Court of Appeals, State of Michigan

ORDER

David Abbo v Wireless Toyz Franchise LLC

Docket No. 304185

LC No. 2007-082804-CK

Elizabeth L. Gleicher
Presiding Judge

Amy Ronayne Krause

Michael J. Riordan
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's majority and dissenting opinions issued February 4, 2014 are hereby VACATED. New majority and dissenting opinions are attached to this order.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY 13 2014
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DAVID ABBO, COLORADO TOYZ, INC., and WIRELESS PHONES, L.L.C.,

Plaintiffs-Appellants,

v

WIRELESS TOYZ FRANCHISE, L.L.C., JOE BARBAT, RICHARD SIMTOB, JSB ENTERPRIZES, INC., and JACK BARBAT,

Defendants-Appellees.

UNPUBLISHED
May 13, 2014

No. 304185
Oakland Circuit
LC No. 2007-082804-CK

Before: GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

Wireless Toyz Franchise, L.L.C. (WTF) awarded David Abbo a Wireless Toyz franchise. Abbo opened a Wireless Toyz retail store in Colorado and subsequently signed a development agent agreement committing to open additional Wireless Toyz stores. When the franchise relationship soured, Abbo filed a nine-count complaint against WTF seeking to rescind both contracts and asserting a variety of contract and tort claims.

A jury considered Abbo's allegations during a hard-fought, 12-day trial featuring more than two dozen witnesses and myriad exhibits. The trial judge denied defendants' directed verdict motions and permitted the jury to consider all of Abbo's averments. The jury found in Abbo's favor on only one claim, rejecting eight others. The trial judge retired and a different judge overturned the jury's verdict by entering a judgment of no cause of action. We reverse and reinstate the jury's verdict.

I. BACKGROUND

Wireless Toyz franchises are retail stores that sell electronic communication devices and initiate cellular telephone services with various providers. Franchisees earn commissions by selling third-party service contracts and additionally profit by marketing cell phones and related merchandise. JSB Enterprizes, Inc., a corporation formed by defendant Joe Barbat, supplied Wireless Toyz franchises with merchandise. JSB also operated several corporate Wireless Toyz stores that were exempt from some of the various fees charged to non-corporate franchise stores.

Plaintiff David Abbo is an entrepreneur; we refer to Abbo and his business entities collectively as Abbo. In the spring of 2004, Abbo learned of an opportunity to purchase a Wireless Toyz franchise store. Abbo and his business partner, Michael Bober, discussed the franchise prospect with defendant Richard Simtob, WTF's vice president of franchise development. Encouraged by Simtob's answers to their questions, Abbo and Bober visited several local Wireless Toyz stores to learn more about the company, investigated competitor cell phone franchises, and attended a prospective franchisee "Discovery Day" at WTF's headquarters. Simtob knew that Abbo and Bober were also considering competitor franchises.

Simtob's Discovery Day presentation provided a basic overview of certain profit reductions unique to the cellular telephone industry: hits and chargebacks. Hits are discounts awarded to customers as incentives to purchase a telephone. Chargebacks are revocations of a franchise store-owner's commission that take effect when a customer prematurely cancels a service contract. Abbo and Bober specifically inquired about the extent of hits and chargebacks experienced by Wireless Toyz stores. Simtob represented that chargebacks annulled only five to seven percent of commissions and that out-of-state stores were subject to only "very minor" hits.[1] The average hit, according to Simtob, did not exceed $50.

Simtob made additional factual representations regarding subjects relevant to a franchisee's success. He extolled WTF's "great" relationships with cellular carriers, asserted that WTF's franchisees enjoyed low inventory costs thanks to reduced bulk pricing, and expressed that WTF had a "formidable" training program for incoming franchisees. Bober recounted Simtob's boast that because of Wireless Toyz's "national presence . . . they get the best commissions[.]" Bober expounded:

> [T]o me that was a really huge part of my decision, because . . . it's a leg up. If I'm getting . . . a tier better than maybe the guy that opened by himself where it's . . . 20 bucks a phone . . . it's a huge difference in . . . what I'm going to end up with at the end of the month.

After hearing Simtob's Discovery Day sales pitch, Abbo and Bober reviewed WTF's Uniform Franchise Offering Circular (UFOC), a disclosure statement mandated by the Federal Trade Commission (FTC). The document set forth estimated costs and profits based on historical data gleaned during 2003, and included disclaimers informing prospective franchisees that WTF could not guarantee financial success. The UFOC presented a chart detailing average monthly gross revenues for WTF stores. The chart indicted that there were 181 "average post paid activations per location" each month, and $222.31 in "average commissions per post paid activation."[2] However, the UFOC made no mention of hits. It advised readers that a franchisee's commissions could be subject to chargebacks, but did not include any data illustrating the

[1] At the trial, Simtob admitted that when he made the statement regarding chargebacks, WTF had not actually started to track chargeback rates.

