

STATE OF IDAHO)
County of KOOTENAI)^{ss}

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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JERRY B. MOTE and JENNIFER MOTE,)
)

Plaintiffs,)
)

vs.)
)

QUIZNO'S FRANCHISING LLC., et ala)
Colorado Limited Liability Company,)
DANIEL A. SCHWALBE, INC.,)
)

Defendants.)
_____)

Case No. **CV 2006 5772**

**MEMORANDUM DECISION AND
ORDER ON DEFENDANT QUIZNO'S
MOTION TO DISMISS**

I. BACKGROUND.

In this case Plaintiffs Motes seek to recover a \$25,000 franchise fee that was paid to the Defendant Quizno's Franchising, L.L.C., for the purpose of opening a Quizno's restaurant in Idaho. In October 2003, the Motes entered into a Franchise Agreement with Quizno's through Mr. Daniel Schwalbe (defendant Daniel A. Schwalbe, Inc.), a representative of Quizno's, to purchase a Quizno's restaurant to be established in the Post Falls area. Motes allege they met Schwalbe at the Hot Rod Café restaurant in Post Falls to discuss the possibility of purchasing and operating a Quizno's and to discuss the terms of the Franchise Agreement. Motes claim that at this meeting Schwalbe appeared to be in a hurry, telling the Motes it was unnecessary for them to read the Franchise Agreement or to seek legal advice, claiming it "didn't matter" if they did so because the Agreement was a "non-negotiable deal," that the Plaintiffs "[couldn't] change anything anyway." Jerry Mote Affidavit, p. 2.; Jennifer Mote Affidavit, p. 2.

Taking Schwalbe at his word, Motes signed the Franchise Agreement and wrote a check for \$25,000 to cover the Initial Franchise Fee. **After** the Franchise Agreement had been signed and the check surrendered, Jerry Mote alleges that he asked Schwalbe if he would have any problems getting the Initial Franchise Fee returned if the Motes were unable to open a Quizno's, to which the Motes allege Schwalbe answered, "Absolutely not" (i.e. they would have no problem getting their money back). Jerry Mote Affidavit, p. 3; Jennifer Mote Affidavit, p. 3.

In the summer of 2004, Jerry Mote received a copy of the Franchise Agreement that had been signed and dated "Effective July 15, 2004." According to the terms of the Franchise Agreement, the Motes then had twelve months in which to find a location, attend training seminars, and get a Quizno's Restaurant up and running. This did not happen because, according to Jerry Mote, while attending a Quizno's franchise owners' meeting in Spokane, Washington, he was apprised of a new promotion that Quizno's had devised. According to Jerry Mote, under this new promotion, which he terms the "loss leader" program, Quizno's franchises "were to give away a sub sandwich (approximately \$3.00 value) for the customer's purchase of chips and a drink (approximate \$2.00 value)". Jerry Mote Affidavit, p. 3. Jerry Mote was concerned this was a violation of Idaho Law and he voiced this concern to one of Quizno's Regional Managers. Jerry Mote alleges he was then told he had to participate in the "loss leader" program and to "work around" such contrary laws. Jerry Mote Affidavit, p. 4. Because Jerry Mote decided not to open and operate the restaurant contrary to Idaho law, he asked for a refund of his Initial Franchise Fee. Unfortunately for the Motes, they both signed a Franchise Agreement which contained a clause in it which clearly states that the Initial Franchise Fee is nonrefundable. Quizno's has refused to return the Initial

Franchise Fee, and the Motes have filed suit to recover that fee.

In their Complaint, Motes allege five causes of action in their Amended Complaint: 1) breach of contract through breach of the implied covenant of good faith and fair dealing; 2) unjust enrichment; 3) mutual mistake; 4) fraudulent inducement, and 5) unconscionability.

Quizno's filed a motion to dismiss the complaint for improper venue and for failure to state a claim upon which relief can be granted. Quizno's argues in the alternative that if this Court should choose not to dismiss the complaint, this Court should strike the Motes' request for a jury trial and require the Motes to amend their complaint to include a more definite statement concerning their fraud-based claims.

Schwalbe filed a motion to dismiss for failure to state a claim of negligent misrepresentation. Schwalbe argues that the parties cannot sign an unequivocal document and then cry fraud because its terms are different from an alleged subsequent oral representation.

Oral argument was held on November 29, 2006. At the conclusion of oral argument, the Court granted Schwalbe's Motion to Dismiss only as to plaintiff Jerry B. Mote's claims. Because plaintiff Jennifer Mote's signature on the agreement is a few days after the meeting at the Hot Rod Café, and a few days after the alleged representations by Schwalbe that they could get their money back, her claims of fraud in the inducement were taken under advisement. On January 3, 2007, the parties filed a "Stipulation for Order of Dismissal With Prejudice and Without Costs of Plaintiffs' Claims Against Defendant Daniel A. Schwalbe, Inc., dba The Quizno's Franchise Co." An Order of Dismissal With Prejudice and Without Costs of Plaintiffs' Claims Against Defendant Daniel A. Schwalbe, Inc., dba The Quizno's Franchise Co." was signed by

this Court and filed later that same day. Accordingly, defendant Schwalbe's Motion to Dismiss is moot and will not be analyzed by this Court.

