

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

3	CARL A. DISSETTE, an individual,)	Docket No. 16 C 11389
	B&C RESOURCES, INC., an)	
4	Illinois corporation, MBT FIVE,)	
	INC., an Indiana corporation,)	
5	and MBT-FIVE IOWA, INC., an Iowa)	
	corporation,)	
6)	
	Plaintiffs,)	Chicago, Illinois
7)	May 11, 2017
	v.)	8:46 a.m.
8)	
	PIE FIVE PIZZA COMPANY, INC., a)	
9	Texas corporation, RANDALL E.)	
	GIER, an individual, MARK H.)	
10	RAMAGE, an individual, and RAVE)	
	RESTAURANT GROUP, INC., a)	
11	Missouri corporation,)	
)	
12	Defendants.)	

13 TRANSCRIPT OF PROCEEDINGS - Oral Ruling
 14 BEFORE THE HONORABLE THOMAS M. DURKIN

15 APPEARANCES:

17	For the Plaintiffs:	CARMEN D. CARUSO LAW FIRM by
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19		
20	For Defendants	SCHOENBERG FINKEL NEWMAN & ROSENBERG LLC by
	Pie Five and Rave:	MR. NORMAN T. FINKEL
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23	Court Reporter:	LAURA R. RENKE, CSR, RDR, CRR
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1 (In open court.)

2 THE CLERK: All rise.

3 Be seated, please.

4 16 C 11389, Dissette v. Pie Five Pizza.

5 THE COURT: Good morning.

6 MR. CARUSO: Good morning, your Honor. Carmen Caruso
7 for plaintiff.

8 MR. FINKEL: Norman Finkel for defendants Pie Five
9 Pizza and Rave Restaurant Group.

10 THE COURT: All right. Thank you for coming in early.
11 I'm going to give you an oral ruling on the
12 defendants' motion to dismiss.

13 This is a franchise case in which the plaintiffs, who
14 are franchisees, bring claims against the franchisor for
15 declaratory judgment, common-law fraud, and alleged violations
16 of the Illinois Franchise Disclosure Act and the Indiana
17 Deceptive Franchise Practices Act and the Iowa Franchise Act.

18 The defendants have moved to dismiss the complaint,
19 raising a whole host of arguments for why the plaintiffs'
20 claims supposedly are without merit. Of course, the issue on a
21 motion to dismiss is not whether the plaintiffs' claims have
22 merit, but whether they're plausible. Moreover, the vast
23 majority of the defendants' arguments for dismissal involve
24 whether it is reasonable to draw certain inferences from the
25 alleged facts.

1 That type of an issue is more appropriately addressed
2 on summary judgment with a developed record. Dismissal under
3 Rule 12(b)(6) is appropriate only if the disclosures defendants
4 made in the franchise disclosure documents, the FDDs, on which
5 the plaintiffs' claims depend incontrovertibly contradict the
6 allegations in the complaint. For that I cite *Bogie v.*
7 *Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013).

8 I've carefully reviewed the disclosures in the FDDs on
9 which the defendants rely for their motion and do not feel it's
10 necessary at this time to go into much detail regarding each of
11 these. But briefly, since the parties have put some effort
12 into the arguments, I find the following:

13 As to item 19, relating to the financial performance
14 representations: While the FDDs do disclose that the financial
15 performance information given by defendants is given for
16 company-owned stores, this disclosure itself does not
17 incontrovertibly contradict the plaintiffs' argument that the
18 disclosure was misleading due to other information being
19 missing, the missing information being the fact that the
20 prospective franchisee would need to add franchise fees to the
21 calculations in order to make those numbers an accurate
22 representation of what the prospective franchisee could expect
23 to achieve.

24 Whether plaintiffs should have known that the
25 disclosed financial data was inaccurate as an estimate of what

1 their own financial data would look like without adding
2 franchise fees to it is a fact question that can't be resolved
3 at this point.

4 As to item 8, relating to supply terms and
5 restrictions: While item 8 discloses that rebates in general
6 may be received by the defendants, this disclosure does not
7 incontrovertibly contradict the plaintiffs' allegations that
8 item 8 overall is misleading without disclosure by the
9 defendants of their receipt of the specific rebate alleged in
10 the complaint.

11 The plaintiffs' reading of item 8 as promising that
12 any rebates received were only received as part of purchasing
13 arrangements with suppliers that provide a benefit to the
14 franchisees is not incontrovertibly contradicted by the item 8
15 disclosure and is not implausible.