[2] Post paid activations are ordinary cell phone service contracts rather than prepaid cell phone service. The UFOC noted that the numbers used in the chart reflected 2003 data.

manner in which chargebacks operated to decrease the gross profit number represented by the "average commissions" figure.

After reviewing the UFOC, Abbo and Bober travelled with Simtob to scout locations for a Colorado store. During this journey, Simtob told Abbo and Bober that a store needed to sell 75 telephones each month to break even. According to Abbo, Simtob implied that selling 200 phones each month would garner a good profit. Specifically, Simtob informed Abbo and Bober that his brother owned a Wireless Toyz franchise store in Phoenix situated in a similar commercial location and was excited to open a second store upon reaching the 200-phones-a-month sales mark.

In August 2004, Abbo's business entity, Wireless Phones, entered into a franchise agreement with WTF. Abbo paid a $20,000 franchise fee. Like the UFOC, the franchise agreement expressly provided that WTF made no guarantees of financial success. Shortly after Abbo opened his Colorado store, another of Abbo's business entities, Colorado Toyz, agreed to become a Wireless Toyz development agent. Abbo paid $180,600 for the exclusive right to market and sell Wireless Toyz franchises throughout Colorado.

By the fall of 2006, Abbo's store ranked in the top third of WTF's stores nationwide. Abbo, however, deemed his profit insufficient. His store experienced an average chargeback rate of 40 percent each month and absorbed hits of $75 to $100 on almost every phone sold. Abbo discovered that Verizon refused to participate directly with Wireless Toyz franchises; instead, cellular service activations for that company were brokered through a middleman who received a cut of the profit. And Wireless Toyz had no relationship with Cingular. Despite Simtob's claim that Wireless Toyz enjoyed low inventory costs, Abbo determined that it was actually cheaper for him to purchase items at a big box store. Further, Abbo testified, WTF never trained him regarding how to manage a chargeback dispute, how to conduct commission audits, or how to control inventory.

Abbo decided that being a WTF franchisee was a losing proposition and sought to end the relationship by selling the franchise back to WTF. WTF refused the offer. By 2009, Abbo's Wireless Toyz store had closed.

Abbo subsequently filed suit, accusing defendants of violating the Michigan Franchise Investment Law (MFIL), MCL 445.1501 *et seq.*, and raising claims labeled breach of contract, rescission, fraudulent misrepresentation, innocent misrepresentation, concert of action, and silent fraud. A subset of Abbo's breach of contract claims were dismissed before trial and Abbo withdrew the rescission claim with prejudice. Defendants sought a directed verdict after Abbo presented his case-in-chief, but the trial judge denied the motion as to all defendants other than Jack Barbat.[3]

[3] The trial judge found that Jack Barbat, Joe Barbat's brother and a WTF executive, did not participate in the contract negotiations.

The jury determined that defendants violated MCL 445.1508 of the MFIL but found that defendants established an estoppel defense. The jury next concluded that defendants breached the franchise agreement but accepted defendants' affirmative defense that Abbo committed the first substantial breach. Although the jury rejected that defendants made any actionable affirmative fraudulent statements, it found defendants liable of silent fraud. The jury considered damages in a separate deliberative session and ultimately awarded plaintiffs $20,000 against Simtob, representing the franchise fee, and $180,600 against WTF, representing the development agent fee.

After the trial, the case was reassigned to a different judge. The posttrial court was familiar with the matter, having presided over most of the pretrial proceedings. Defendants requested that the posttrial court enter judgment notwithstanding the verdict (JNOV), or in the alternative, grant a new trial or remittitur.

The posttrial court issued a written opinion granting defendants' motion for JNOV, ruling that: (1) the merger clauses in the franchise and development agent agreements precluded, as a matter of law, defendants' liability for silent fraud; (2) the trial evidence did not support a claim for silent fraud; and (3) "Plaintiffs failed to establish the reasonable reliance element of the Silent Fraud claim as a matter of law."

On appeal, plaintiffs challenge only the entry of judgment notwithstanding the jury's silent fraud verdict.

II. STANDARD OF REVIEW

We review de novo a court's decision on a motion for JNOV. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). When faced with a JNOV motion, a court must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Granting a JNOV is contrary to our policy of giving all due deference to jury verdicts and should not be taken lightly. "The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). If reasonable minds could differ regarding the evidence, the court must accept the jury verdict. *Slanga v Detroit*, 152 Mich App 220, 224; 393 NW2d 487 (1986).