II. ANALYSIS.

A. STANDARD OF REVIEW.

Quizno's Motion to Dismiss has essentially been converted to a Motion for Summary Judgment due to the submission of affidavits and exhibits.

In considering a motion for summary judgment, this Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (citation omitted). In ruling on a motion for summary judgment, the trial court is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983). Should the evidence reveal no disputed issues of material fact, then summary judgment should be granted. *Smith*, 128 Idaho at 718, 918 P.2d at 587 (citation omitted).

A party responding to a motion for summary judgment (the non-moving party) is not required to present evidence on every element of its case. *Thompson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994). The non-moving party must establish a genuine issue of material fact only with respect to the elements

challenged by the moving party's motion. *Id.* The moving party is entitled to summary judgment when the non-moving party fails to support the existence of an essential element of the non-moving party's case that they (the non-moving party) must prove at trial. *Thompson*, 126 Idaho at 530-31, 887 P.2d at 1037-38. At a trial in a contract case the plaintiff has the burden of proving: 1) that a contract existed; 2) the defendant breached the contract; 3) the plaintiff was damaged on account of the breach, and; 4) the amount of damages. IDJI2.d, 6.10.1. A mere scintilla of evidence will not create a material issue of fact. *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 681, 837 P.2d 805, 807 (1992). The non-moving party may not simply rest on allegations or denials. *Id.* Affidavits setting forth facts that would be admissible as evidence and other response provided for in I.R.C.P. 56(e) must show a genuine issue for trial. *Id.* Summary judgment is proper if the pleadings, depositions, admissions, and affidavits filed show that there is no genuine issue of material fact. *Id.*

B. QUIZNO'S MOTION TO DISMISS (SUMMARY JUDGMENT) FOR IMPROPER VENUE.

Quizno's argues Motes' Complaint should be dismissed for improper venue under Idaho Rule of Civil Procedure 12(b)(3), Idaho Code § 29-110, and the Franchise Agreement. The Franchise Agreement states Colorado law should apply and that Colorado is the proper place for venue. The determination of venue is within the discretion of the court only in cases where conflicting issues of fact must be resolved. *Hayes v. Kingston*, 140 Idaho 551, 96 P.3d 652 (2004). Idaho Code §29-110 places a limitation on a court's discretion when there is a franchise agreement which purports to waive the venue or jurisdiction of the state of Idaho. Idaho Code § 29-110(2) states in pertinent part:

Any condition, stipulation or provision in a franchise agreement is void to the extent it purports to waive, or has the effect of waiving venue or jurisdiction of the state of Idaho's court system.

This provision codifies Idaho's public policy against franchise agreements that contain a choice of venue clause. The limited case law applicable to this policy holds that "the commencement and maintenance of an action in any other county than that fixed by statute is not a proper subject of contract." *McCarty v. Herrick*, 41 Idaho 529, 240 P. 192 (1925). The Supreme Court of Idaho has held that statutes such as I.C. § 29-110 operate to void forum selection clauses in contracts which mandate an out-of-state forum, reasoning that if the Court were to uphold such a clause, "it would violate a strong public policy either in the forum where the suit would be brought *or the forum from which the suit had been excluded.*" *Cerami-Kote, Inc., v. Energywave Corp.*, 116 Idaho 56, 59, 773 P.2d 1143, 1146 (1989). (emphasis in original).

Deciding the venue issue requires a two-step analysis. First, this Court must determine which State's law applies, Idaho's or Colorado's. Second, the Court must apply the appropriate State's law to the choice of forum provision in the Quizno's Franchise agreement.

1. Colorado Law Applies.

Quizno's argues both parties *specifically contracted* that Colorado law would apply to any dispute arising from the Franchise Agreement. Quizno's correctly argues *Cerami-Kote* held choice of law provisions are recognized in Idaho so long as the state chosen bears a "reasonable relation" to the transaction. Quizno's cites to the second portion of I.C. § 29-110(2), which reads:

Any condition, stipulation, or provision in a franchise agreement, to the extent it purports to assert, or has the effect of asserting the choice of law is enforceable.

Idaho Code § 29-110(2). The entire section in context reads:

(2) Any condition, stipulation or provision in a franchise agreement is void to the extent it purports to waive, or has the effect of waiving venue or jurisdiction of the state of Idaho's court system. Any condition, stipulation or provision in a franchise agreement, to the extent it purports to assert, or has the effect of asserting the choice of law is enforceable. This subsection shall apply to any franchise agreement entered into or renewed on or after July 1, 2003, by any person who at the time of entering into or renewing such franchise agreement was a resident of this state or incorporated or organized under the laws of this state.