16 As to item 6, which relates to other fees:
17 Defendants' disclosure in Section 6.5 of the FDD, which states
18 that fees paid to the franchisor and franchisor affiliates must
19 be by ACH, does not incontrovertibly contradict the plaintiffs'
20 allegations regarding payments to PFG because PFG is neither
21 the franchisor nor an affiliate of the franchisor.

22 Defendants state in their reply that the payments in
23 question were made not to PFG but instead to Norco, which is an
24 affiliate of defendant. But those facts are outside the
25 complaint, and the Court therefore can't properly consider them

1 at this time.

2 There are a number of other arguments defendants make
3 that fall under each of these three general disclosure
4 categories, which the Court is not going to get into
5 specifically.

6 Suffice it to say that despite defendants' various
7 arguments, the Court finds that none of the disclosures at
8 issue "incontrovertibly contradict" the plaintiffs' fraud
9 claims. Those claims are based primarily on alleged omissions
10 of material fact.

11 Under the various franchise statutes on which
12 plaintiffs base their claims, a disclosure is considered
13 misleading if it "omit[s] to state a material fact necessary in
14 order to make the statements made, in the light of the
15 circumstances under which they are made, not misleading." That
16 quote is from the Illinois franchise statute, but the Indiana
17 and Iowa franchise statutes are the same.

18 Under the case law, information is material if there's
19 a substantial likelihood a reasonable investor would have
20 viewed the information as having significantly altered the
21 total mix of available information.

22 While defendants make some very valid points about the
23 disclosures and what the plaintiffs knew or should have known
24 given those disclosures, I can't say that those disclosures
25 warrant the conclusion on the current undeveloped record that

1 the plaintiffs' claims are completely lacking in plausibility.

2 For a similar case, I refer the parties to *Hanley v.*
3 *Doctors Express Franchising, LLC*, 2013 WL 690521, District
4 Court of Maryland, February 25th, 2013, where the defendants,
5 like the defendants here, argued that they never concealed
6 anything and that the alleged missing information was
7 information that the plaintiff should have known.

8 The Court there said, "Perhaps this argument would
9 convince a fact-finder. But it does not undermine the legal
10 sufficiency of the plaintiffs' claims at the pleading stage."
11 And that's at page 23.

12 The Court would say the same thing here about the
13 defendants' arguments. Therefore, the motion to dismiss based
14 on the FDDs is denied.

15 I also deny defendants' motion to dismiss based on the
16 Rule 9(b) pleading requirements for fraud. The complaint gives
17 more than sufficient detail concerning the specific nature of
18 the charges of fraud against the defendants.

19 The fact that the defendants were able to raise the
20 arguments they do regarding the disclosures they made
21 concerning the items -- concerning items 19, 8, and 6
22 disclosures demonstrates that the defendants have notice of the
23 specific conduct on which the plaintiffs' fraud claims are
24 based.

25 Malice, intent, knowledge, and other conditions of a

1 person's mind may be alleged generally. Moreover, a Court
2 should hesitate to dismiss a complaint under Rule 9(b) if the
3 Court is satisfied (1) that the defendant has been made aware
4 of the particular circumstances for which he will have to
5 prepare a defense at trial and (2) that plaintiff has
6 substantial prediscovery evidence of those facts. That's
7 *Hanley*, 2013 WL 690521 at *13, which quotes *Harrison v.*
8 *Westinghouse*, 176 F.3d 776, 784 (4th Cir. 1999).

9 Moreover, Rule 9(b) is "less strictly applied with
10 respect to claims of fraud by concealment" or omission of
11 material facts, as opposed to affirmative misrepresentations,
12 because "an omission cannot be described in terms of the time,
13 place, and contents of the misrepresentation or the identity of
14 the person making the misrepresentation."

15 Finally, to the extent that defendants' motions to
16 dismiss -- or motion to dismiss raises arguments based on
17 written releases executed by the plaintiffs as part of the
18 franchise agreement, those arguments are also not appropriately
19 resolved at this time. Plaintiffs have made plausible
20 arguments in response to their claims -- in response that their
21 claims are outside the release provisions at issue. I can't
22 resolve that issue without further development of the record
23 regarding the circumstances surrounding the plaintiffs' claims.