III. ANALYSIS

A. SILENT FRAUD

Because the parties' legal arguments arise from the jury's decision that defendants committed silent fraud, we begin with a discussion of that tort.

Silent fraud, also known as fraudulent concealment, arises from suppression of the truth. Long ago, our Supreme Court declared that "[a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud."

Tompkins v Hollister, 60 Mich 470, 483; 27 NW 651 (1886). The term "suppression" implies deliberate action. But fraud may also result from inaction – silence – when there is a duty to speak. In a claim for silent fraud, "the suppression of a material fact, which a party in good faith is duty-bound to disclose, is equivalent to a false representation." *M & D, Inc v McConkey*, 231 Mich App 22, 28-29; 585 NW2d 33 (1998). Most recently, our Supreme Court described silent fraud as a doctrine that has "long been recognized in Michigan," holding that "when there is a legal or equitable duty of disclosure," fraud may arise from "suppression of the truth" with "intent to defraud." *Titan Ins Co v Hyten*, 491 Mich 547, 557; 817 NW2d 562 (2012) (quotation marks and citation omitted).

As discussed in greater detail, *infra*, defendants had a statutory duty to disclose those material facts "necessary" to make the UFOC's statements "not misleading" under the circumstances in which they were presented. Abbo's silent fraud claim arose from a breach of this statutory obligation, as well as from defendant's common-law responsibility to truthfully respond to direct inquiries regarding hits and chargebacks, and to avoid creating false impressions when allaying Abbo's financial concerns. "[A] legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Hord v Environmental Research Inst*, 463 Mich 399, 412; 617 NW2d 543 (2000) (citations omitted).

Thus, to prove silent fraud Abbo was required to establish that defendants (1) suppressed or concealed the truth by employing false and misleading words (2) with the intent to defraud or deceive, (3) while having a duty to disclose factually accurate information.

Abbo's silent fraud claim focused on defendants' failure to disclose the truth regarding hits, chargebacks, the nature of Wireless Toyz's relationships with cell phone carriers, the hidden costs of purchasing inventory from Wireless Toyz, and the number of sales required to make a profit. Abbo claims that despite a duty to reveal negative information about each of these aspects of the cell phone business, WTF deliberately provided information that concealed the truth or was designed to mislead. After reading the trial transcript, the posttrial court was not persuaded that Abbo sustained his burden of proving silent fraud. We now examine that ruling.

B. THE MERGER CLAUSES

In a written opinion, the posttrial court determined that the merger clauses of the franchise and development agent agreements barred Abbo's silent fraud claim, "which is based upon alleged extra-contractual and oral misrepresentations or omissions[.]" Merger clauses prohibit the introduction of parol evidence introduced to revise or contradict the terms of a written contract. Alternatively stated, merger clauses bar evidence of earlier agreements because the law presumes that a contract represents the final expression of the parties' bargaining.

Silent fraud, however, involves information that has been deliberately and deceptively withheld by one of the contracting parties. Undisclosed material facts that were never the subjects of precontractual negotiations are not absorbed by a contract. A contrary ruling would immunize from liability a contracting party who suppressed information that it was duty-bound to include in the parties' discussions. Contrary to the posttrial court's opinion, the trial court

correctly allowed Abbo to introduce parol evidence substantiating that defendants deliberately suppressed such pertinent information.

The WTF franchise and development agent agreements both contain merger clauses. The franchise contract provides:

> 28. ENTIRE AGREEMENT
>
> This agreement and the Manuals contain all of the covenants and agreements of the parties with respect to this subject matter, and supercede any and all prior or contemporaneous agreements, whether oral, written, express or implied, between the parties with respect to the subject matter.

The development agent agreement's corresponding clause states:

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

These clauses assure that the memorialized products of the parties' negotiations — the written franchise agreement and development agent agreement contracts — would govern their future dealings. "'Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.'" *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). Merger clauses prevent one party to a contract from introducing parol evidence to prove an agreement other than the one actually signed. See *Coal Resources, Inc v Gulf & Western Indus, Inc*, 756 F2d 443, 446-447 (CA 6, 1985). As this Court has emphasized, "The raison d'être of an integration clause is to prohibit consideration of parol evidence by nullifying *agreements* not included in the written agreement." *UAW-GM Human Resource Ctr*, 228 Mich App at 507 n 14 (emphasis added).

But merger clauses do not mechanically eliminate from consideration *all* precontractual statements or representations. A party may present evidence that deceit induced a contract, thereby rendering the agreement void. *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006). "[I]t is well established that parol evidence is admissible to show that the execution of a written instrument was procured by fraud, for the purpose of invalidating the instrument." *Peoples Wayne Co Bank of Dearborn v Harvey*, 268 Mich 47, 57; 255 NW2d 436 (1934).