Idaho Code § 29-110(2). Keep in mind the first sentence codifies Idaho's public policy against forum selection clauses, while the next sentence sets forth Idaho's choice of law provisions. Idaho courts have explained that in order for a forum selection clause to be enforceable in non-commercial situations, the court should apply the law of the state that bears a "reasonable relationship" to the transaction as set forth in I.C. § 28-1-105(1).

Cerami-Kote, 116 Idaho at 58, 773 P.2d at 1145.

Idaho Code § 28-1-105(1) states:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this act applies to transactions bearing an appropriate relation to this state.

The "reasonable relations" test generally means the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs. *Seaman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626 (1927). However, an agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen. *Official Comment to I.C. §28-1-105*.

In a choice of law analysis, both states can possibly have a "reasonable

relationship” to the transaction. This Court finds both Idaho and Colorado have a “reasonable relation” to this transaction, but since the Quizno’s Franchise Agreement states the choice of applicable law is Colorado, that ends the inquiry.

Motes argue this Court should “balance” the various “relations” each State bears to the transaction and “weigh” which state has the most “relations” to the transaction. Motes call this the “most significant relationship” test and cite *Klosterman v. Choice Hotels International, Inc.*, 2005 WL 1177947 (D.Idaho 2005). Plaintiffs’ Memorandum in Support of Objection to Defendants’ Motions to Dismiss, pp. 5. That test would be at odds with the “reasonable relation” test set forth by Justice Bistline in *Cerami-Kote* back in 1989.

At oral argument, none of the attorneys for the various parties could reconcile *Klosterman* with *Cerami-Kote*. Motes urged this Court follow *Klosterman* and find that the federal district court overruled the Idaho Supreme Court. This is something this Court cannot do. This Court finds the two decisions cannot be reconciled, and that *Cerami-Kote* is controlling for several reasons. First, *Klosterman*, even though written in 2005, has not found its way into the Federal Supplement 2nd. Thus, it appears to not be a published opinion. Second, the analysis of *Klosterman* is flawed. In writing the “Applicable Law” portion of the *Klosterman* decision, the federal district court made several sequential errors as it ultimately determined the “most significant relationship” test was the appropriate choice of law analysis. The first error was to claim that:

Idaho has a strong public policy against the enforcement of contractual choice of law provisions. [citing via footnote 5 See *Cerami-Kote*, 773 P.2d at 1146] This policy, as enunciated by Idaho Code § 29-110, precludes the enforcement of the contractual choice of law provisions in the franchise agreement.

2005 WL 1177947, p. 3. Regarding the first sentence quoted, nowhere at 773 P.2d 1146 did Justice Bistline in *Cerami-Kote* write that Idaho has a strong policy against the

enforcement of contractual choice of law provisions. That specific page of *Cerami-Kote* concerned only “choice of venue” analysis, not “choice of law” analysis. Regarding the second sentence quoted above, the federal district court was simply wrong when it wrote: “This policy, as enunciated by Idaho Code § 29-110, precludes the enforcement of the contractual choice of law provisions in the franchise agreement.” In fact, Idaho Code § 29-110 says just the opposite. Regarding “choice of law”, Idaho Code § 29-110 reads: “Any condition, stipulation or provision in a franchise agreement, to the extent it purports to assert, or has the effect of asserting the choice of law **is enforceable**.” This Court is convinced that the federal district court simply confused the concept of “choice of law” with “choice of venue”. This is the only logical way to explain *Klosterman*. Finally, the federal district court announced “the most significant relationship” test by citing *Seubert Excavators, Inc. v. Anderson Logging Co.*, 126 Idaho 648, [651], 889 P.2d 82, 85 (1995). *Klosterman*, 2005 WL 1177947, p. 3, n. 8. The fundamental problem in citing *Seubert* is that case dealt with a **conflict of law** situation, not a **choice of law provision** in an agreement. Fary Farrens, an Anderson Logging Inc. (Idaho corporation) employee was killed on the job in Oregon. The question was which state’s worker’s compensation law (specifically the statutory limitation on employer’s liability) should apply: Oregon or Idaho. No contract was involved, so no choice of law provision in any contract was involved. The Idaho Supreme Court in *Seubert* held in a “classic conflict of laws” case, the “most significant relationship test” is the appropriate test. 126 Idaho at 651, 889 P.2d at 85. In the present case, we do not have a “conflict of law” situation; we have a franchise agreement with a “choice of law” clause. The “choice of law” situation is to be analyzed by the “reasonable relation” test, as specifically called for in *Cerami-Kote*, 116 Idaho at 58, 773 P.2d at 1145.

The bottom line is while this Court agrees with Motes that Idaho probably does have “more significant relationships” compared to Colorado (the place of contracting, negotiation, site location, the residence of the Motes, and it was Quizno’s Idaho representative that negotiated this agreement with the Motes), that is not relevant. Just as in *Cerami-Kote*, where Justice Bistline found the performance of Cerami-Kote’s obligations to the contract would have to take place in Florida (116 Idaho at 58, 773 P.2d at 1145), so too Quizno’s obligations under the franchise agreement would have to take place in Colorado. Just as the Idaho Supreme Court in *Cerami-Kote* held: “Therefore, Florida bears a reasonable relation to the transaction”, so too does Colorado bear a reasonable relation to the transaction here, the Quizno’s franchise agreement.

