discovery, and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id.* The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In response to a properly supported motion, the responding party must present specific facts showing that contradiction is possible. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 950-52 (9th Cir.1978). In a motion for summary judgment, the court draws all reasonable inferences that may be taken from the underlying facts in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. Definition of "Employer" Under the FLSA

7-Eleven argues that plaintiffs' Second and Fourth Causes of Action under the FLSA fail as a matter of law because 7-Eleven was not plaintiffs' employer. Since the relevant sections of the FLSA apply to employers in labor matters, a finding that 7-Eleven was not plaintiffs' employer would necessarily be fatal to plaintiffs' FLSA claims.

***3** The FLSA defines an "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency[.]" 29 U.S.C. § 203(d). Plaintiffs argue that the joint employment standard of 29 C.F.R. § 791.2(b) [1], under the FLSA, applies in this case, citing *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908 (9th Cir.2003). In *Chao,* the Ninth Circuit held that the two home health care companies were a single enterprise under common control because there was a substantial merging of operations. *Id.* at 912-13. This "horizontal" joint employment involved sharing of employees, supervisors, administrative services, and a scheduler. *Id.* The franchise relationship in the present case, on the other hand, is more closely analogous to a "vertical" relationship "in which a company has contracted for workers who are directly employed by an intermediary company." *Id.* at 917. In such vertical relationships, the "economic reality test" applies in determining joint employment status. *Id.*

The Ninth Circuit has specified that whether an entity is an employer under the FLSA is a question of law that must be determined by applying the economic reality test. *Torres-Lopez v. May,* 111 F.3d 633, 638, 639 (9th Cir.1997) (citing *Bonnette v. California Health and Welfare Agency,* 704 F.2d 1465, 1469, 1470 (9th Cir.1983); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir.1979)). Under the economic reality test, a court must "consider the totality of the circumstances of the relationship, including whether the alleged employer has the power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records." *Hale v. State of Arizona,* 993 F.3d 1387, 1394 (9th Cir.1993) (citing *Bonnette,* 704 F.2d at 1470).

1. The Power to Hire and Fire Employees

The first factor of the economic reality test examines the alleged employer's power to hire and fire employees. *Id.* The relevant language of 7-Eleven's "Individual Store Franchise Agreement" reads:

> You and we agree that this Agreement creates an arm's-length business relationship and does not create any fiduciary, special or other similar relationship. You agree: (a) to hold yourself out to the public as an independent contract; (b) to control the manner and means of the operation of the Store; and (c) to exercise complete control over and responsibility for all labor relations and the conduct of your agents and employees, including the day-to-day operations of the Store and all Store employees. You and your agents and employees may not: (i) be considered or held out to be our agents or employees or (ii) negotiate or enter any agreement or incur any liability in our name, on our behalf, or purporting to bind us or any of our or your successors-in-interest. Without in any way limiting the preceding statements, we do not exercise any discretion or control over your employment policies or employment decision. All employees of the Store are solely your employees and you will control the manner and means of the operations of the Store. No actions you, your agents or employees take will be attributable to us or be considered to be actions obligating us.

***4** Franchise Agreement at ¶ 2. Based upon the language of the Franchise Agreement, it appears clear that Duong possessed exclusive right and responsibility to control the hiring and firing decision. Contractual language, however, does not establish the nature of the employment relationship as a matter of law. Real, 603 F.2d at 755. In further support, Duong, Singh, and Kaur have all affirmatively testified that Duong had sole control over hiring and firing at the Store. Duong Dep. at 24:25-25:1, 117:11-22; Singh Dep. at 11:12-12:5, 33:3-10, 40:8-23; Kaur Dep. at 11:10-13, 30:9-31:4. Plaintiffs nevertheless assert that Duong did not have sole control in hiring because employees were subject to the terms and conditions of the training, on-going training, and satisfaction of 7-Eleven service standards. However, no evidence indicates that 7-Eleven exercised any control over any terms of the employment, including training of employees, or influenced Duong's choice of employees or manner of hiring. In fact, plaintiffs' deposition testimony corroborate that Duong hired Singh and Kaur, without any input from 7-Eleven, and when Singh and Kaur resigned from their employment, they notified Duong and no one else.

Plaintiffs argue that because Duong was required to satisfy 7-Eleven service standards, if Duong disagreed with 7-Eleven's standards, the franchise agreement could be terminated by 7-Eleven. According to plaintiffs, this condition rendered Duong's ability to control the terms of the employees illusory. "Such conditions, however, neither create nor preserve an employee status. The most that can be said is that they establish a month-to-month tenancy[, which is] not ordinarily associated with master-servant relationships." *The Southland Corporation, d/b/a Speedee 7-Eleven,* 170 N.L.R.B. 1332, 1333 (1968) (citing *Clark Oil & Refining Corp.,* 129 N.L.R.B. 750, 756 (1960)). Indeed, the power to terminate a franchisee alone is not sufficient to create a joint employment relationship. *Evans v. McDonald's Corp.,* 936 F.2d 1087, 1090 (10th Cir.1991); *Alberter v. McDonald's Corp.,* 70 F.Supp.2d 1138, 1145 (D.Nev.1999).

2. Supervision and Control of Employee Work Schedules or Conditions of Employment

The second factor of the economic reality test examines the alleged employer's power to supervise and control employee work schedules or conditions of employment. *Hale,* 993 F.3d at 1394. The parties dispute whether Duong was solely responsible for controlling plaintiffs' work schedules. Nevertheless, plaintiffs and Duong's deposition testimony support the conclusion that Duong exclusively arranged plaintiffs' workshifts according to the operational demand of the Store. Duong Dep. at 117:24-118:8, 119:14-18; Singh Dep. at 13:16-25, 15:1-13, 29:18-21, 51:17-25, 60:7-25; Kaur Dep. at 16:10-11, 28:17-24. Plaintiffs have presented no evidence to suggest a factual issue as to Duong's sole control of the work schedules.

***5** Plaintiffs further contend that Duong was not the only person who instructed plaintiffs on their job duties. Plaintiffs allege that the Store was under common control and that essential areas relating to the terms and conditions of employment were regulated by 7-Eleven. Specifically, plaintiffs argue that 7-Eleven set the store hours to be

24 hours a day, had total control over the delivery of service by plaintiffs, and had control over the food service and the uniforms to be worn. The enforcement of these terms and conditions, however, are limited. Under the Store Franchise Agreement, 7-Eleven may terminate the franchise agreement on three days notice with the opportunity to cure the violation in most cases. Franchise Agreement at ¶ 26(a)(2)(f). The remedies available do not permit 7-Eleven to interfere with day-to-day operations of the Store. Moreover, simply setting the standards without actual control of day-to-day operations is not sufficient to establish an employer-employee relationship between 7-Eleven and plaintiffs. *See e.g., Alberter,* 70 F.Supp.2d at 1145; *Thomas v. Freeway Foods, Inc.,* 406 F.Supp.2d 610, 617 (M.D.N.C.2005). Such policies are merely reflective of an inherent interrelation of operations between the two entities and 7-Eleven's goal of attaining conformity to certain operational standards and details. *Scales v. Sonic Industries, Inc.,* 887 F.Supp. 1435, 1439 (E.D.Okla.1995) (citing *Evans,* 936 F.2d at 1091 ("Outside of the necessary control over conformity to standard operational details inherent in many franchise settings, McDonald's only real control over [the franchisee] was its power to terminate the franchises.")).