> [W]here the inducements for the execution of a contract are *fraudulent representations as to existing facts*, testimony as to such representations is not within the parol evidence rule. They do not vary, change, or alter the terms of the written contract and are admissible in evidence, as bearing upon the question of

> whether a contract, fair on its face, was procured by fraud. [*Robinson v Great Lakes College, Inc*, 294 Mich 192, 196; 292 NW 701 (1940) (emphasis added).]

"'Fraud . . . makes a contract voidable at the instance of the innocent party.'" *UAW-GM Human Res Ctr*, 228 Mich App at 503 (ellipsis in original), quoting 3 Corbin, Contracts, § 580, p 431. The latest version of Corbin's text continues: "The exception to the parol evidence rule applies even if the testimony contradicts the terms of a completely integrated writing." 6 Corbin, Contracts (rev ed), § 25.20[A], pp 277-279. To hold otherwise would be to provide an impenetrable shield to "'disreputable parties who knowingly submit false accountings . . . to unknowing parties as long as they were savvy enough to include a merger clause in their contracts.'" *Barclae v Zarb*, 300 Mich App 455, 481; 834 NW2d 100 (2013), quoting *Star Ins Co v United Commercial Ins Agency, Inc*, 392 F Supp 2d 927, 929 (ED Mich, 2005).[4]

Further, the language of a merger agreement bears relevance to its applicability. The merger agreements at issue in this case apply, respectively, to "any and all prior or contemporaneous agreements, whether oral, written, express or implied, between the parties with respect to the subject matter" and "all previous written and oral agreements or understandings between the parties." We enforce this unambiguous contractual language according to its plain terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Neither merger clause makes reference to prior "representations" or "inducements." Rather, these clauses provide that the signed contracts embody the parties' bargained-for "agreements." While the merger clauses disclaimed "any and all prior agreements or understandings," they did not preclude the admission of factual representations regarding matters unaddressed by the contract.

Parol evidence substantiating that WTF fraudulently concealed the true effects of hits and chargebacks, WTF's poor relationships with cellular carriers, high inventory costs, and ineffective training program neither contradicted nor varied any contractual terms. Because defendants' factual representations regarding the operational mechanics of a Wireless Toyz store

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[4] The dissent fails to take into account the critical distinction between information supplied to induce a contract, and a contractual term. According to the dissent, any representations made in response to Abbo's inquiries constitute "collateral agreements or understandings . . . eviscerated by [the] merger clause." With respect, the dissent has confused representations with "agreements" or actual contractual terms. WTF's answers to direct inquiries about hits, chargebacks, and other matters influencing profit were factual representations that the jury determined were either untrue or incomplete. The answers to Abbo's questions were simply not "agreements" of any kind. Nor did factual information provided in response to Abbo's direct inquiries "contradict the statements in the franchise agreement disclaiming guarantees of profitability," as the dissent insists. We think it obvious that a prudent investor will ask questions about facts underlying data presented in a UFOC. If a franchisor elects to answer the questions, it has a statutory and common-law duty to do so truthfully, and without guile. If a franchisor could merely stand on a general disclaimer of profitability guarantees, questions would be useless because the answers could be mere contrivances, or even shams.

did not constitute "agreements" contradicting contract terms, they were not merged into the contracts.[5]

Nor did Abbo's failure to specifically plead fraud in the inducement preclude a silent fraud claim. More than one type of fraud may vitiate a contract. Fraudulent inducement may serve, and so may silent fraud. Indeed, both types of fraud require proof that the defendant procured contractual promises through fraud. Like fraudulent inducement, silent fraud undermines a party's ability to make an informed economic decision to enter into a contract. Accordingly, defendants may not hide behind the merger clauses merely because Abbo pleaded a species of fraud other than fraudulent inducement. "When incidents of fraud, innocent misrepresentation or mistake precede an integration, they clearly were not bargained over, and thus proof of them should never be barred by a merger clause or other application of the parol evidence rule." 6 Corbin, Contracts (rev ed), § 25.20[B][3], p 294. Thus, the posttrial court erred by concluding that the merger clauses immunized defendants from Abbo's suit for silent fraud.

C. THE SUFFICIENCY OF ABBO'S FRAUD EVIDENCE

Next we turn to the posttrial court's JNOV ruling that Abbo's evidence failed to establish that defendants committed silent fraud. Our consideration of this issue is guided by the bedrock principle that the trial evidence and all legitimate inferences flowing from that evidence must be viewed in the light most favorable to Abbo. "Only if the evidence so viewed fails to establish a claim as a matter of law" should a court grant JNOV. *Wilkinson*, 463 Mich at 391.