2. Under Colorado Law the Venue Clause is Unenforceable.

In *Cerami-Kote* the Idaho Supreme Court failed to uphold a choice of venue provision found within a business contract entered into between the parties which contained the following language:

[the parties]...specifically agree that the venue for the enforcement, construction, or interpretation of this agreement shall be the Circuit Court of Citrus County, Florida, and the parties do hereby specifically waive any venue privilege and/or diversified citizenship privilege which they have or may have...and hereby waive any right...in any other county of the state of Florida, in any other state.

Id., 116 Idaho at 57, 773 P.2d at 1144. By applying Florida law, the Idaho Supreme Court held Idaho Code § 29-110 rendered void the forum selection clause in the contract that mandated an out-of-state forum. *Id.* While that may sound impossible, here is how it happened. As just shown, the Idaho Supreme Court held that due to the “reasonable relation” test, Florida law applied. Applying Florida case law, specifically *Maritime Limited Partnership v. Greenman Advertising Associates, Inc.*, 455 So.2d 1121, 1123 (Fla.App. 4th

Dist. 1984), the Idaho Supreme Court held the Florida courts would find that enforcement of the forum selection provision would contravene a strong policy enunciated in Idaho Code § 29-110. *Id.* Thus, the forum selection clause was invalid.

Quizno's argues: "under Colorado law, contractual choice of venue provisions are almost categorically upheld as long as the clause is fair and reasonable." Reply in Support of Defendant Quizno's Franchising LLC Amended Motion to Dismiss, p. 7. This argument is somewhat superficial and misleading. Quizno's cites several Colorado cases that uphold forum selection clauses in franchise agreements. However, Quizno's fails to analyze how those cases were decided, fails to cite cases on point, and fails to analyze more recent Colorado cases that are consistent with the Supreme Court of Idaho's holding in *Cerami-Kote*. Quizno's cites *Vessels Oil and Gas Co. v. Coastal Ref. & Mktg., Inc.*, 765 P.2d 391 (Colo. Ct. App. 1988) which upheld a forum selection clause in a **sales contract** requiring action to be brought in Texas. A sales contract is not a franchise agreement, and given that Idaho Code § 29-110(2) is a statute that is specific to franchise agreements, *Vessels Oil* is not on point. Quizno's correctly cites *ABC Mobile Sys., Inc., v. Harvey*, 701 P.2d 137 (Colo. Ct. App. (1985), for the proposition that "the burden of proving that a forum selection clause is unfair or unreasonable is on the party seeking to avoid its effect." Reply in Support of Defendant Quizno's Franchising LLC Amended Motion to Dismiss, p. 7. However, Quizno's fails to analyze subsequent case law which adds more depth to the simplistic "unfairness" analysis in *ABC Mobile*. Quizno's cites *QFA Royalties, LLC v. Case*, 2006 WL 894882 (D.Colo. March 31, 2006) only to reiterate who has the burden of proof in challenging forum selection clauses. A review of that case shows it is of no relevance, as the federal district court noted that the parties were not arguing over whether the forum selection clause was unfair or unreasonable, but rather the argument was over whether the

clause was negotiated.

As mentioned above, in *Cerami-Kote* the Idaho Supreme Court went on to apply Florida law in accordance with the choice of law provision found within that contract. The Idaho Supreme Court found that when an Idaho resident contracts with a foreign company to use, sell and install that company's licensed product (a roofing sealant) which it markets and distributes, the law of the foreign company's locale has a reasonable relationship to the transaction. 116 Idaho at 58, 773 P.2d at 1145. The Idaho Supreme Court held the district court erred in not applying Florida law. However, when Florida law was applied by the Idaho Supreme Court, Florida law required the Idaho Supreme Court to determine if: "Enforcement [of the forum selection clause] would not contravene a strong policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, or the forum which the suit has been excluded." 116 Idaho at 58-59, 773 P.2d at 1145-46, citing *Maritime Limited Partnership v. Greenman Advertising Associates, Inc.*, 455 So.2d 1121, 1123 (Fla.App. 4th Dist. 1984). The Idaho Supreme Court noted that the Florida *Maritime* court viewed *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) as requiring the analysis as to whether enforcement of the forum selection clause would contravene a strong policy enunciated by either state. Using that criteria, the Idaho Supreme Court held that the forum selection clause violates the public policy expressed in I.C. § 29-110, and concluded that the Florida courts would refuse to enforce the [forum selection] clause.