24 In addition, the defendants have not adequately
25 addressed which misrepresentations based on omissions fall

1 within the release provisions.

2 I'll direct you to this Court's opinion in *Walls v.*
3 *VRE Chicago Eleven, LLC*, 2016 WL 5477554 at page 3 -- that's a
4 Northern District case, of course, September 9, 2016 -- where
5 it's noted that the Illinois Appellate Court has suggested that
6 a fraudulent concealment claim is not barred by a no-reliance
7 clause if that clause does not expressly encompass omissions.

8 And even apart from these issues, the plaintiffs have
9 argued that the release provisions at issue are invalid under
10 state law.

11 Insofar as this issue presents a straight legal issue
12 that potentially could be resolved on a motion to dismiss, the
13 parties' treatment of it in the briefing was too truncated for
14 me to decide at this time. For instance, neither side has
15 cited any case on point that deals specifically with the issue
16 of whether the no-waiver statutory provision in the Illinois,
17 Indiana, and Iowa franchise statutes would or should apply to
18 the circumstances at issue here.

19 Since the defendants bear the burden of persuasion on
20 the issue and since the plaintiffs' claims would survive in any
21 event based on the first argument the Court has found to be
22 plausible, that the claims fall outside the release provision,
23 the Court declines to address the applicability of the
24 no-waiver statutory provisions at this time.

25 Similarly, the defendants only briefly touch upon a

1 number of arguments that raise legal issues, such as the issue
2 of whether there was any duty to disclose information
3 concerning the financial condition of defendants' parent
4 company, Rave, or whether the alleged misrepresentations were
5 nonactionable promises relating to future events.

6 Again, those legal arguments are presented in too
7 summary a fashion and without sufficient case support for the
8 Court to rule on at this time.

9 To the extent the defendants argue that plaintiffs
10 knew about Rave's financial condition, that issue turns on
11 disputed issues of fact. For present purposes, the plaintiffs'
12 claims adequately allege facts that provide a plausible basis
13 for avoiding the legal impediments to their claims advanced by
14 the defendants.

15 There are a number of other issues raised in the
16 briefing that the Court did not specifically mention. Included
17 among them are the arguments for striking plaintiffs' requests
18 for punitive damages and jury demand.

19 As to the punitive damages and jury trial issue, as
20 well as any others not specifically mentioned in this ruling,
21 the Court has considered the defendants' arguments but does not
22 feel defendants have met their burden of persuasion on them at
23 this time. Therefore, a ruling on those issues will be
24 deferred to the summary judgment -- until the summary judgment
25 stage of these proceedings.

1 So in conclusion, for all the reasons just stated,
2 defendants' motion to dismiss and motion to strike are denied.

3 All right. Where do we stand on the case otherwise?

4 MR. CARUSO: Thank you, your Honor.

5 We're -- we've exchanged written document requests and
6 interrogatories as you permitted. The parties are just about
7 ready to start exchanging documents, and we've also tendered to
8 the defense a draft protective order, which was modeled after
9 the one you approved for us last year in the Culver's case. So
10 we're hoping it's noncontroversial. So we should be able to
11 get our documents exchanged within the next few weeks.

12 And my suggestion would be maybe we come back in about
13 30 days for a status after we've seen each other's documents,
14 and then maybe we could set a realistic discovery cutoff that
15 we can both live with.

16 THE COURT: How does that sound to the defense?

17 MR. FINKEL: That sounds fine, Judge.

18 THE COURT: Okay. We'll give you a date in 30 days.

19 THE CLERK: Can you come back on June 21st, perhaps?

20 MR. CARUSO: Yes.

21 MR. FINKEL: Could we make it the following week,
22 Judge? I'm out of the country that week.

23 THE CLERK: Sure. 27th?

24 MR. FINKEL: That's fine.

25 MR. CARUSO: Yes.

1 THE COURT: Very good.

2 Okay. We'll see you then.

3 MR. CARUSO: Thank you, Judge.

4 MR. FINKEL: Thank you.

5 THE COURT: Thank you.

6 (Concluded at 8:57 a.m.)

7 C E R T I F I C A T E

8 I certify that the foregoing is a correct transcript of the
9 record of proceedings in the above-entitled matter.

10

11 /s/ LAURA R. RENKE

May 16, 2017

12 LAURA R. RENKE, CSR, RDR, CRR
13 Official Court Reporter

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