The posttrial court ruled that defendants had no duty to disclose the extent of charges that a franchisee would incur, and that "the evidence adduced at trial established that [p]laintiffs were not defrauded or mislead [sic] regarding the extent of hits, chargebacks and other costs." In reaching these conclusions, the court observed:

> With respect to hits and chargebacks, it is significant that the UFOC item 6 disclosed that all commissions were subject to being charged back in the event of service cancellations. . . . The Court finds that the evidence shows that Defendants did not conceal the existence, nature, uncertainties or financial efforts [sic] of hits and chargebacks. During Discovery Day, there was a general discussion regarding all aspects of the wireless industry and the Wireless Toyz

[5] The only contractual "term" identified by the dissent as having been contradicted by parol evidence is the franchise agreement's disclaimer of a guarantee of profitability. Abbo did not assert that WTF made representations guaranteeing a profit. Rather, Abbo presented evidence substantiating that Abbo made a good faith attempt to calculate the likelihood of profiting from a franchise investment, and in so doing relied on information provided by WTF that was *not* addressed, or was incompletely addressed, in the UFOC. Moreover, Abbo did not seek (or receive) "representations or projections of potential earnings, sales costs, expenses, prospects or chances of success" as disclaimed in the development agent agreement; he attempted to acquire the raw data necessary to make his *own* profit projections.

> business model including hits and chargebacks. In fact, Plaintiff Mr. Abbo testified that he understood that Wireless Toyz's UFOC expressly did not disclose the amount or extent of hits or chargebacks Plaintiffs could sustain. . . . Based upon the evidence presented at trial, Plaintiffs understood the risks associated with the franchise agreements including the extent of hits, chargebacks and other costs.

To sustain a claim for silent fraud, Abbo was required to clearly and convincingly prove that WTF had a duty to disclose information that it instead suppressed or misrepresented with the intent to defraud. Contrary to the posttrial court's conclusions, the trial evidence met this legal prerequisite.

1. Duty to Disclose

Defendants insist that the posttrial court correctly granted JNOV because the trial court failed to make the threshold determination that defendants had a duty to disclose information. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981). Regardless of whether the trial court made the necessary finding on the record, defendants did have a legal duty to accurately disclose material information concerning the Wireless Toyz franchise. MCL 445.1505 of the MFIL provides:

> A person shall not, in connection with the filing, offer, sale, or purchase of any franchise, directly or indirectly:
>
> (a) Employ any device, scheme, or artifice to defraud.
>
> (b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.
>
> (c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

"[T]he general purpose of franchise legislation is to protect the rights of franchisees[.]" *Gen Aviation, Inc v Cessna Aircraft Co*, 13 F3d 178, 181 (CA 6, 1993). "Generic franchise relationship laws like the MFIL address a perceived inequality of bargaining power among the parties to the franchise agreement by providing franchisees with a variety of rights designed to prevent abuses." *Geib v Amoco Oil Co*, 29 F3d 1050, 1056 (CA 6, 1994). This Court has recognized the remedial nature of the MFIL. *Martino v Cottman Transmission Systems, Inc*, 218 Mich App 54, 61; 554 NW2d 17 (1996). Remedial statutes should be broadly "construed to favor the persons the Legislature intended to benefit." *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998).

The MFIL imposes on franchisors a statutory obligation to refrain from making material misrepresentations and omitting pertinent information from any disclosures. When WTF representatives made oral statements about chargebacks, hits, inventory costs and training elements, the representatives had a statutory duty to speak the truth. FTC regulations similarly provide that a franchisor is "free to disseminate additional . . . information" beyond that provided

in the UFOC as long as the information is "truthful" and "non-deceptive." *Colorado Coffee Bean, LLC v Peaberry Coffee Inc*, 251 P 3d 9, 22 (Colo Ct App, 2010), quoting 72 Fed Reg at 15516 n 733, 15531 n 886. Michigan administrative rules governing franchise disclosures also create a duty to avoid "[m]isrepresent[ing] [] the training and management assistance available to the franchisee" or "that goods or services are offered for sale at a reduced price when they are not." Admin Code R 445.901(b), (o). Thus, as a matter of law defendants owed Abbo a duty to disclose truthful, non-misleading information in the UFOC and to avoid concealing or misrepresenting material facts when responding to further inquiries.