The Colorado Court of Appeals has adopted *Bremen*. In *ABC Mobile Systems Inc.*, 701 P.2d 137 (Colo.Ct.App. 1985), that court adopted: Restatement (Second) of Conflict of Laws § 80 (1971); Comment "a" to that section; and *Bremen*. 701 P.2d at 138. That case upheld a forum selection clause and did not discuss the criteria set forth in *Maritime*

requiring analysis as to whether enforcement of the forum selection clause would contravene a strong policy enunciated by either state. In 1996, the Colorado Court of Appeals embraced that concept, and in 2005 reiterated their adoption of that concept:

In *Morris v. Towers Financial Corp.*, 916 P.2d 678 (Colo.App. 1996) (citing *M/S Bremen, supra*), a division of this court held that a contract's forum selection clause should be held unenforceable if its enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Adams Reload Company, Inc., v. International Profit Associates, Inc., 143 P.3d 1056 (Colo.App. 2005). In *Adams Reload*, the Colorado Court of Appeals noted that the Colorado Consumer Protection Act being interpreted in that case did not have a strong public policy precluding enforcement of the forum selection clause, and that the Colorado Wage Claim Act being interpreted in *Morris* likewise had no strong public policy precluding enforcement of the forum selection clause. 143 P.3d at 1059.

In the present case, the Idaho Supreme Court has already spoken. The Idaho Supreme Court noted that the Florida *Maritime* court viewed *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) as requiring the analysis as to whether enforcement of the forum selection clause would contravene a strong policy enunciated by either state. Using that criteria, the Idaho Supreme Court held that the forum selection clause in that case violated the public policy expressed in Idaho Code § 29-110, and concluded that the Florida courts would refuse to enforce the [forum selection] clause. In light of *Adams Reload* and *Morris*, this Court finds the forum selection clause in the Quizno's Franchise Agreement, applying Colorado law, violates the strong public policy clearly expressed in Idaho Code § 29-110.

For the reasons stated above, Quizno's Motion to Dismiss for Improper Venue is **denied**. However, for the reasons discussed below, I believe Quizno's Motion to Dismiss

for Failure to State a Claim should be **granted**.

C. QUIZNO'S MOTION TO DISMISS (SUMMARY JUDGMENT) FOR FAILURE TO STATE A CLAIM.

Motes assert five causes of action: 1) breach of contract through breach of the implied covenant of good faith and fair dealing; 2) unjust enrichment; 3) mutual mistake; 4) fraudulent inducement and 5) unconscionability. Because Motes cannot meet the required elements of each cause of action, this case must be dismissed for failure to state a claim under Idaho Rule of Civil Procedure 12(b)(6). As noted by Motes, "A motion to dismiss for failure to state a claim should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.' *Taylor v. Maile*, 142 Idaho 253, [127 P.3d 156] (2005); *Wackerli v. Martindale*, 82 Idaho 400, 353 P.2d 782 (1960). Plaintiff's Memorandum in Support of Objection to Defendants' Motions to Dismiss and Motion for More Definite Statement, pp. 9, 10.

1. Motes Fail to State A Claim For Breach Of The Implied Covenant of Good Faith and Fair Dealing.

Motes argue Quizno's breached the Franchise Agreement by breaching the implied covenant of good faith and fair dealing when it failed to negotiate with them in regards to its "loss leaders" program. In Idaho, the implied covenant of good faith and fair dealing is a covenant implied by law between parties to a contract. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000). No covenant will be implied which is contrary to the terms of the contract negotiated and executed by the parties. *Id.* The implied covenant is used to effectuate the intentions of the parties or to honor their reasonable expectations. *Bayou Land Co. v. Talley*, 924 P.2d 135 (Colo. 1996); *Clement v. Farmers Ins. Exch.*, 115 Idaho 298, 766 P.2d 768 (1988). The primary source for the intent and expectations of the parties, however, is the language of the agreement itself. *Wells Fargo Realty Advisors*

Funding, Inc., v. Uiloi, Inc. 872 P.2d 1359 (Colo. Ct.App. 1994). The implied covenant cannot be used to contradict the express terms of the contract. *Amoco Oil Co. v. Erwin*, 908 P.2d 493 (Colo. 1995); *See also Idaho Power Co.* 134 Idaho at 750, 9 P.3 at 1216 (no covenant will be implied which is contrary to the terms of the contract). The courts will not inject new substantive terms or conditions to the contract under the guise of the implied covenant of good faith and fair dealing. *City of Boulder v. Public Sev. Co. of Colorado*, 996 P.2d 198 (Colo. Ct.App. 1999).

Motes argue the implied covenant requires Quizno's to perform the contract in a manner that will not violate their right to "receive the fruits of the bargain or dishonor their reasonable expectations". Plaintiff's Memorandum in Support of Objection to Defendants' Motions to Dismiss and Motion for More Definite Statement, p. 11. Motes argue this "loss leaders" program is in violation of Idaho's Uniform Sales Act, I.C. §48-404 and Colorado's Unfair Practices Act. C.R.S. § 6-2-105. *Id.* Motes argue selling merchandise at a loss is expressly prohibited by Idaho law and public policy, and just because the "loss leaders" program is not specifically mentioned within the contract, the Motes are nonetheless required to perform their contractual duties of establishing and promoting the Quizno's franchise. Even if this Court assumes that such a "loss leaders" promotion were to violate one or both state's statutes (Quizno's does not concede this issue, Reply in Support of Defendant Quizno's Franchising LLC Amended Motion to Dismiss, p. 10, n. 3), Motes cannot meet the prima facie case for breach of the covenant of good faith and fair dealing.

