

COLORADO COURT OF APPEALS
STATE OF COLORADO
2 East 14th Avenue, Denver, Colorado 80203

Appeal from the District Court for Denver County, CO
Trial Judge: The Honorable William D. Robbins
Trial Court Case Number: 2006CV4514

Plaintiffs-Appellants:

COLORADO COFFEE BEAN, LLC, a Colorado limited liability company; DOUBLE R COFFEE, LLC, a Colorado limited liability company; MLT TAYLOR, LLC, a Colorado limited liability company; PEAK JAVA COMPANY, a Colorado corporation; JKF, LLC, a Colorado limited liability company; CZ-DM, INC., a Colorado corporation; JKRR, LLC, a Colorado limited liability company; PEAK MOUNTAIN COFFEE, INC., a Colorado corporation; KING SOOPERS JM, INC., a Colorado corporation; and, ABC SALES INC., a Colorado corporation,

Defendants-Appellees:

PEABERRY COFFEE, INC., a Colorado corporation; PEABERRY COFFEE FRANCHISE, INC., a Colorado corporation; WILLIAM I. TOINTON; JAMES T. ORR; and PERKINS COIE, LLP, a Washington Limited Liability Partnership.

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Case Number 09CA0130

**AMICUS CURIAE BRIEF OF
INTERNATIONAL FRANCHISE ASSOCIATION**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 6,217 words.

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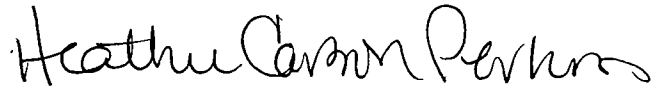
The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. ____, p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.



s/ Heather Carson Perkins

Heather Carson Perkins

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I. STATEMENT OF ISSUES ADDRESSED BY AMICUS IFA

The District Court dismissed Plaintiffs-Appellants' (hereinafter, "Plaintiffs") claim under the Colorado Consumer Protection Act ("CCPA"), holding that Plaintiffs failed to show that the challenged conduct had significant public impact. The question presented by the IFA is whether the dismissal of the CCPA claim should be affirmed on the alternate and additional ground that Plaintiffs' CCPA claim is precluded under the CCPA's express exemption set forth in section in Section 6-1-106(1)(a) for "[c]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency" because the disclosures by Peaberry Coffee Franchise, Inc. ("Peaberry") in its Uniform Franchise Offering Circular ("UFOC") complied with Federal Trade Commission ("FTC") franchise disclosure regulations.

II. STATEMENT OF INTEREST OF AMICUS IFA

Founded in 1960, the International Franchise Association ("IFA") is the oldest and largest association in the world devoted to representing the interests of franchising. The IFA is a membership organization of franchisors, franchisees and suppliers. The IFA's mission is to safeguard and enhance the business environment for franchising worldwide. The IFA has more than 11,400 members, including seventy percent of the registered franchise companies in the United

States. The IFA serves as a resource center for current and prospective franchisors and franchisees. In addition, the IFA and its members advise public officials across the country about the laws that govern franchising, with the goals of promoting franchise growth and advancing the interests of franchisors, franchisees and suppliers. The IFA is the only trade association that acts as a voice for both franchisors and franchisees throughout the United States and the world.

Plaintiffs contend that the Court should find that Peaberry's omission of certain financial information from its UFOC constitutes a violation of the CCPA, even though (1) Peaberry fully complied with the applicable FTC franchise disclosure regulations in omitting that information; and (2) the CCPA expressly exempts from its reach conduct in compliance with the rules of a state or federal government agency. The IFA has requested the Court's permission to participate in this case as *amicus curiae* because of its concern that adoption by the Court of Plaintiffs' argument could have far-reaching negative implications for franchising.

III. STATEMENT OF THE CASE

The IFA incorporates Defendants-Appellees' Answer Brief Statement of the Case.

IV. SUMMARY OF ARGUMENT

The IFA urges the Court to reject Plaintiffs' argument that franchise disclosure by Peaberry that complied with FTC franchise disclosure regulations nevertheless could constitute an unfair or deceptive practice in violation of the CCPA. Plaintiffs claim that Peaberry should have disclosed its parent company's financial statements and certain information regarding the expenses of operation of the company-owned stores. However, the financial information that Plaintiffs claim Peaberry should have disclosed in its UFOC is information that is *not* required to be disclosed by the Franchise Rule and the applicable regulatory regime and, as explained below, is, in part, *prohibited* from inclusion in its UFOC. Therefore, because Peaberry complied with the applicable regulatory scheme, its conduct should not form the basis of a claim for a deceptive trade practice.

The FTC promulgated the FTC Franchise Rule, 16 C.F.R. Part 436 et seq. (the "Franchise Rule"), in 1978 to prevent deceptive and unfair practices in the sale of franchises. In adopting the Franchise Rule, the FTC decided what information was necessary for franchisors to provide to prospective franchisees to protect the franchisees' interests by enabling them to make informed purchase decisions. Franchisors historically have relied on the FTC's Franchise Rule and the related Uniform Franchise Offering Circular Guidelines, and continue to do so under an

amended Franchise Rule (the “Amended Rule”) adopted by the FTC in 2007 and the related NASAA Guidelines (all collectively referred to hereinafter as the “Franchise Disclosure Regulations”), to know what information to provide to prospective franchisees in franchise disclosure documents.

All fifty states and the District of Columbia have adopted consumer protection acts prohibiting unfair or deceptive practices in the sale of products and services.¹ Many of these statutes contain exemptions similar to the CCPA’s exemption, at Section 6-1-106(1)(a), for “[c]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency”. Exemptions like the one in the CCPA are intended to avoid conflicts between laws. Accordingly, the Supreme Court of Colorado has held that the purpose of the CCPA exemption is to preclude individual consumers from bringing an action based on practices that are in compliance with other laws. Courts in other states interpreting comparable exemptions in their consumer protection acts have uniformly found that claims alleging violations based on conduct found to be in compliance with, or specifically authorized or permitted by, other laws is

¹ See Victor E. Schwartz et al., *“That’s Unfair!” Says Who – The Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93, 102 (2007).

precluded. No cases interpreting consumer protection act exemptions similar to the CCPA exemption have held that where the alleged conduct complied with a regulatory scheme, the conduct may nevertheless be in violation of the consumer protection act.

If the Court were to find that a franchisor's disclosures in compliance with the Franchise Disclosure Regulations could nevertheless constitute a violation of the CCPA, the federal regulatory scheme would be undermined because franchisors would no longer be able to rely on the Franchise Disclosure Regulations to know what information they need to provide to prospective franchisees. Moreover, because many states have statutes similar to the CCPA, franchisors would not know the information each state would require to be included in disclosure documents for prospective franchisees in their states, even though they complied with the Franchise Disclosure Regulations, and they would not know whether a practice in compliance with the Franchise Disclosure Regulations might be found to be an unfair or deceptive practice on an ad hoc basis in a particular state. The Court can prevent such unfairness and uncertainty by confirming that Peaberry's omission of certain financial information from its UFOC cannot violate the CCPA because Peaberry's actions complied with the Franchise Disclosure Regulations.

V. ARGUMENT

Disclosure by a Franchisor that Complies with The Franchise Disclosure Regulations Should Not be Subject to a CCPA Claim.

Plaintiffs argue that Peaberry committed a deceptive trade practice in violation of the CCPA by not disclosing the financial statements of Peaberry's parent company and cost and profit information for company-owned shops in Peaberry's UFOC. To the extent Plaintiffs base their CCPA claim on the fact that Peaberry's UFOC did not include that financial information, the Court should hold that Peaberry's conduct is exempted from the CCPA because, as discussed below, Peaberry's disclosures complied with the Franchise Disclosure Regulations.

A. The Franchise Disclosure Regulations Prescribe the Disclosures that Are to be Made by a Franchisor in the UFOC.

As a franchisor, Peaberry is subject to a comprehensive federal regulatory scheme. The franchisor disclosures made to prospective franchisees are prescribed by the Franchise Disclosure Regulations.² The FTC promulgated the Franchise

² As noted above, the Franchise Rule was amended in 2007 and franchisors must now follow the requirements set forth in the Amended Rule and the guidelines adopted for it. The disclosure requirements under the Franchise Rule and the Amended Rule are similar, and the two rules and their guidelines are collectively referred to in this brief as the "Franchise Disclosure Regulations." The Franchise Rule is applicable here as the disclosures were made in 2003-2005.

Rule in 1978 to prevent deceptive and unfair practices in the sale of franchises and business opportunities. *See* 72 Fed. Reg. 15,444, 15,445 (March 30, 2007) (Statement of Basis and Purpose (“SBP”) to Amended Rule). The rulemaking process for the Franchise Rule began in 1971, and the Franchise Rule was adopted following years of proposals, hearings, comment and data analysis. *See* 43 Fed. Reg. 59,614, 59,627-39 (Dec. 21, 1978) (SBP to Franchise Rule).

The Franchise Rule is a pre-sale disclosure rule that requires specified disclosures through a disclosure document that must be provided to prospective franchisees prior to the offer or sale of a franchise. It requires franchisors to disclose material information to prospective franchisees on the theory that informed investors can determine for themselves whether a particular franchise transaction is in their best interests. *Id.*

The North American Securities Administrators Association (“NASAA”), an association of state securities regulators, adopted its own set of requirements for pre-sale franchise disclosure, known as the “UFOC Guidelines.” *See* Uniform Franchise Offering Circular – 1993 Guidelines, Business Franchise Guide (CCH) ¶ 5773 (a copy of the UFOC Guidelines is attached). The FTC accepts satisfaction