2. The Evidence Supporting Silent Fraud

Abbo contends that the trial evidence supported that defendants misrepresented the frequency and extent of hits and chargebacks, creating a false impression of a store's profit potential. Additional misrepresentations, Abbo maintains, further muddied the true profitability picture of a Wireless Toyz franchise. While the UFOC recommended that interested parties consult several identified Wireless Toyz stores for information about the franchise, it neglected to mention that the listed stores paid no franchise fees or royalties. Contrary to Simtob's representation that WTF enjoyed strong relationships with cellular carriers, Abbo learned that WTF had no relationship at all with Cingular, and that he had to work through a "master agent" middleman to sell Verizon products.

The posttrial court determined that plaintiffs failed to establish that they were defrauded regarding franchise expenses because the UFOC warned prospective franchisees that it contained only estimates of store revenues and disclaimed any financial guarantees. The posttrial court highlighted the UFOC's statement that "[t]here is a charge back for customer contracts that are cancelled by the customer within a period specified by the Carrier" and Abbo's admitted awareness of the potential financial impact of hits and chargebacks. Viewed in the light most favorable to Abbo, however, the evidence established that the UFOC omitted material facts, that defendants falsely answered Abbo's questions regarding hits and chargebacks, and that defendants failed to disclose material aspects of Wireless Toyz's business structure.

The trial evidence substantiated that in the cellular telephone retail world, hits and chargebacks figure prominently in an investment calculus. Simtob conceded that chargeback and commission data provide important information for a potential franchisee. Barbat likewise confirmed that commissions supply retail stores with a central revenue stream and that chargebacks reduce revenue. While the UFOC included a chart setting forth "average commissions per post paid activation" and "average post paid activations per location," it omitted specific information concerning average hits or chargebacks. According to Barbat, WTF consciously decided against disclosing the extent of chargebacks likely to be encountered, despite that chargeback data could have been tracked using WTF's software system. Barbat explained that commissions were often earned and chargebacks incurred in different years, rendering inaccurate the one-year snapshot data included in the UFOC.

Although the UFOC detailed potential expenses including taxes, depreciation and royalties, it also withheld any mention of hits. Dave Ebner, WTF's chief financial officer, testified that WTF decided against including information about hits in the UFOC. Instead, Ebner emphasized, potential franchisees were encouraged to obtain this information from current

franchisees. Simtob explained that the UFOC provided potential investors with access to gross commission numbers "and we asked the franchisees to do their own research on their charge-backs and on all the other expenses in running the business." To expedite this investigation, the UFOC included the names and addresses of several Wireless Toyz retail locations.[6] However, the UFOC did not disclose that many of the identified stores were owned by Barbat's and Simtob's family members who did not pay royalties, franchise fees, or mandatory advertising expenses. For those franchisees, a jury could infer that hits played a smaller percentage in reducing the bottom-line.

The investigation conducted by Abbo and Bober focused on questioning Simtob about profit set-offs such as hits and chargebacks. Viewed in the light most favorable to plaintiffs, the evidence substantiated that Simtob knowingly eased plaintiffs' concerns by providing falsely deflated figures, asserting that chargebacks affected only five to seven percent of total commissions "and that a good operator could keep the percentage much lower than that." Hits, Simtob advised Abbo, usually did not exceed "50 bucks." He continued, "[T]he greatest thing is since you're moving out of state, a lot of our out of state stores don't even have to take hits."

Abbo testified that after opening his store, he learned that defendants' factual representations regarding hits and chargebacks were untrue. Abbo testified that hits for his store averaged approximately $100 per phone, elaborating: "[H]its are devastating to your business. It's . . . not something that you can just sweep under the rug. . . . [Y]ou can't say you're not going to take a hit, because then you're not going to be competitive. . . . [S]o what I learned was that you had to take a hit and the hits could be extensive." Chargebacks, Abbo claimed, totaled approximately $151,000 during the four years his store remained open. This sum, according to Abbo, reduced the store's total commissions by almost 40 percent and constituted "a significant part of the business." Furthermore, Abbo insisted, even after his store reached the 200 phones a month benchmark, cash flow was a problem.

Other representations also proved false. WTF advised potential franchisees that thanks to the volume of phones sold by Wireless Toyz stores, retail stores would receive "inventory at cost, plus shipping and handling." Abbo determined that he saved money by purchasing phones at Walmart and Target. Nor was WTF's training program "formidable," as represented by Simtob, as it omitted any training regarding methods to reduce or track chargebacks.

While the posttrial court correctly pointed out that the UFOC warned readers not to rely on its profit estimates and disclosed that chargebacks could potentially impact all sales, Abbo's silent fraud evidence sufficed to establish that defendants withheld material information in response to Abbo's direct questions and omitted pertinent information from the UFOC. Viewed in the light most favorable to Abbo, the evidence supported that defendants falsely concealed

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[6] Item 19 of the UFOC similarly counseled prospective franchisees to consult operating stores, stating in capital letters: "YOU SHOULD CONDUCT AN INDEPENDENT INVESTIGATION OF THE COSTS AND EXPENSES YOU WILL INCUR IN OPERATING YOUR FRANCHISED BUSINESS. FRANCHISEES OR FORMER FRANCHISEES, LISTED IN THE OFFERING CIRCULAR, MAY BE ONE SOURCE OF THIS INFORMATION."

material information to encourage Abbo to sign the franchise and development agent agreements.[7] Accordingly, Judge Kumar erred by concluding that no evidence supported Abbo's silent fraud claim.