Quizno's argues Motes cannot use this covenant of good faith and fair dealing to surpass the Motes' obligation of opening a restaurant by injecting into the contract an alleged verbal requirement that the Motes participate in the "so-called 'loss leader' program". Reply in Support of Defendant Quizno's Franchising LLC Amended Motion to

Dismiss, p. 9. Quizno's argues that nowhere in the contract is the pricing of products discussed, nor is there any requirement that a franchisee participate in any promotional deals instituted by the franchise. Quizno's argues the Motes cannot assert a legal requirement into the contract that would require Quizno's to negotiate terms that are not found within the Franchise Agreement, and therefore, the implied covenant of good faith and fair dealing cannot be used to add substantive terms to the contract.

Quizno's concedes Motes' argument that not all of Quizno's operational standards and requirements are specifically outlined in the Franchise Agreement, but rather many duties are outlined in Quizno's operations manual and other manuals provided to the franchise owners. Quizno's argues this does not save Motes' claim. Instead, Quizno's asserts that had the Motes gone forward as required by the Franchise Agreement, they would have learned that they would not have been required to participate in any specific promotional program because Quizno's gives its franchise owners discretion as to whether they participate in promotions or not. Reply in Support of Defendant Quizno's Franchising LLC Amended Motion to Dismiss, p. 10. This Court finds that argument speculative and not persuasive.

However, this Court also finds Motes' argument in the first instance, is even more speculative. Motes argue Quizno's breached the Franchise Agreement by breaching the implied covenant of good faith and fair dealing when it failed to negotiate with them in regards to its "loss leaders" program. That is speculative as Motes were never required to sell products at a loss or to perform an allegedly illegal contract because they never opened a restaurant and never sold a single product, above or below cost. See, Reply in Support of Defendant Quizno's Franchising LLC Amended Motion to Dismiss, p. 10.

What is persuasive is the fact that the express terms of the contract specifically

state that the Initial Franchise Fee was non refundable, and regardless of the implied covenant of good faith and fair dealings, the Motes are not entitled to a refund of the Initial Franchise Fee. The implied covenant cannot be used to inject into the agreement the responsibility of Quizno's to negotiate terms that are not even found within the Franchise Agreement, let alone a duty to negotiate terms that are not specifically enforced by the Franchise. Motes acknowledged and agreed that the Initial Franchise Fee represented payment for the initial grant of the right to use the Quizno's name and trademark and cannot later try to back out of the agreement by inserting new terms into a fully integrated contract. The implied covenant of good faith and fair dealing cannot be used to alter the clear terms of the Franchise Agreement and thus, Motes' claim for breach of the implied covenant of good faith and fair dealing must be dismissed.

2. Motes Fail to State a Claim For Restitution Under the Theory of Unjust Enrichment.

Motes claim that allowing Quizno's to retain the Initial Franchise Fee would constitute unjust enrichment. Unjust enrichment is a theory that involves an implied-in-law contract. Under Idaho law, a contract implied in law is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity. *Continental Forrest Products, Inc. v. Chandler Supply Co.*, 95 Idaho 739, 518 P.3d 1201 (1974). However, recovery for unjust enrichment is not permissible where there is an enforceable express contract between the parties covering the same subject matter. *Wilhelm v. Johnston*, 136 Idaho 145, 30 P.3d 300 (Ct.App. 2001); *Bedard v. Martin*, 100 P.3d 584 (Colo. Ct.App. 2004). Only when the agreement is found to be unenforceable may the court apply the doctrine of unjust enrichment in contravention of the express contract. *DBSI/TRI V v. Bender*, 130 Idaho 796, 948 P.2d 151 (1997).

Motes allege the Franchise Agreement called for illegal performance under the

Unfair Sales Act, and, as such, this illegality renders the Franchise Agreement void. Motes further argue it is patently unjust for Quizno's to retain the Initial Franchise Fee, making restitution the proper remedy in this case.

Quizno's responds by asserting that there is nothing unjust about the retention of the Initial Franchise Fee, especially in light of the express agreement covering the fee's non-refundability. Quizno's argues Motes cannot assert the theory of unjust enrichment in order to retain the Initial Franchise Fee because they specifically acknowledged, in an enforceable written contract, that the fee represented payment for the initial grant of the franchise, was earned upon receipt, and that it was non-refundable after payment. Memorandum in Support of Defendant Quizno's Franchising LLC's Amended Motion to Dismiss, p. 15. Quizno's argues Motes cannot meet the elements of unjust enrichment because they cannot show that: 1) Quizno's received a benefit; 2) at the Plaintiffs expense, which 3) would make it unjust for Quizno's to retain the benefit without paying.