Plaintiffs set forth in declarations in support of their opposition brief, that Anistik, 7-Eleven's field consultant, would inspect plaintiffs' uniforms and equipment and instruct plaintiffs to check customers' identification when selling alcoholic beverages and cigarettes. Decl. Baljinder Singh Supp. Opp'n Mot. Summ. J. ("Singh Decl.") ¶ 6; Decl. Rajinder Kaur Pls.' Opp'n ("Kaur Decl.") ¶ 7. The court is not persuaded that plaintiffs' declarations create a factual issue as to whether Anistik gave any instructions directly to plaintiffs. To the extent that plaintiffs' declarations suggest she did, the declarations contradict their prior deposition testimony in which they state that they had no communication with Anistik. Singh Dep. at 32:20-22, 39:3-5; Kaur Dep. at 13:6-8, 33.[2] In considering a motion for summary judgment, a trial court may not evaluate the credibility of a witness or weigh the evidence. *California Steel and Tube v. Kaiser Steel Corp.,* 650 F.2d 1001, 1003 (9th Cir.1981) (citing *Neely v. St. Paul Fire & Marine Insurance Co.,* 584 F.2d 341, 344 (9th Cir.1978)). The focus of the evaluation is to determine if a material factual dispute exists. *Id.* Nevertheless, an issue of fact may not be "genuine" for purposes of summary judgment, where a witness changes his story to create an issue of fact. *Radobenko v. Automated Equipment Corp.,* 520 F.2d 540, 543-44 (9th Cir.1975). As in *Radobenko,* plaintiffs' declaration supporting their opposition brief contradicts their prior deposition testimony resulting in a factual dispute. Plaintiffs' contradictory affidavits do not explain the inconsistency with the earlier deposition testimony. *Kennedy v. Allied Mutual Insurance Co.,* 952 F.2d 262, 266-67 (9th Cir.1991). More importantly, even if Anistik checked uniforms and equipment and told plaintiffs to check identification when selling alcohol or cigarettes, such actions do not raise a material issue of fact regarding 7-Eleven's control of the workplace or conditions of employment.

3. Determination of the Rate and Method of Payment and Maintenance of Employment Records

***6** The third and fourth factors of the economic reality test examines the alleged employer's ability to determine the rate and method of payment and maintain employment records. *Hale,* 993 F.3d at 1394. Plaintiffs contend that 7-Eleven had control over all payroll functions, including keeping and generating time records; withholding and paying federal and state taxes, worker's compensation premiums, and EDD taxes; calculating, generating, and delivering the employees' paychecks; filing quarterly returns; and providing employees with annual W2's. These ministerial functions are insufficient to support plaintiffs argument that 7-Eleven controls labor relations. Providing a "payroll service to a franchisee's employees does not in any manner create an indicia of control over labor relations sufficient to demonstrate that the franchisor is a joint employer." *Hatcher v. Augustus,* 956 F.Supp. 387, 392 (E.D.N.Y.1997); *Scales,* 887 F.Supp. at 1439. The court finds that 7-Eleven was not responsible for setting plaintiffs' wages, using its funds to pay plaintiffs, or providing any employment benefits. The record indicates that 7-Eleven has not utilized its own funds to pay any portion of the compensation to plaintiffs. All payroll funds and taxes were directly debited from Duong's equity account. Duong Dep. at 22:21-24:22. Although 7-Eleven generates paychecks, this is merely a convenience for the franchisees such as Duong, who provided all relevant wage and tax information. *Speedee 7-Eleven,* 170 N.L.R.B. at 1333.

4. Conclusion

Considering all factors and considering the relationship between the plaintiffs and 7-Eleven as a whole, for the reasons set forth above the court finds that 7-Eleven was not plaintiffs' employer under the economic reality test. Accordingly, plaintiffs' Second and Fourth Causes of Action under the FLSA fail as a matter of law.

C. California Labor Code Claims

Plaintiffs' First, Third, and Fifth Causes of Action involve identical claims to plaintiffs' Second and Fourth Causes of Action, except that they are asserted under California labor law. The dispositive issue, as with plaintiffs' federal claims, is whether 7-Eleven was plaintiffs' employer. Unlike the FLSA, however, the California Labor Code does not specifically define the term "employer." Moreover, although 7-Eleven urges this court to adopt the economic reality test [3] under the FLSA in considering the state claims, the California Supreme Court has suggested that the federal definition under the FLSA is inapplicable to the California Labor Code. *Reynolds v. Bement,* 36 Cal.4th 1075, 1087, 32 Cal.Rptr.3d 483, 116 P.3d 1162 (2005). The *Reynolds* court acknowledged that

> while it is true that [f]ederal decisions have frequently guided our interpretations of state labor provisions the language of which parallels that of federal statutes, where the language or intent of state and federal labor laws substantially differ[s], reliance on federal regulations or interpretations to construe state regulations is misplaced. While the FLSA contains an express definition of "employer," section 1194 does not.
>
> *7 *Id.* (citations and quotation marks omitted) (discussing Cal. Labor Code § 1194). As with section 1194, none of the California Labor Code provisions pled in the complaint defines "employer." Thus, as *Reynolds* explained, the FLSA and other federal authorities 7-Eleven cited do not apply to plaintiffs' claims under California labor law. *Jones v. Gregory,* 137 Cal.App.4th 798, 804, 40 Cal.Rptr.3d 581 (2006).

California courts have consistently recognized that the principle test for determining employment relationships is the right of control over the manner or means of accomplishing the result desired. *Isenberg v. California Employment Stabilization Comm'n,* 30 Cal.2d 34, 39, 180 P.2d 11 (1947); *Wickham v. Southland Corp.,* 168 Cal.App.3d 49, 54, 213 Cal.Rptr. 825 (1985). "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established." *Tieberg v. Unemployment Insurance Appeals Bd.,* 2 Cal.3d 943, 946-47, 88 Cal.Rptr. 175, 471 P.2d 975 (1970) (citing *Moody v. Industrial Accident Comm'n,* 204 Cal. 668, 670, 269 P. 542 (1928)). Strong evidence of the right to control is shown by the right to discharge the worker. *Isenberg,* 30 Cal.2d at 39, 180 P.2d 11.

As set forth above, the court has determined that the undisputed facts establish that Duong exclusively possessed the right to discharge employees, including Singh and Kaur. Plaintiffs argue, however, that Duong's right to run the operation is illusory and that, in reality, the franchise agreement allows 7-Eleven to control the essential areas relating to the terms and conditions of employment. The facts do not support the argument. "A franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and good will, without the risk of creating an agency relationship with its franchisees." *Cislaw v. Southland Corp.,* 4 Cal.App.4th 1284, 1295, 6 Cal.Rptr.2d 386 (1992). Furthermore, California courts have consistently held that a principal-agency relationship exists only when the franchisor retains complete or substantial control over the daily activities of the franchisee's business. *Id.* at 1296, 6 Cal.Rptr.2d 386; *Kaplan v. Coldwell Banker Residential Affiliates, Inc.,* 59 Cal.App.4th 741, 746, 69 Cal.Rptr.2d 640 (1997). The court finds no evidence to indicate that 7-Eleven controlled the daily activities of the Store.

Therefore, as the court finds that 7-Eleven was not plaintiffs' employer under the right to control test, plaintiffs' First, Third, and Fifth Causes of Action under the California Labor Code fail as a matter of law.

III. ORDER

For the foregoing reasons, the court grants defendant 7-Eleven's motion for summary judgment on all of plaintiffs' claims.

Footnotes

1 Plaintiffs rely on section 791.2(b)(3), which provides that:

> Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the work week, a joint employment relationship generally will be considered to exist in situations such as: ...

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2(b)

2 7-Eleven apparently inadvertently did not provide page 33 from the Kaur deposition, but quoted it in its reply papers. Def.'s Reply at 2:15-28.

3 7-Eleven cites a federal case that applied the FLSA definition by reasoning that the "California courts would likely to focus on the economic realities' of the relationship, rather than on mere contractual or technical distinctions." *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1469 (C.D.Cal.1969).

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United States District Court,
S.D. New York.

Glenna TOPPEL and Robert Toppel, Plaintiffs,
v.
MARRIOTT INTERNATIONAL, INC.,
Marriott Worldwide Corporation, Defendants.

No. 03 Civ. 3042(DF). | July 22, 2008.

Opinion

MEMORANDUM AND ORDER

DEBRA FREEMAN, United States Magistrate Judge.

*1 In this slip and fall case before me on consent pursuant to 28 U.S.C. § 636(c), defendants Marriott International, Inc. ("Marriott International") and Marriott Worldwide Corporation ("Marriott Worldwide") (collectively, "Defendants" or "Marriott") have moved for summary judgment, seeking to dismiss the Second Amended Complaint of Glenna and Robert Toppel (collectively, "Plaintiffs"). For the reasons set forth below, Marriott's motion for summary judgment is denied.

BACKGROUND

A. *Factual Background*

This case arises out of a slip and fall at the Nassau Marriott Hotel and Crystal Palace Casino (the "Hotel"), located in the Bahamas. (Defendants' Statement of Material Facts ("Def. Rule 56.1 Stmt.") (Dkt.37), at ¶ ; Opposition to Defendants' Statement of Material Facts ("Pl.Opp.Stmt.") (Dkt.41), at ¶ 1.)[1] On or about January 30, 2002, Ms. Toppel was reading a menu for the Sole Mare, a restaurant located in the Hotel. (Def. Rule 56.1 Stmt., at ¶ 2; Pl. Opp. Stmt., at ¶ 2.) According to Plaintiffs, the menu had been mounted on a wall at the top of a flight of stairs in an area with inadequate lighting. (*See* Pl. Opp. Stmt, at ¶ 2; Declaration of Noah Kushlefsky in Support of Plaintiffs' Opposition to Defendants' Motion to [sic] for Summary Judgment, dated Feb. 28, 2008 ("Kushlefsky Decl.") (Dkt.39), Ex. A (Transcript of deposition of Glenna Toppel, conducted Jan. 10, 2007 ("Glenna Toppel Dep.")), at p. 16, ll. 14-21; Kushlefsky Decl., Ex. B (Transcript of deposition of Robert Toppel, conducted Jan. 10, 2007 ("Robert Toppel Dep.")), at p. 81, l. 4; p. 82, ll. 6-15).) The area where the incident occurred was carpeted and, according to Plaintiffs, the carpet did not distinguish the adjacent stairs. (Pl. Opp. Stmt., at ¶ 2, Kushlefsky Decl., Ex. C (photograph depicting carpeted area).) When Ms. Toppel moved toward the menu to get a better view, she slipped and fell down the flight of stairs next to the menu. (Def. 56.1 Stmt., at ¶ 3; Pl. Opp. Stmt., at ¶ 3; Second Amended Complaint, dated Aug. 29, 2006 ("Second Am. Compl.") (Dkt.25), at ¶ 13.) According to Plaintiffs, Ms. Toppel suffered a broken ankle, a broken wrist, and severe pain in her leg, neck, shoulders, and back as a result of the fall and was subsequently homebound and mostly bedridden for more than two months. (Pl. Add'l Facts, at ¶ 2.)

B. *Procedural History*

On April 30, 2003, Plaintiffs filed a Complaint against Marriot International, seeking damages for Plaintiffs' injuries sustained from Ms. Toppel's slip and fall. (*See* Complaint, dated Apr. 29, 2003 (Dkt.1).) Plaintiffs filed an Amended Complaint on February 17, 2004, adding the Hotel operators, Ruffin Companies ("Ruffin") and Ruffin's Crystal Palace Hotel Corporation, LTD ("RCPHCL" or the "Franchisee") as defendants. (*See* Amended Complaint, dated Feb. 17, 2004 (Dkt.8).) On August 24, 2006, the Court dismissed Ruffin and RCPHCL for lack of personal jurisdiction. (See Memorandum and Order, dated Aug. 24, 2006 (Batts, J.) ("8/24/06 Order") (Dkt.24).) On September 6, 2006, Plaintiffs filed a Second Amended Complaint, removing Ruffin and RCPHCL as defendants in accordance with the Court's ruling, but adding Marriott Worldwide as a new defendant. (*See* Second Am. Compl., at ¶ 3.)

*2 Plaintiffs allege in their Second Amended Complaint that Defendants "breached their duty of reasonable care by negligently, carelessly, and recklessly creating a dangerous condition" by placing the dinner menu for the restaurant on a wall at the top of the stairs in a "dimly lit area" with carpet that did not distinguish the stairs. (Second Am. Compl., at ¶¶ 15-17; *see also* Pl. Opp. Stmt, at ¶ 2.) Ms. Toppel seeks $ 1 million in damages for the injuries she sustained, and Mr. Toppel seeks $250,000 for loss of consortium. (Second Am. Comp., at ¶¶ 22, 25, 26.) In their summary judgment motion, Defendants argue that they may not be held vicariously liable for the actions of the Hotel because the Hotel was a mere franchisee over which Marriott exercised no control. (Defendants' Memorandum of Law in Support of Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56, dated Jan.

30, 2008 ("Def.Mem.") (Dkt.37), at 8.) Defendants also argue that, even if they may be vicariously liable for the Hotel's negligence, the placement of the Sole Mare's menu on the wall was neither negligent nor the proximate cause of Ms. Toppel's injury. (*Id.*, at 11.)

C. *The Franchise Agreement Governing the Relationship Between Mariott Worldwide and the Hotel*

Both parties cite to the "Nassau Marriott Resort Franchise Agreement Between Marriott Worldwide Corporation (Franchisor) and Carnival's Crystal Palace Hotel Corporation Limited (Franchisee)" [2] ("Franchise Agreement"), as well as to a "Standard Operating Procedure Manual" ("SOP Manual"), to demonstrate the extent of Marriott's supposed control (or lack of control) over the Hotel. [3] (*See generally* Def. Rule 56.1 Stmt., Ex. B [4] ("Franchise Agreement"); Kushlefsky Decl., Ex. F (SOP Manual).)

The Franchise Agreement is a 60-page document that describes, in a fair amount of detail, the conditions under which Marriott expects the Hotel to operate. (*See generally* Def. Rule 56.1 Stmt., Ex. B.) For example, as discussed further below, the Franchise Agreement addresses a number of specific requirements concerning, *inter alia*, the Hotel's "Operation in Accordance with the System," "Renovating and Furnishing the Hotel," "Staffing and Training," "Food and Beverage Operations," "Advertising, Marketing, Promotional, Public Relations and Sales Programs," "Quality Assurance Program," "Signs," and "Maintenance of the Hotel and the Hotel Building." (*See* discussion *infra* at Point II(A) (2) and (3).) The agreement also contains a section titled "Independent Contractor and Indemnification." (*See infra* at Point II(A)(4).) Annexed to the agreement are a number of exhibits, including a "Nondisturbance and Attornment Agreement," "Quarterly Casino Certification," and "Renovation Program." (*See* Def. Rule 56.1 Stmt., Ex. B (Franchise Agreement, and Exs. C-E thereto).) The Renovation Program details plans for various renovations throughout the Hotel to be completed in three phases. (*Id.*, Ex. B (Franchise Agreement, and Ex. C thereto).) The completion date for Phase I. A was December 1, 1994, prior to the grant of the franchise, and the completion dates for the various other renovations fell within the period from April 1, 1995 to January 1, 1997. (*Id.*) Under Phase II, the Renovation Program required, among other things, the replacement of the carpet in the public corridors, while Phase III required that the light level be increased and the carpet be replaced in and around the Sole Mare. (*Id.*)

*3 The SOP Manual is "Marriott's compilation of procedures, standards, specifications, and controls for the operation of [its] Hotels" in accordance with the Marriot "System." [5] (Def. Rule 56.1 Stmt., Ex. B, at 1.1; *see* Kushlefsky Decl., Ex. F.) The SOP Manual covers approximately 90 detailed topics and procedures, each addressed in a section of one to 10 pages in length. (*See* Kushlefsky Decl., Ex. F.) Examples of the types of topics and procedures covered in the SOP Manual are: "Guest Safety," "Light Bulb Wattage," "Marketing Communications Display," "Uniforms," "Hotel Retail Outlet," "Cash Handling Procedures," "Check In/Check Out Procedures," "Christmas Trees and Decorations," "Soiled Linen Handling," and "Flag Display." (*Id.; see* Pl. Add'l Facts, at ¶ 30.)

D. *Use of the "Marriott" Name at the Hotel*

According to Plaintiffs, they at all times believed that they were staying at a Marriott property. (Pl. Add'l Facts, at ¶ 32; Declaration of Robert Toppel in Support of Plaintiffs' Opposition to Defendants' Motion to [*sic*] for Summary Judgment, dated Feb. 27, 2008 ("Robert Toppel Decl.") (Dkt.40), at ¶ 2.) Mr. Toppel received a receipt for breakfast at a restaurant in the Hotel showing that it was the "Nassau Marriott Hotel." (Pl. Add'l Facts, at ¶ 33; Robert Toppel Decl., Ex. A.) The room bill was also printed on "Nassau Marriott" letterhead, with the largest word on the page being "Marriott." (Pl. Add'l Facts, at ¶ 34; Robert Toppel Decl., Ex. C.) In addition, the Toppels' express check-in and check-out cards contained the label "Marriott" in large letters, without any reference to Ruffin or RCPHCL. (Pl. Add'l Facts, at ¶ 35; Robert Toppel Decl., Ex. D, Ex. E.)

DISCUSSION

I. *SUMMARY JUDGMENT STANDARDS*

A. *Fed.R.Civ.P.56*

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law," Fed.R.Civ.P. 56(c), *i.e.*, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *accord Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 765 (2d Cir.1998). "Only disputes over facts that might affect the outcome of the suit

under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and the Court must view the record in the light most favorable to the non-movant by resolving all ambiguities and drawing all reasonable inferences in favor of that party, *Matsushita*, 475 U.S. at 587-88; *see also Tomka v. Seller Corp.*, 66 F.3d 1295, 1304 (2d Cir.1995). Where, however, the non-movant has no evidentiary support for an essential element on which it bears the burden of proof, summary judgment is warranted. *Celotex*, 477 U.S. at 322-23; *Silver v. City Univ. of New York*, 947 F.2d 1021, 1022 (2d Cir.1991); *see also Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995) ("In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim.").

B. *Local Civil Rule 56.1*

***4** Under this Court's rules, a party moving for summary judgment under Rule 56 must submit "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." Local Civ. R. 56.1(a). If the opposing party fails to respond to the moving party's Rule 56.1 Statement, then the material facts contained in the moving party's statement are deemed admitted as a matter of law. *See Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir.2003); *see also* Local Civ. R. 56.1(c) ("Each numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.").

"The purpose of Local Rule 56.1 is to streamline the consideration of summary judgment motions by freeing the district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller*, 258 F.3d 62, 74 (2d Cir.2001). Local Rule 56.1, however, does not relieve the party seeking summary judgment of the burden of establishing that it is entitled to judgment as a matter of law. *Id.* Summary judgment may only be granted where the Court is satisfied that the undisputed facts, as supported by the record, " 'show that the moving party is entitled to a judgment as a matter of law.' " *Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir.1996) (quoting Fed.R.Civ.P. 56(c)).

II. *DEFENDANTS' MOTION*

As noted above, Defendants move for summary judgment in their favor on two grounds: first, that, in light of the Franchise Agreement and their purported lack of direct control over the Hotel or its operations, they cannot be held vicariously liable for any negligent acts of the Hotel; and second, that, in any event, the evidence cannot support a finding of negligence in this case. Neither of Defendants' arguments are persuasive.

A. *Vicarious Liability*

Plaintiffs seek to hold Marriott liable for the injuries that Ms. Toppel sustained at the Hotel when she fell down a flight of stairs while attempting to view the Sole Mare's menu. Although it is undisputed that, through the Franchise Agreement, Marriott granted the Hotel the right to operate the premises, including the Sole Mare restaurant, Plaintiffs contend that Marriott retained sufficient control to render Defendants vicariously liable for any injuries Plaintiff suffered as a result of her fall. (*See* Plaintiff[s'] Opposition to Defendants' Motion for Summary Judgment, dated Feb. 29, 2008 ("Pl.Opp.Mem.") (Dkt.38), at 8-9.)

1. *Applicable Legal Standards*

Under New York law,[6] when determining whether a franchisor is vicariously liable for acts of its franchisees, the most significant factor to consider is the "degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred." *Hart v. Marriot Int'l, Inc.*, 304 A.D.2d 1057, 1058, 758 N.Y.S.2d 435 (3d Dep't 2003) (internal quotations omitted); *see also Repeti v. McDonald's Corp.*, 49 A.D.3d 1089, 1090, 855 N.Y.S.2d 281 (3d Dep't 2008) (internal citations omitted); *see also Schoenwadt v. Jamrfo Corp.*, 261 A.D.2d 117, 117, 689 N.Y.S.2d 461 (1st Dep't 1999). Further, where the plaintiff contends that his or her injuries were caused by a particular "instrumentality" or condition on the premises, the question of liability may hinge upon whether there is a sufficient showing that the franchisor exercised a "considerable degree of control over the instrumentality at issue," *Wu v. Dunkin' Donuts, Inc.*, 105 F.Supp.2d 83, 87 (E.D.N.Y.2000), *aff'd*, 4

Fed. Appx. 82 (2d Cir.2001), or that "such control resulted in plaintiff's injury," *Schoenwadt,* 689 N.Y.S.2d at 462.

*5 When looking to the terms of the franchise agreement to determine the extent of the franchisor's control over the operations of its franchisee, courts have granted summary judgment in favor of the franchisor where the agreement specifically provides that the *franchisee* is to perform the activities or control the instrumentalities in question. *See Hart,* 758 N.Y.S.2d at 438 (affirming grant of summary judgment for franchisor where plaintiff slipped and fell on a wet floor in franchisee's hotel, as the franchise agreement specifically provided that franchisee was responsible for, *inter alia,* daily maintenance and operations, and franchisee had its own written policy detailing how its employees were required to handle wet floors to prevent slip and fall accidents). Courts have also granted summary judgment where there is insufficient evidence to demonstrate that the franchisor had control over the specific conditions that caused the plaintiff's injury, or where the franchisor did not maintain control over the franchisee's daily operations. *See Wu,* 105 F.Supp.2d at 90-94 (finding, under New York law, that a franchisor was not vicariously liable for the assault and rape of franchisee's employee where the franchisor merely recommended, but did not mandate, security measures to be employed by franchisee, and franchisor's general control under the agreement was insufficient by itself to create liability);[7] *Schoenwadt,* 689 N.Y.S.2d at 462 (reversing lower court's denial of summary judgment where there was insufficient evidence to show that the franchisor controlled the franchisee's daily operations or controlled the instrumentality that resulted in plaintiff's injury); *Andreula v. Steinway Baraqafood Corp.,* 243 A.D.2d 596, 596, 668 N.Y.S.2d 891 (2d Dep't 1997) (reversing lower court's denial of summary judgment for franchisor where franchisee's employee struck plaintiff with delivery vehicle, and franchisor neither controlled franchisee's hiring practices nor maintained the right to "control the manner of performing the very work in the course of which the accident occurred").

Conversely, summary judgment should be denied where a franchise agreement demonstrates that the *franchisor* has retained specific control over the particular instrumentality or condition at issue, or where there are disputed facts bearing on the extent of control exercised by the franchisor. *See Vaughn v. Columbia Sussex Corp.,* No. 91 Civ. 1629(CSH), 1992 U.S. Dist. LEXIS 820, at *13, 1992 WL 18843 (S .D.N.Y. Jan. 28, 1992) (denying summary judgment motion brought by franchisor under New York law in a slip and fall case where "Holiday Inn's license agreement with [the franchisee] guarantees substantial control by the franchisor [in that] [n]ot only is the franchisor involved in the training of hotel employees and construction of the hotel itself, but it may inspect the hotel at any time and order upgrading and rehabilitation pursuant to the franchisor's own standards"); *Hilton v. Holiday Inns, Inc.,* No. 87 Civ.1958(MJL), 1990 U.S. Dist. LEXIS 9466, at *7-8, 1990 WL 113133 (S.D.N.Y. Aug. 1, 1990) (denying summary judgment under New York law for franchisor in an action involving injuries sustained by plaintiff while using the hotel's provided transportation on the basis that franchisor inspected premises at least twice a year and "all aspects of [the hotel] including but [not] limited to personnel, building, ground, furnishings, fixtures, decor, equipment, signs, vehicles ... and any other element thereof as affects the guest directly or indirectly [had to] be maintained at all times in accordance with the high standards of quality and appearance associated with Holiday Inns") (emphasis omitted); *Repeti,* 855 N.Y.S.2d at 283 (denying summary judgment where "defendant has tendered insufficient evidence to establish, as a matter of law, that it lacked control over the doors which allegedly caused [plaintiff's] injuries").

2. *Extent To Which the Franchise Agreement Afforded Marriott General Control Over the Hotel's Operations*

*6 Turning first to the question of whether Defendant may be said to have exercised general control over the Hotel's daily operations, Plaintiffs highlight several provisions of the Franchise Agreement, which, they contend, demonstrate that Defendants have maintained a fair amount of such control. Plaintiffs note, in general, that the Franchise Agreement requires the Franchisee to maintain all aspects of the Hotel in accordance with the Marriott System[8] and to abide by specific standards for, *inter alia,* required upgrades and renovations, staffing and training, products used, and promotional campaigns. (*See generally* Def. Rule 56.1 Stmt., Ex. B.)

In particular, the Franchise Agreement requires, and makes the grant of the right to operate the Hotel contingent upon, the Franchisee's undertaking of "the obligation to operate the Hotel as an MHRS Hotel in accordance with the [Marriott] System and this Agreement"[9] and completion of aspects of the renovation program. (Def. Rule 56.1 Stmt., Ex. B, at 2.1(A) and (B).) Further, Plaintiffs point out that the Franchise Agreement requires the franchisee to operate the Hotel in strict "conformity with all aspects

of the [Marriott] System (including without limitation the procedures, standards, specifications, and controls prescribed in the Hotel Design Guide and the SOP Manual)," as such conformity "is essential in order to maintain the exceptional quality and guest service of MHRS Hotels ...." (*Id.*, at 6.1, 855 N.Y.S.2d 281.) These provisions alone suggest a degree of control that weighs against granting summary judgment to Defendants. *See Hilton,* 1990 U.S. Dist. LEXIS 9466, at *7, 1990 WL 113133.

In *Hilton,* a case presenting a similar franchisor-franchisee relationship to the one presented here, this Court denied summary judgment to the franchisor because provisions of the governing franchise agreement required the facility to meet certain minimum standards set by the franchisor, thereby demonstrating that the franchisor had at least a certain degree of control over its franchisee. *See id.* Specifically, the Court pointed to a section of the franchise agreement which read:

> All Aspects of a Holiday Inn (hotel, motel, restaurant, lounge, or any associated facility or service) including but [not] limited to personnel, building, ground, furnishings, fixtures, decor, equipment, signs, vehicles, utensils, linens, supplies, foodstuffs, china, glass, printed matter and any other element thereof as affects the guest directly or indirectly must be maintained at all times in accordance with the high standards of quality and appearance associated with Holiday Inns.

Id., at *7-8 (emphasis omitted). The Court found that the extent to which this provision, along with provisions allowing for supervision and inspection of the premises, were sufficient to subject the franchisor to liability for injuries sustained on the hotel's property was a factual issue to be determined at trial. *Id.*, at *8-9; *see also Vaughn,* 1992 U.S. Dist. LEXIS 820, at *5, 13, 1992 WL 18843 (finding a triable issue of fact remained regarding extent of franchisor's control where its "system" provided for the right to inspect hotel or order upgrades at any time and approval rights covering, among other things, hotel construction, training of hotel employees and types of products and services used).

*7 Here, as in *Hilton,* Defendants-through the Franchise Agreement-not only required the Hotel to conform to Marriott's own standards, but also required the Hotel to undertake particular construction and renovations of the premises, again in accordance with Marriott's standards. *See Vaughn,* 1992 U.S. Dist. LEXIS 820, at *5, 13, 1992 WL 18843. Thus, Section 8.1 of the Franchise Agreement, entitled "Renovating and Furnishing the Hotel," states, in part, that,

> Franchisee, at its expense, shall fully complete in timely fashion and to Franchisor's satisfaction the renovation program described in *Exhibit C* in accordance with (i) first class, full-service international standards, (ii) such plans, designs, specifications, fire and life safety standards, and time schedules as incorporate the standards of Marriott as set forth in the Hotel Design Guide, and (iii) such other plans, designs, specifications, fire and life safety standards, and time schedules as are agreed between Franchisee and Franchisor.

(Def. Rule 56.1 Stmt., Ex. B, at 8.1(A).) [10]

Further, the Franchise Agreement imposes requirements for staffing and training the Hotel employees. Although Defendants claim that no showing has been made that they were involved with any decisions regarding the Hotel's employees (*see* Defendants' Reply, dated Mar. 12, 2008 ("Def. Reply Mem.") (Dkt.42), at 5), this too easily side-steps the language of Section 5.2(A) of the Franchise Agreement, which specifically states that, "[i]n selecting personnel, Franchisee shall use the screening procedures and qualifications guidelines as may be prescribed in the SOP Manual ." (*See* Pl. Opp. Mem., at 9.) Additionally, all Hotel managers are "required to attend and successfully complete (as determined by Franchisor)" Defendants' training program (Def. Rule 56.1 Stmt., Ex. B, at 5.2(C)(1)), and all Hotel employees must wear uniforms as specified in the SOP Manual (*see id.*, at 5.2(E); Pl. Opp. Mem., at 9).

Defendants also appear to have maintained a degree of control or approval rights regarding the types of products used at the Hotel, including products used or sold by the restaurant on the Hotel premises. In this regard, the Franchise Agreement states that the Hotel shall:

> [m]aintain in sufficient supply, and use at all times, only such food and beverage products and ingredients, supplies, paper goods, dinnerware, and furnishings as conform with Franchisor's procedures, standards, specifications, and controls or are otherwise approved in advance by Franchisor [and][s]ell or offer for sale only the menu items and beverages prescribed in the SOP Manual or otherwise approved in advance by Franchisor; sell or offer for sale all required menu and beverage items and prepare them in accordance with Franchisor's procedures, standards, specifications, and controls; and discontinue selling and offering for sale any items that Franchisor, at its sole discretion, disapproves at that time....

***8** (Def. Rule 56.1 Stmt., Ex. B, at 6.5(A)(ii),(iii).) This is another factor that weighs against granting Defendants' summary judgment motion. *See Vaughn,* 1992 U.S. Dist. LEXIS 820, at *5, 13, 1992 WL 18843 (finding a triable issue of fact remained regarding extent of franchisor's control where its "system" provided for approval rights covering, among other things, the types of products and services used at the hotel).

The Franchise Agreement additionally contains provisions pertaining to advertising, marketing, promotions, public relations and sales. Marriott obligates the Franchisee to "participate in or offer, as the case may be ... [a]ll Marketing Activities required by [Defendants] ... and all other MHRS customer surveys and guest satisfaction audits" (Def. Rule 56.1 Stmt., Ex. B., at 6.7(i)), as well as make suitable office space available to Defendants "for purposes of advertising, marketing, promoting and selling Marriott's timeshare, resort and vacation products to the general public" (*id.*, at 6.12).

Moreover, similar to the ability of the franchisors in *Hilton,* as well as in *Vaughn,* to inspect the franchisee's premises and require upgrades to ensure compliance with their "system," Defendants here may inspect the Hotel and require it to cure any noncompliance with the Marriott System. The relevant portions read:

> **6.8** ***Quality Assurance Program.***
>
> A. Franchisor shall administer a quality assurance program for MHRS Hotels which shall include conducting periodic inspections of the Hotel and customer surveys and guest satisfaction audits to ensure compliance with [Marriott] System procedures, standards, specifications, and controls. Such inspections will occur no more often than two (2) times per year so long as no material deficiencies have been noted in prior inspections. Franchisee hereby grants to Franchisor and its representatives the right to enter the Hotel at all reasonable times, with or without prior notice, for the purpose of conducting inspections ....
>
> B. If the quality assurance program described in Section 6.8A discloses that Franchisee has failed to comply with any provision of this Agreement, Franchisor may so notify Franchisee and require Franchisee to cure every noncomplying item within thirty (30) days after such notice (or if the noncomplying item is such that it cannot reasonably be cured within thirty (30) days, Franchisee shall begin such cure within thirty (30) days after such notice and thereafter diligently pursue such cure efforts to completion).

(*Id.,* at 6.8.) For these inspections, either Marriott employees, or third-party vendors trained by Marriott, conduct "quality assurance" inspections by using a checklist provided by Marriot to see if the Hotel's products and services meet Marriott's minimum standards. (*See* Kushlefsky Decl., Ex. D (Transcript of the deposition of Michael Rosenman, conducted Nov. 13, 2007), at p. 35, ll. 7-24; p. 37, ll. 4-13; Ex. G (Marriott Brand Standards Checklist and Marriott's inspection and evaluation of the Nassau Marriott Resort).)

3. *Extent To Which the Franchise Agreement Afforded Marriott Control Over the Specific "Instrumentalities" at Issue*

***9** As pleaded by Plaintiffs, there are several specific "instrumentalities" that may have led to Ms. Toppel's fall down the flight of stairs and resultant injuries. Plaintiffs point to the location of the menu next to the stairs, the dim lighting around the area of the incident, and the carpeting, which allegedly did not distinguish the stairs, as the bases of their negligence claim. (Pl. Opp. Mem., at 2.)

In this regard, Plaintiffs assert that Phase III, Section I(A)(1) of the Renovation Program shows that Marriott exercised "substantial control" over the Sole Mare area, such that

a reasonable trier of fact could find Defendants liable for Plaintiffs' alleged injuries. (*See* Pl. Opp. Mem., at 9.) Under Phase III, Section 1(A)(1), Defendants required that light levels be increased and carpet be replaced in and around the Sole Mare. (See Def. Rule 56.1 Stmt., Ex. B (Franchise Agreement, and Ex. C thereto); Pl. Opp. Mem., at 9.) In addition to the renovations cited by Plaintiffs, Phase II, Section (II)(C) mandated that, among other things, the Hotel replace existing carpet in its public corridors prior to January 1, 1996. While it is not entirely clear whether the carpeting and lighting described in the Renovation Program would include the carpet that Plaintiffs claim "did not distinguish the stairs" (Pl. Opp. Stmt., at ¶ 2) and the lighting in the same area, Plaintiffs have submitted evidence from which it certainly could be found that Marriott, not the Hotel, controlled those renovation and construction decisions.

As for the signs in the Hotel,[11] the Franchise Agreement indicates that,

> Franchisee shall obtain and prominently display in and upon the Hotel such signs, advertisements and graphic materials of such nature, size, form, color scheme, content (except for prices to be charged) and *location* as prescribed in the SOP Manual, the Hotel Design Guide or otherwise by Franchisor.

(Def. Rule 56.1 Stmt., Ex. B, at 8.2(A) (emphasis added).) Further, the Franchisee is required to

> maintain the Hotel and the Hotel Building (including without limitation all signs (interior and exterior), parking areas, entrance ways, landscaping, and all other facilities and appurtenances) in first class condition and in conformity with the [Marriott] System and all applicable laws and regulations. In connection therewith, Franchisee shall make, at Franchisee's sole cost and expense, all repairs, alteration, renewals, replacements, and additions of signs and other FF & E [*i.e.*, "furniture, furnishing, fixtures, signage, and equipment"] to the Hotel and the Hotel Building as Franchisor may reasonably direct; and Franchisee shall not make any material alterations to the Hotel or the Hotel Building without first obtaining the prior consent of Franchisor."

(*Id.*, at 8.4; *see also id.* at 1.1 (defining "FF & E").)[12] The Franchise Agreement also provides that, "Franchisee shall not install or permit to be installed at the Hotel, without Franchisor's prior consent, any FF & E ... not previously approved by Franchisor." (*Id.*, at 8.1(B).)

***10** Finally, the inspection checklist apparently intended for use by Marriott employees or their trained inspectors included an inspection of lighting, signage and carpeting in guest hallways, stairwells and restaurants at the Hotel as well as an inspection of menus at the restaurants. (*See* Kushlefsky Deck, Ex. G.)

In light of these provisions, Defendants cannot plausibly argue that there is no issue of material fact as to the extent of their control over the "instrumentalities" at issue here. In fact, while Defendants assert that they did not exercise "day-to-day control over the franchisee" (Def. Mem., at 11), they do not specifically refute Plaintiff's argument that they had some degree of control over the carpeting in the particular area, and/or the lighting near the posted menu. Although the extent of a franchisor's day-to-day control is a factor in determining whether the franchisor may have vicarious liability, so too is the degree of the franchisor's control over the instrumentalities at issue. *See Wu,* 105 F.Supp.2d at 87. Here, despite their argument to the contrary, the Franchise Agreement, taken as a whole, suggests that Defendants exercised or retained at least some control over the general operations of the Hotel. The agreement also suggests that Defendants had at least some control over the particular instrumentalities that allegedly caused Ms. Toppers injuries.

4. *Defendants' Argument That the Hotel Was an Independent Contractor*

Defendants also argue that they cannot be liable for the actions of the Hotel because the Hotel, as Franchisee, is an "independent contractor." (*See* Def. Mem., at 11; *see also Kleeman v. Reingold,* 81 N.Y.2d 270, 273, 598 N.Y.S.2d 149, 614 N.E.2d 712 (1993) ("The general rule is that a party who retains an independent contractor ... is not liable for the independent contractor's negligent acts.").) In support of this argument, Defendants rely on Section 20.1(A) of the Franchise Agreement, which states that "Franchisee is an independent contractor, and nothing in this Agreement is intended to constitute either party an agent, legal representative, subsidiary, joint venturer, partner, employee or servant of the other for any purpose." (Def. Rule 56.1 Stmt., Ex. B, at 20.1(A).)

The language of this provision, however, is not dispositive of the relationship between the Franchisor and Franchisee, especially where considerable evidence has been presented

of Marriott's control over the Hotel's operations. *See Hart,* 758 N.Y.S.2d at 438 (stating that although the franchise agreement specifically provided that franchisee was an independent contractor, "the label that the franchise agreement gives the franchisee is not dispositive of the relationship"). On the record presented, the question of whether the Hotel was, in fact, acting as an independent contractor must be left for the trier of fact.

5. ***Apparent Authority***

Finally, in arguing that the Franchisee, and not Defendants, controlled the operations of the Hotel, Defendants cite to *Sims v. Marriott Int'l, Inc.*, 184 F.Supp.2d 616 (W.D.Ky.2001), a case that apparently involved the same hotel-and same franchise agreement-as this case. *See id.* at 616-18; *see also* Def. Reply Mem., at n. 1. In Sims, the court found that the agreement gave complete operating control of the hotel to the *franchisee*. *Sims,* 184 F.Supp.2d at 617. *Sims,* however, not only applies Kentucky law, but the particular facts underlying that case are not detailed in the opinion. In any event, the Court notes that, in *Sims,* the defendant-franchisor's motion for summary judgment was denied on the ground that, regardless of whether the defendant had control of the premises under the franchise agreement, an issue of fact remained as to whether the franchisee had acted under the defendant's "apparent authority." *Id.*

***11** Here, while Marriott asserts that Plaintiffs have never pleaded a claim based on a theory of apparent authority (*see* Def. Reply Mem., at 8), the Court's prior decision in this action found otherwise (*see* 8/24/06 Order, at 17-18) (partially denying motion to dismiss on the ground that, *inter alia,* Plaintiffs had stated a viable claim based on apparent authority). Further, although Defendants argue that Plaintiffs have submitted no evidence to support their position that the Hotel acted with apparent authority (*see* Def. Reply Mem., at 9), Plaintiffs have in fact submitted a hotel receipt, hotel letterhead, and check-in and check-out cards, all displaying the "Marriott" trademark. (*See* Robert Toppel Decl., Ex. A, Ex. C, Ex. D, Ex. E.) Moreover, certain provisions in the Franchise Agreement suggest that Defendants were attempting to create an appearance that the Hotel was Marriott-owned and operated. (*See* Pl. Opp. Mem., at 13; Def. Rule 56.1 Stmt., Ex. B, at 6.7 (requiring Franchisee to participate in Marriott promotional campaigns), 9.4 (same), 6.12 (obligating Franchisee to provide Defendants with office space in the Hotel for the purpose of promoting and selling Marriott's products to the public); Ex. F (mandating that Franchisee cross-sell other Marriott locations by "prominently" displaying Marriot "brand-specific posters" in public areas as well as "Cross Brand Marketing Brochures" and "Marriott Rewards Brochures" at the Front Desk).) On this record, regardless of Defendants' argument that it lacked sufficient actual control of the premises to render it potentially liable in this case, the evidence suggests that Plaintiffs may still prevail on a theory of "apparent authority," and thus summary judgment based on the Franchise Agreement would, in any event, be inappropriate.

In sum, the Franchise Agreement, in combination with the other evidence submitted by the parties, raises triable issues as to the extent of Marriott's control (and right of control) over the general operations of the Hotel, as well as its control over the very instrumentalities that allegedly caused Ms. Toppel's fall, including the Hotel's lighting, carpeting and placement of a menu at the top of a staircase. It also raises an issue as to whether the Hotel may properly be characterized as fully "independent" of Marriott, and whether the Hotel acted with Marriott's apparent authority. As the record demonstrates the existence of disputed facts and conflicting inferences that may be drawn from the evidence, Defendants' motion for summary judgment in its favor on the issue of vicarious liability is denied.

B. ***Negligence***

In their Second Amended Complaint, Plaintiffs claim that the placement of the Sole Mare's menu at the top of a staircase in a dimly lit area, in combination with the use of carpet that allegedly failed to distinguish the adjacent stairs, created a dangerous condition, which was the proximate cause of Ms. Toppel's fall and injuries. (*See* Second Am. Compl., at ¶¶ 15, 16, 17.)[13] In moving to dismiss this claim, Defendants argue that Plaintiffs have failed to show that the placement of the menu was negligent, and have also failed to show that the Hotel or Defendants had notice of the alleged dangerous condition. (*See* Def. Mem., at 11-12; Def. Reply Mem., at 10-11.) According to Defendants, the record suggests that Ms. Toppel's accident was proximately caused by her own "failure to be aware of her surroundings, and proceeding to move toward the edge of the staircase in a careless manner," not by the placement of the menu on the wall. (*See* Def. Mem., at 11-13; Def. Reply Mem., at 11-12.)

***12** Despite arguments to the contrary by Defendants, it is plain from the record presented that Plaintiffs have demonstrated a genuine issue of material fact on their negligence claim, requiring a trial. Indeed, when the record

is construed in the light most favorable to Plaintiffs, it is apparent that triable issues exist regarding the appropriateness of the placement of the menu at the top of the staircase, the adequacy of the lighting in the vicinity of the menu, and the patterned carpet's delineation of the stairs.

Under New York law, for liability to be imposed in a slip and fall accident, the defendant must have created the dangerous condition that caused the accident or had actual or constructive knowledge of the condition. *See Torosian v. Bigsbee Village Homeowners Ass'n.*, 46 A.D.3d 1314, 1315, 848 N.Y.S.2d 452 (3d Dep't 2007) (citing *Zabbia v. Westwood, LLC,* 18 A.D.3d 542, 544, 795 N.Y.S.2d 319 (2d Dep't 2005)); *Goldman v. Waldbaum, Inc.,* 248 A.D.2d 436, 437, 669 N.Y.S.2d 669 (2d Dep't 1998). To constitute constructive notice, the condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to allow the defendant to discover and remedy the problem. *Gordon v. Am. Museum of Natural History,* 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986). A plaintiff may prove proximate causation by establishing that her accident was the "natural and probable consequence" of the dangerous condition. *See McHale v. Westcott,* 893 F.Supp. 143 (N.D.N.Y.1995) (citing *Gordon,* 67 N.Y.2d at 837, 501 N.Y.S.2d 646, 492 N.E.2d 774; *Ellis v. County of Albany,* 205 A.D.2d 1005, 613 N.Y.S.2d 983, 985 (3d Dep't 1994)).

In moving for summary judgment to dismiss a complaint, the defendant is required to submit evidence sufficient to establish, as a matter of law, that it did not create the condition or have actual or constructive notice thereof. *Scoppettone v. ADJ Holding Corp.,* 41 A.D.3d 693, 694, 839 N.Y.S.2d 116 (2d Dep't 2007); *Scott v. Beverly Hills Furniture,* 30 A.D.3d 577, 578, 817 N.Y.S.2d 381 (2d Dep't 2006); *Goldman,* 669 N.Y.S.2d at 669. Here, the evidence upon which Marriott has relied fails to establish that the Hotel did not create the allegedly hazardous condition that, according to Plaintiffs, caused Ms. Toppel's fall, or that Marriott lacked notice of that condition. *See Scott,* 817 N.Y.S.2d at 382 (reversing lower court's grant of summary judgment for defendant where defendant had failed to make a *prima facie* evidentiary showing that it did not create the hazardous condition that caused plaintiffs accident).

Furthermore, Plaintiffs have offered sworn testimony that, at the time of the accident, the menu was placed at the top of the stairs very near the edge of the staircase and that the area at issue was dimly lit. These sworn assertions, along with the photograph showing, *inter alia,* the patterned carpet in the area where the accident occurred, are sufficient to defeat summary judgment in Defendants' favor, as this evidence could lead a reasonable trier of fact to conclude that Ms. Topper's fall was a natural and probable consequence of an unreasonably dangerous condition that was created by the Hotel, for which Defendants may be held vicariously liable. *See Wilson v. Proctor's Theater & Arts Ctr. & Theater of Schenectady, Inc.,* 223 A.D.2d 826, 636 N.Y.S.2d 456 (3d Dep't 1996) (affirming denial of summary judgment where defendant failed to show the absence of a triable issue, in the face of plaintiff s assertions that dimmed lighting, variations in stair tread and the absence of a handrail made a theater's stairway unreasonably dangerous, causing her to fall).

***13** Accordingly, as triable issues of fact related to the existence of a dangerous condition and causation remain, Marriot's motion for summary judgment in its favor on Plaintiffs' negligence claim is denied.

CONCLUSION

For the foregoing reasons, this Court denies summary judgment on Plaintiff's Second Amended Complaint.

SO ORDERED.

Footnotes

1 Plaintiffs' "Opposition to Defendants' Statement of Material Facts and Plaintiffs' Statement of Additional Material Facts" is divided into two sections: "Opposition to Defendants' Statement of Material Facts" (Pl.Opp.Stmt.") and "Plaintiffs' Statement of Additional Material Facts" (Pl. Add'l Facts"). As each section is separately numbered, beginning with paragraph no. 1, the sections will be cited here separately, for ease of reference.

2 This entity named as the "Franchisee" in the agreement was apparently the predecessor in interest to the Hotel. (*See* 8/24/06 Order, at 5 n. 2.).

3 Marriott International is not named in the Franchise Agreement, but as the parent corporation of Marriott Worldwide (*see* Second Am. Compl., at ¶ 3), its potential liability in this case hinges on the potential liability of Marriott Worldwide.

4 While Marriott's Notice of Motion for Summary Judgment states that exhibits are annexed to the Affirmation of Bruce Young, it appears that no such affirmation was submitted. Instead, Defendants' exhibits were submitted as part of a bound packet of documents also containing their Notice of Motion, Defendants' Statement of Material Facts, and a supporting memorandum of law. As Defendants' exhibits are first referenced in Defendants' Statement of Material Facts, they will be cited as exhibits to that document.

5 The Marriott "System" refers to those "procedures, standards, specifications, controls, systems, manuals, guides, and other distinguishing characteristics which the Marriott Companies have developed in connection with the operation of [its] Hotels ...." (hereinafter "Marriott System"). (Def. Rule 56.1 Stmt., Ex. B, at 1.1.)

6 The parties agree that the law of the State of New York should govern the substantive issues in this case. (Pl. Opp. Mem., at 7; Def. Mem., at 7.) "[W]here the parties have agreed to the application of the forum law, their consent concludes the choice of law inquiry." *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir.1997); *see also British Int'l Ins. Co. Ltd. v. Seguros la Republica, S.A.*, 342 F.3d 78, 81 (2d Cir.2003). Accordingly, this Court will apply New York law to Plaintiffs' claims.

7 Courts have been reluctant to hold a franchisor liable for the actions of a franchisee when the policies of the franchise agreement are mere suggestions, as opposed to requirements, for the franchisee's operation. *See Wu*, 105 F.Supp.2d at 89 ("In deciding whether the franchisor's actions give rise to a legal duty, courts typically draw distinctions between *recommendations* and *requirements*.") (emphasis in original). Defendants attempt to draw no such distinction in this case. In any event, the provisions of the Franchise Agreement discussed infra are phrased as requirements, not mere recommendations. (*See, e.g.*, Def. Rule 56.1 Stmt., Ex. B, at 8.4 ("Franchisee *shall* maintain the Hotel and the Hotel Building (including without limitation all signs ... and all other facilities and appurtenances) in first class condition and in conformity with the [Marriott] System") (emphasis added).)

8 *See supra* at n. 5.

9 MHRS refers to "Marriott Hotels, Resorts, and Suites." (*Id.*, at 1.1.)

10 The "Hotel Design Guide" referenced in this section is "the design guide that states architectural and construction standards and specifications for MHRS Hotels, as such guide may from time to time be modified by Marriott; a copy of the Hotel Design Guide has been delivered to Franchisee, and modifications to it shall be delivered to Franchisee, and the Hotel Design Guide (including modifications) is incorporated herein by reference." (*See* Def. Rule 56.1 Stmt., Ex. B, at 1.1.) A copy of the Hotel Design Guide has not been provided to this Court.

11 Both parties appear to suggest that the posted Sol Mare menu was a "sign" within the meaning of the Franchise Agreement. (*See, e.g.*, Pl. Opp. Mem., at 1, 9; Def. Reply Mem., at 7.)

12 The Court notes that, as support for Defendants' contention that they did not maintain control over the placement of the menu, Defendants quote only a portion of Section 8.4 of the Franchise Agreement. In particular, Defendants quote the portion of that provision that states: "Franchisee shall make, at Franchisee's sole cost and expense, all repairs, alterations, renewals, replacements, and additions of signs and other FF & E to the Hotel and the Hotel Building ...." (Def. Mem., at 5; Def. Reply Mem., at 7.) Yet the final part of this sentence (which Defendants omit from their quotation) reads: "as Franchisor may reasonably direct"-an omission that shows Defendants' argument to be disingenuous. Read in full, the language of the Franchise Agreement in fact suggests that Marriott, as Franchisor, maintained at least some control over the maintenance of signs and other FF & E.

13 Although, in their Second Amended Complaint, Plaintiffs also alleged that the Defendants negligently failed to install handrails on the stairs (Second Am. Compl., at ¶ 17), neither Defendants nor Plaintiffs mention this in their submissions regarding summary judgment, and thus the Court will not address this aspect of Plaintiffs' claim.

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Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On December 28, 2012, I served, in the manner indicated below, the foregoing document described as **Opening Brief on the Merits** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)), as indicated on the service list.

☐ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.

☐ BY OVERNIGHT DELIVERY: I caused such envelopes to be delivered by courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 28, 2012, at Costa Mesa, California.

Rudi Wilson

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