3. Reliance

The posttrial court also erred in determining that JNOV was proper based on Abbo's failure to establish the reliance element of silent fraud. First, the posttrial court erroneously determined that the trial court failed to instruct the jury on the reliance element. Second, the court erred in "conclude[ing] that even if the jury had been properly instructed on the element of reliance in a Silent Fraud claim, the Court finds that based upon the evidence, any reliance on extra contractual statements was inherently unreasonable."

Paragraph 11.2 of the franchise agreement states:

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

The posttrial judge opined that the precontractual statements about hits and chargebacks "were contradicted by the express disclaimers in the UFOC, Franchise Agreement, Development Agent Agreement, and Acknowledgements," including provisions specifically indicating that WTF agents had no authority to project the potential earnings of a franchisee. That a "plaintiff acted in reliance upon" a material misrepresentation is a necessary element of any fraud claim. *Custom Data Solutions*, 274 Mich App at 243; *M & D, Inc*, 231 Mich App at 27. This element is incorporated into M Civ JI 128.02, which provides that the plaintiff must establish that:

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[7] The dissent takes issue with our conclusion, largely on the basis of federal cases discussing securities law such as *In re Donald J Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F3d 357 (CA 3, 1993). The securities cases on which the dissent relies do not support that JNOV should have been granted in this case. As discussed in *Trump*, 7 F3d at 371, several federal circuits embrace the "bespeaks caution" doctrine, which holds that "when forecasts, opinions or projections in a disclosure statement are accompanied by meaningful warnings and cautionary language, the forward-looking statements may not be misleading." See, e.g., *Harden v Raffensperger, Hughes & Co, Inc*, 65 F3d 1392, 1404 (CA 7, 1995). The "bespeaks caution" doctrine does not shield statements of present fact, *id.*, or past facts. *Westley v Oclaro, Inc*, 897 F Supp 2d 902, 918 (ND CA, 2012). However, a "vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation." *Trump*, 7 F3d at 371. Here, the UFOC included no "forecasts, opinions or projections." And if it did, the boilerplate disclaimer regarding guaranteed profitability would not suffice to insulate the projections from challenge under the securities law cited by the dissent.

e. When defendant failed to disclose the [fact / facts], defendant intended that plaintiff rely on the resulting false impression.

f. Plaintiff relied on the false impression.

g. Plaintiff was damaged as a result of [his / her / its] reliance.

Although the trial court did not discuss the reliance element contemporaneously with the elements of a silent fraud claim, the court did instruct the jury in this regard. Specifically, the court informed the jury:

> In order to prove their claim of violation of Section 5 of the Michigan Franchise Investment Law, *silent fraud*, fraudulent misrepresentation, and innocent misrepresentation, Plaintiffs must prove by clear and convincing evidence that they reasonably relied on the alleged misrepresentation, omissions, and/or false impressions attributed to Defendants. [Emphasis added.]

The trial court also defined "relied":

> When I use the words relied, I mean the Plaintiffs would not have entered into the franchise agreement and/or the development agent agreement with Wireless Toyz if the Defendants had not made the representations or given the false impression, even if the representation or false impression was not the only reason for Plaintiffs' actions.

In relation to the term "reasonable" reliance, the trial court merely stated that "a reasonable person would be likely to rely on it."

WTF contends that Abbo could not have reasonably relied on any statements made by Simtob regarding chargebacks and hits because they failed to investigate the impact of these items when questioning current franchisees about their businesses. Defendants suggested that the reasonability of plaintiffs' reliance was negated by a lack of due diligence. Our Supreme Court recently held, however, that due diligence is not prerequisite to reliance under any fraud theory.

> [A]lthough the doctrines of actionable fraud, innocent misrepresentation, and silent fraud each contain separate elements, none of these doctrines requires that the party asserting fraud prove that the fraud could not have been discovered through the exercise of reasonable diligence. Stated differently, these doctrines do not require the party asserting fraud to have performed an investigation of all assertions and representations made by its contracting partner as a prerequisite to establishing fraud. [*Titan Ins Co*, 491 Mich at 557 (citations omitted).]