This Court agrees with Quizno's argument and finds there is no unjust enrichment, and therefore restitution would not be proper. The Franchise Agreement specifically states that the franchise fee was consideration for "the initial grant of the right to use the Marks and Licensed Methods, that Franchisor has earned the Initial Franchise Fee upon receipt, and that the Initial Franchise Fee is not refundable after it is paid". Franchise Agreement, §4.1. It is not unjust for Quizno's to retain this money simply because the Motes failed to go through with their end of the bargain. The Motes must show Quizno's received a benefit through improper, deceitful, or misleading behavior. Since Motes have failed to show such, their claim for unjust enrichment should be denied.

3. Motes Fail to State a Claim for Rescission Under the Theory Of Mutual Mistake Under Idaho or Colorado Law.

The Motes claim the Franchise Agreement is unenforceable due to a mutual

mistake regarding the “loss leaders” program. A mutual mistake occurs when both parties, *at the time of contracting*, share a misconception about a basic assumption or vital fact upon which they based their bargain. *Leydet v. City of Mountain Home*, 119 Idaho 1041, 1044, 812 P.2d 755, 758 (Ct.App. 1991). (emphasis added). Mutual mistake also occurs where both parties *proceed into performance* of the contract with the different misconceptions concerning a basic assumption or vital fact. *Id.* (emphasis added). The doctrine of mutual mistakes allows a party to rescind a contract when, 1) at the time the contract is made, 2) the parties make a mutual mistake about a material fact, 3) the existence of which is a basic assumption of the contract.” *Id.*, see also *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997); *Beals v. Tri-B Assoc.*, 644 P.2d 78 (Colo Ct.App. 1982). Rescission is normally granted in those circumstances where a breach is so material that it destroys the entire purpose for entering the contract. *Primary Health Network, Inc. v. State Dept. of Admin.*, 137 Idaho 663, 668, 52 P.3d 307, 312 (2002).

Motes’ claim that the Franchise Agreement’s legality was a most basic assumption to which the parties agreed, and since both parties were mistaken (according to Plaintiffs) as to the legality of performance at the time of contracting, this mutual mistake calls for rescission.

Quizno's counters this argument by claiming, once again, that there is no such program as the “loss leaders” program, specifically nothing found within the Franchise Agreement pertaining to such a program, and therefore there was no mutual mistake. Quizno's argues that, at most, there is a unilateral mistake on Motes’ part, which may be due to Motes failure to use due diligence in reading the contract before signing it.

This Court finds there is no mutual misunderstanding or misinterpretation of the Franchise Agreement. Instead, as Quizno's suggests, it merely looks as if the Motes failed

to read their contract, are mistaken as to the terms and agreements of the contract, and are now trying to rescind a contract with which they do not wish to be bound. Motes admit in their affidavits that they failed to read the contract before signing it. This failure to read does not constitute a mutual mistake on the part of all parties. Instead, it constitutes a mistake on the part of the Motes for failing to know and understand the agreement to which they entered. Such a unilateral mistake cannot support a rescission of the contract.

4. Motes Fail to State a Claim for Recovery Under The Theory of Fraudulent Inducement.

Motes allege in their complaint that Schwalbe told them **before** they signed the contract that the franchise agreement allowed the Motes to receive a full refund of the Initial Franchise Fee if the Motes were unable to set-up a Quizno's restaurant. Amended Complaint ¶XXVII. However, in their affidavits, the Motes assert that Schwalbe told them, **after** they had signed the Franchise Agreement and were walking out the door, that there would be no problem receiving a refund of the Initial Franchise Fee if they failed to establish the restaurant. Jerry Mote Affidavit, p. 3; Jennifer Mote Affidavit, p. 2.

To establish a claim of fraud in the inducement of a contract, the Motes must show that there was: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) his intent that it should be acted on by the person and in the manner reasonably contemplated; 6) the hearer's ignorance of its falsity; 7) his reliance on the truth; 8) his right to rely thereon; and 9) his consequent and proximate injury. *Faw v. Greenwood*, 101 Idaho 387, 613 P.2d 1338 (1980). Generally, the terms of a written contract will control; however, Idaho law allows that fraud in the inducement is always admissible to show that representations by one party were a material part of the bargain. *Aspiazu v. Mortimer*, 139 Idaho 548, 82 P.3d 830 (2003).

Quizno's argues that there was no justifiable reliance on the alleged statements,

and simply looking to the elements and the letter of the law, the Motes' claim of fraudulent inducement cannot stand. Quizno's argues the Motes cannot justifiably rely on oral statements that were directly contrary to the terms of the contract.

This Court finds the arguments made by Motes to be totally invalid. The Motes cannot allege fraudulent inducement based upon a **post-signing** oral representation that directly contradicts expressed contractual terms. Fraud in the inducement requires the party to rely on the representations **before** entering the contract. The Motes admit that they did not ask Mr. Schwalbe about the refundability of the Initial Franchise Fee until after they had signed the Franchise Agreement and were heading out the door of the restaurant. Thus, the ability of obtaining a refund was not a material term of the contract which induced the Motes to sign, and in fact, such assertions hold little merit when the parties themselves admit the question of refundability was a mere afterthought, posed as they were leaving the negotiated agreement.

5. Motes Fail to State A Claim For Unconscionability Because the Contract is Not and Substantively Unconscionable.

For a contractual provision to be void as unconscionable, it must be both procedurally and substantively unconscionable. *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 72 P.3d 877 (2003). Procedural unconscionability is found when the contract was not the result of free bargaining between the parties. *Northwest Pipeline v. Forrest Weaver Farm, Inc.*, 103 Idaho 180, 183, 646 P.2d 422 (1982). The two indicators of procedural unconscionability are 1) lack of voluntariness and 2) lack of knowledge. *Lovey v. Regence of Blueshield Idaho* at 42. There are several factors to look at when determining if there was a lack of voluntariness by either party. These factors include whether there is a use of high-pressure tactics, coercion, oppression, threats short of duress, or by great imbalance on the parties' ability to bargain or

negotiate the terms of the contract. *Id.* Courts have also found a lack of voluntariness when “the stronger party’s terms [are] nonnegotiable and the weaker party [is] prevented by market factors, timing, or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.” *Id.*

Lack of knowledge can be shown where there is a lack of understanding regarding the contract terms arising from the use of “inconspicuous print, ambiguous wording, complex legalistic language... the lack of opportunity to study the contract and inquire about the terms... or a disparity in the sophistication, knowledge or experience of the parties.” *Walker v. American Cyanamid Co.*, 130 Idaho 824, 948 P.2d 1123 (1997).

Substantive unconscionability focuses solely upon the terms of the contract or the provision at issue. *Hershey v. Simpson*, 111 Idaho 491, 725 P.2d 196 (Ct.App.1986). The contract or provision is substantively unconscionable if it is a bargain that “no person in his or her senses and not under delusion would make on the one hand and that no honest and fair person would accept on the other. *Lovey* 139 Idaho at 42. at 72 P.3d at 882. Two factors the court should consider when looking at substantive unconscionability is the commercial setting in which the agreement was executed and the reasonableness of the terms at the time of contracting. *Id.* at 43.

Motes argue they were forced into an unconscionable agreement when Schwalbe used “high pressure tactics, coercion or threats short of duress” to get them to sign the Franchise Agreement. Plaintiffs’ Memorandum in Support of Objectio to Defendants’ Motions to Dismiss, p. 18. Motes allege this coercion came in the form of Schwalbe indicating that there was a lot of interest in the Post Falls franchise and that there was insufficient time to study the contract because Schwalbe kept indicating to

them that he was in a hurry. The Motes also allege Schwalbe's insistence that there was no point in seeking legal advice because the contract was "non-negotiable" was further pressure to sign the contract immediately and without reading it. Quizno's argues these allegations do not rise to the level of unconscionability because the Franchise Agreement as a whole was not so one-sided, nor was it so outrageous and unfair in its wording or application that it would "shock the conscience". Reply In Support of Defendant Quizno's Franchising LLC's Amended Motion to Dismiss, p. 15.

Although there may have been a lack of bargaining power during the parties' "negotiations," and a lack of knowledge on the Motes' part as to the terms of the Franchise Agreement, such does not render the contract unenforceable. Instead, it merely shows the Motes' lack of due diligence in researching and inquiring into the agreement to which they were binding themselves. There is nothing to suggest that had Motes asserted a right to take the Franchise Agreement home and read it, or take it to an attorney for further advice, the Motes would have lost their chance at obtaining the franchise. Schwalbe's statements, that there were others interested in the franchise, do not seem to fall under the category of "high pressure tactics." The Motes were free at all times to walk away from the negotiations and look for a better deal, or take their time in making sure they knew what they were getting into. Failure to do so on their part does not amount to an unconscionable Franchise Agreement.

For the reasons stated above, Quizno's Motion to Dismiss for Failure to State a Claim must be **granted**. The Motes have failed as a matter of law to meet any of the claims stated in their complaint.

III. ORDER.

IT IS HEREBY ORDERED defendant Quizno's Motion to Dismiss for Improper Venue pursuant to I.R.C.P. 12(b)(3) is **DENIED**.

IT IS FURTHER ORDERED defendant Quizno's Motion to Dismiss Plaintiffs' Claims for Failure to State a Claim, pursuant to I.R.C.P. 12(b)(6) is **GRANTED**. Defendant Quizno's is ordered to prepare a judgment consistent with this opinion.

IT IS FURTHER ORDERED defendant Quizno's Motion to Strike Motes' Request for a Jury Trial and Motion for a More Definite Statement Re: Fraud Claims is moot. Due to the "Stipulation for Order of Dismissal With Prejudice and Without Costs of Plaintiffs' Claims Against Defendant Daniel A. Schwalbe, Inc., dba The Quizno's Franchise Co." and "Order of Dismissal With Prejudice and Without Costs of Plaintiffs' Claims Against Defendant Daniel A. Schwalbe, Inc., dba The Quizno's Franchise Co.", defendant Schwalbe's Motion to Dismiss is Moot.

Entered this 9th day of January, 2007.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
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Secretary