Moreover, Abbo presented significant due diligence evidence substantiating that before entering the franchise and development agent agreements, he investigated the competition, toured the market area to consider the need for their services, questioned individual store owners

about the elements of their profits and costs, and specifically asked a co-owner of the company about hits and chargebacks. Instead of directing plaintiffs to question franchise owners who would be similarly situated to Abbo, that company co-owner provided deflated figures and downplayed the significance of chargebacks and hits on a store's profits.[8]

The posttrial court also cited the existence of the merger/integration and disclaimer clauses to support its conclusion that Abbo's reliance on Simtob's precontractual statements was unreasonable. If the merger/integration clauses trumped Abbo's silent fraud claims, the postttrial court's decision would be correct. See *UAW-GM Human Resource Ctr*, 228 Mich App at 504 ("Here, the merger clause made it unreasonable for plaintiff's agent to rely on any representations not included in the letter of agreement."). As noted, however, the jury accepted Abbo's silent fraud claim premised on WTF's failure to disclose pertinent information. A merger clause cannot integrate that which was not revealed. Furthermore, we may not second-guess the jury's factual and credibility determinations in this regard.

Finally, the posttrial court found that by dismissing his claim for rescission, Abbo forfeited any argument that fraud invalidated the entire contract. "Fraud in the procurement of [a] contract may be grounds for monetary damages in an action at law . . . or, . . . grounds to retroactively avoid contractual obligations through traditional legal and equitable remedies such as cancellation, rescission, or reformation[.]" *Titan Ins Co*, 491 Mich at 557-558. We have found no legal support for the proposition that Abbo's repudiation of rescission damages eliminated a separate and distinct claim for fraud.

D. JNOV ON DAMAGES WOULD BE IMPROPER

Defendants claim that the posttrial court's grant of JNOV was alternatively supported by the jury's award of rescissionary damages after Abbo withdrew the rescission claim with prejudice.

At the close of testimony on February 24, 2010, the parties discussed certain jury instruction issues on the record. The trial court then invited the parties into his chambers to discuss the jury instructions off the record. The following morning, the trial court indicated that it had "asked Plaintiff[s] to make an election." Abbo's counsel stated that his client elected to seek damages and would withdraw the rescission claim because the theories were "incompatible." The trial court then dismissed the rescission claim with prejudice. At oral argument before this Court, Abbo's counsel indicated that this election was required in relation to the MFIL claims.

On March 2, 2010, the trial court conducted a hearing to consider the parties' arguments related to the damages issue in order to develop the jury instructions and create a jury verdict form. Abbo expressed intent to seek several "out-of-pocket expenses," including the franchise and development agent fees. Defendants argued that such expenses were rescissionary in nature

[8] Moreover, we question how a plaintiff alleging silent fraud could have relied on information that the defendant deliberately failed to reveal.

because the effect was to "void the contract" and return Abbo's "initial investment and all expenditures made," placing Abbo in the same position as if the contract was never made. Defendants contended that Abbo was precluded from seeking such rescissionary damages because Abbo chose to forego that remedy by affirming the contract.

Abbo retorted that plaintiffs were not seeking rescissionary damages. Rather, there was overlap between compensatory and rescissionary damages such that plaintiffs could claim damages in the amount of the franchise and development agent fees. The trial court rejected defendants' challenge and gave the jury the option of awarding the franchise and development agent fees.

First, we can find no support in the MFIL for requiring a plaintiff to select between rescissionary and actual damages. MCL 445.1531(2) precludes a party from filing suit for actual damages if the franchisor has offered "to refund the consideration paid together with interest," but no such offer was made in this case. Requiring plaintiffs to select a remedy before proceeding to the damages portion of the trial is contrary to "[m]odern rules of civil procedure" under which a plaintiff need not present consistent theories of its case. This Court has held that a plaintiff may seek rescission and damages for fraud, despite that one requires affirmance of the contract while the other demands disavowal, as long as the jury picks one theory and does not award double recovery. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 92-93; 443 NW2d 451 (1989).

Second, we agree with Abbo's assertion that there was overlap between rescissionary and actual damages in this case, rendering the jury's award proper even under defendants' suggested legal rubric. As quoted with approval in *Sorel v Crantz*, 362 Mich 154, 156-157; 106 NW2d 757 (1961), "A permissible measure of damages in an action of fraud of this kind is recovery of the out-of-pocket loss of the plaintiff and he is permitted to recover from the person whose false representations induced him to part with his money or valuable property." The damages overlap because the act of deceit causes the plaintiff to part with funds and he or she then does not receive the benefit of the bargain. Accordingly, we discern no error in the trial courts' presentation of out-of-pocket expenses as a damages element in this case.

Reversed. Plaintiffs, as the successful parties, may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause