

No. 09-55818

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**DIRECTBUY, INC.**

**Defendant-Petitioner,**

**V.**

**PHIL GANEZER AND LYNETTE SOHL,  
ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS  
SIMILARLY SITUATED**

**Plaintiffs-Respondents**

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 2:cv 08-8666

HONORABLE GARY A. FEESS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF  
DEFENDANT-PETITIONER AND RECOMMENDING THAT THIS COURT  
REVERSE AND VACATE THE DISTRICT COURT'S REMAND ORDER,  
and *AMICUS CURIAE* BRIEF

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The International Franchise Association (“IFA”) moves the court, pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure and Circuit Rule 29-B, for an order granting the IFA leave to file a brief as *amicus curiae* in support of petitioner DirectBuy, Inc. Petitioner DirectBuy consents to the IFA filing a brief as *amicus curiae*. Respondents Phil Ganezer and the other class plaintiffs oppose IFA’s motion.

The IFA is familiar with the questions presented in this appeal and believes that additional argument on the nature of the franchisor/franchisee relationship will be of assistance to the court. As set forth in the attached brief, this issue is of particular concern to the IFA and its members. The IFA contends the district court erred in considering the business activity of franchisees relevant to determining the principal place of business of a franchisor.

The IFA is uniquely positioned to assist the court on this issue. The IFA is the oldest and largest trade association in the world devoted to the representation of the interests of franchising. The IFA is a membership organization of franchisors, franchisees, and suppliers. Since its inception in 1960, the IFA has represented and protected the interests of the franchise community. The IFA has more than 11,400 members who, collectively, constitute a “Who’s Who” of American industry. The IFA represents 70% of the registered franchise companies in the United States.

Since 1993, when it first invited franchisees to join, the IFA has attracted more than 10,000 franchisee members. A number of franchisees currently serve in

IFA leadership positions, including as members of the Executive Committee and Board of Directors. The IFA's members conduct business in virtually all of the 85 industries that choose franchising as a method of doing business.

The IFA's mission is to enhance and safeguard the business environment for franchising worldwide. In addition to serving as a resource for current and prospective franchisors and franchisees, the IFA and its members work closely with public officials across the country to shape the laws and regulations that govern franchising, with the goals of promoting franchise growth and advancing the interest of both franchisees and franchisors. The IFA is the only trade association that acts as a voice for both franchisors and franchisees throughout the United States and the world.

Counsel for *amicus curiae* has read the parties' principal briefs and believes that the analysis and policy considerations in the accompanying brief will help to define the considerations that govern the appropriate decision in this case. Accordingly, the IFA respectfully requests permission to file, on its own behalf and on behalf of its members, the attached *amicus curiae* brief.

Counsel was provided authority to file this brief on behalf of IFA by David French, IFA's Vice President of Government Relations.

## *AMICUS CURIAE BRIEF*

### **I Corporate Disclosure Statement**

The International Franchise Association has no parent company, subsidiary, or affiliate that has issued shares to the public.

### **II Introduction**

The IFA presents this brief to the court because of its concern over the district court's ruling that the activities of DirectBuy's franchisees are relevant to determining DirectBuy's principal place of business under a diversity jurisdiction analysis. The district court's ruling reflects a fundamental misunderstanding of the nature of the franchisor/franchisee relationship. Franchisors and franchisees are legally distinct entities. Their relationship is far more distant than parent and subsidiary corporations. Yet the district court treated the business activity of DirectBuy's franchisees as the business activity of DirectBuy, even though there is no allegation or evidence of alter ego or of an agency relationship between DirectBuy and its franchisees.

If this court affirms the district court's ruling, it will significantly alter the legal relationship between franchisors and franchisees. Franchisors will be conducting the same business as its franchisees in every state in which its franchisees are located. Under this rule, a franchisor's citizenship would change depending upon the state in which its franchisees happen to do the most business that year. The district court's rationale forecasts even more dire legal consequences for franchisors. A natural consequence of the district court's failure

to acknowledge the legal separateness of franchisors and their franchisees may be to lead courts addressing issues of personal jurisdiction to subject franchisors to general personal jurisdiction in every state in which a franchisee is located, a result that makes no sense. Another consequence may be that courts could hold a franchisor vicariously liable for the acts of the franchisees in circumstances under which there is no other legal justification for doing so. This mischaracterization of the franchisor-franchisee relationship could also result in unjustified consequences in arenas such as tax and labor law. This court should correct the district court's conflation of legally separate franchisors and franchisees for purposes of determining corporate citizenship.

### **III Statement of Interest of the International Franchise Association**

The IFA incorporates the statement of interest in its motion for leave to file an amicus curiae brief that immediately precedes this brief.

### **IV Argument**

This court should clarify that the business activities of a franchisee are not relevant to determining the principal place of business of a franchisor under a diversity jurisdiction analysis. For federal courts to exercise subject matter jurisdiction under 28 U.S.C. § 1332, the parties to the controversy must be “citizens of different States.”<sup>1</sup> *Id.* at §1332(a)(1), (d)(2)(A). A corporation, such as DirectBuy, is “deemed to be a citizen of any State in which it has been

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<sup>1</sup> The district court found that DirectBuy satisfied the \$5 million amount in controversy requirement under 28 U.S.C. § 1332(d)(2). The IFA therefore assumes that the amount in controversy requirement is satisfied here.

incorporated and of the State where it has its principal place of business.” Id. at § 1332(c)(1). Here, it is undisputed that class plaintiffs are citizens of California and that DirectBuy is incorporated under the laws of Indiana. Therefore, the only issue relevant to diversity jurisdiction is whether DirectBuy’s principal place of business is California or some other state.

There presently is a dispute concerning whether in determining a corporation’s “principal place of business” in cases such as this one, courts should employ this circuit’s “place of operations” test or the “nerve center” test. However, the IFA’s interest does not extend to that dispute. Regardless of which test this court applies, the activities of DirectBuy’s franchisees should be irrelevant to its application. Because the district court applied the “place of operations” test, the IFA will use that test in its analysis here. Ganezer v. DirectBuy, Inc., 2009 U.S. Dist. LEXIS 15821, \*6 (N.D. Cal. 2009).

Under the “place of operations” test, a corporation’s principal place of business is in the state in which it conducts a “substantial predominance of corporate activity, including the location of employees, tangible property, production activities, sources of income, and where sales take place.” Tosco Corp. v. Communities for a Better Env’t., 236 P.3d 495, 500 (9th Cir. 2001). Here, as the district court noted, DirectBuy provided evidence that its 430 employees are all in Indiana, its tangible property is in Indiana, and its business activities occur entirely within Indiana. Ganezer, 2009 U.S. Dist. LEXIS 15821 at \*8. The district court nonetheless ruled that it lacked sufficient information to conclude that the

predominance of DirectBuy's corporate activity was not in California instead of Indiana.

The district court made it clear that the additional information it thought necessary to make the "principal place of business" determination is not information about DirectBuy, but information about "the activities of its franchisees" and the "operation of franchise locations." Id. at \*8, \*9. The district court went so far as to catalogue the type of information it considered lacking, including such things as "the total number of memberships sold to the public" by DirectBuy franchisees and "the total annual sales volume of its franchise outlets." Id. at \*10. Based upon DirectBuy's failure to provide such information, the district court concluded that DirectBuy "has not met its burden of proving that it is a citizen of a state or states other than California." Id. at \*11-12.

The sole authority relied upon by the district court for the proposition that it should consider "the operation of franchise locations . . . for purposes of determining diversity jurisdiction" is a footnote in this court's decision in Tosco. 236 P.3d at 501 n.2. In respondents' brief, they make clear that this footnote is the sole authority for considering the activities of franchisees relevant to determining the principal place of business of franchisors. (Resp. Br. at 15.)

As explained below, the IFA contends that (i) the footnote in Tosco is dictum, and therefore is not binding precedent on this court, and (ii) this court should expressly reject this dictum to ensure that the separate legal status of franchisors and franchisees continues to be recognized in the Ninth Circuit.

## A The Tosco Footnote Is Not Binding on This Panel

This panel is “bound by decisions of prior panels unless an *en banc* decision, Supreme Court decision or subsequent legislation undermines those decisions.”<sup>2</sup> General Constr. Co. v. Castro, 401 F.3d 963, 975 (9th Cir. 2005). In this circuit, “where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.” United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001) (en banc). However, “[w]here it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel’s full attention, it may be appropriate to re-visit the issue in a later case.” Johnson, 256 F.3d at 916. Here, the footnote in Tosco not only was unnecessary to the outcome, but also was uttered in passing without analysis.<sup>3</sup>

In Tosco, this court held that because Tosco’s “principal place of business is California, [the] Court lacks diversity jurisdiction.” Id. at 502. The court’s analysis hinged upon whether the test for “substantial predominance” of business activity is determined by comparing business activity in the state in question with

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<sup>2</sup> The IFA will not repeat DirectBuy’s analysis of how this court called Tosco into question in Davis v. HSBC Bank Nevada, N.A., 557 F.3d 1026 (9th Cir. 1990). (Pet. Br. at 13-14.)

<sup>3</sup> It is worth noting that the Tosco footnote first appeared in the Tosco district court’s opinion, which was adopted by the panel in its per curiam opinion. Tosco, 236 F.3d at 497.

(i) its business activity in all other states combined or (ii) its business activity in the “specific state that can reasonably compare” to the activities in the state in question. Id. at 500. The court concluded that “‘substantial predominance’ does not require the majority of a corporation’s total business activity to be located in one state, but instead requires only that the amount of [a] corporation’s business activity in one state be significantly larger than any other state in which the corporation conducts business.” Id.

Tosco had failed to satisfy its burden of proving it was not a citizen of California because the evidence it provided compared activities in California to activities in all other states combined: (i) “only 21 percent of Tosco’s employees are located in California;” (ii) less than 50 percent of its refining capacity is located in California; (iii) “only 35 percent of Tosco’s total retail marketing locations are located in California;” (iv) only “15 percent of its Circle K convenience stores [are] in California;” (v) “less than one-third of its sales are generated from its California operations;” and (vi) only a few of its administrative offices are located in California. Id. at 501-02. The court concluded that while this evidence demonstrated that a majority of Tosco’s business activity was not located in California, it did not demonstrate that Tosco’s business activity in California was not “significantly larger than any other state.” Thus, the court affirmed the district court’s finding that Tosco’s principal place of business was California.

In outlining the evidence that “only 35 percent of Tosco’s total retail marketing locations are located in California,” the court dropped a footnote stating that Tosco had “attempt[ed] to divorce its franchised retail locations for purposes

of determining diversity jurisdiction by arguing that ‘just 14 percent’ of its ‘company operated’ retail locations are located in California.” Id. at 501 n.2. The court found Tosco’s argument “unpersuasive” because Tosco “is still conducting business activity in its franchised locations.” Id. This is the footnote upon which the district court here relied to conclude that DirectBuy needed to provide information about its California franchisees.

The Tosco footnote is not binding. First, adding Tosco’s franchised retail locations to its company operated locations was not outcome determinative, as either the 35 percent figure (which included both types of locations) or the 14 percent figure (which included company operated locations only) are consistent with California having more of Tosco’s retail operations than any other state. Moreover, the Tosco court cites no authority and provides no analysis for its conclusion that the franchised retail locations are relevant to determining Tosco’s principal place of business. Because the Tosco footnote provides no “reasoned analysis,” but instead was included in the opinion “casually and without analysis” and was “uttered in passing without due consideration of the alternatives,” the footnote is dicta. Johnson, 256 F.3d at 914. This panel, therefore, is not bound by the Tosco footnote.

**B The Court Should Clarify That the Business Activity of Franchisees Is Irrelevant to Determining the Principal Place of Business of a Franchisor**

This court should clarify that franchisees are legally distinct from franchisors, and, therefore, the business activities of the former are irrelevant to determining the principal place of business of the latter. In particular, the court should clarify that the relationship between a franchisor and franchisee is defined entirely by contract, and, therefore, has less relevance to a diversity jurisdiction analysis than does the relationship between parent and subsidiary corporations.

The contractual relationship between a franchisor and franchisee is not one of principal/agent or fiduciary/beneficiary. Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285, 1292 (9th Cir. 1987) (“The relation between a franchisor and a franchisee is not that of a fiduciary to a beneficiary.”); Anderson v. Turton Dev., Inc., 483 S.E.2d 597, 600-01 (Ga. Ct. App. 1997) (granting summary judgment for franchisor on different agency theories). Rather, franchisees are typically independent contractors. Blanton v. Texaco Refining & Marketing, Inc., 914 F.2d 188, 190 (9th Cir. 1990). Absent unusual circumstances—such a franchisor’s “complete or substantial control over the franchisee”—the franchisor is considered a distinct legal entity from its franchisees. Kelton v. Stravinski, 138 Cal. App. 4th 941, 947 (2006).

It is also well settled that where two entities are legally distinct, only their individual activities are relevant to a “minimum contacts” analysis used to determine personal jurisdiction. For this reason, a franchisor/franchisee relationship is irrelevant to a personal jurisdiction analysis. Oddi v. Mariner-

Denver, Inc., 461 F.Supp. 306, 310 (S.D. Ind. 1978) (“the mere fact that it may have subsidiaries, franchisees or licensees in this state does not subject it to the jurisdiction of this state”). As this court has explained in the parent/subsidiary context (which involves a more substantial relationship than that between franchisor and franchisee), unless a parent corporation is liable for the acts of a subsidiary under an agency or alter ego theory, “[t]he existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries’ minimum contacts with the forum.” Doe v. Unocal Corp., 248 F.3d 915, 925 (9th Cir. 2001).

The rule for parent and subsidiary corporations is no different in determining the “place of operations” test for citizenship under a diversity jurisdiction analysis. This court has noted that “the activities of a subsidiary should not be considered to determine its parent’s principal place of business where there is no showing of an alter ego relationship.” Danjaq, S.A. v. Pathe Comm. Corp., 979 F.2d 772, 775 (9th Cir. 1992); Moore’s Federal Practice § 102.56[7][a] (“As a general rule, for purposes of diversity jurisdiction, a subsidiary maintains a separate corporate character and does not adopt the citizenship of its parent corporation.”). This rule applies even where “the parent corporation exerts a high degree of control through ownership or otherwise.” Moore’s Federal Practice § 102.56[7][a].

The same rule applies to corporate affiliates. Lincoln Prop. Co. v. Roche, 546 U.S. 81, 94 (2005) (“But Congress surely has not directed that a corporation, for diversity-of-citizenship purposes, shall be deemed to have acquired the citizenship of all or any of its affiliates.”). The U.S. Supreme Court recently noted

that “Congress has provided simply and only this instruction: ‘[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.’” Id. (quoting 28 U.S. C. § 1332(c)(1)) (emphasis added). It is the location of the corporation’s principal place of business that determines citizenship, not the location of some other distinct legal entity’s principal place of business. As the court explained, “[t]he jurisdictional rule governing here is unambiguous and it is not amenable to judicial enlargement.” Id.

The logic of refusing to impute the activities of a subsidiary or affiliate for purposes of determining “place of operations” is even more compelling in the franchisor/franchisee context. The relationship between a franchisor and franchisee is created by private contract. Unless an agency or other unusual relationship exists between a franchisor and franchisee, the business activities of a franchisee should be declared irrelevant to determining the “place of operations” of the franchisor. A franchisor’s state of citizenship should not depend upon which of its franchisees has more “sales volume” in a given year, a factor the district court here considered relevant. The sales are not those of the franchisor; they are the revenues of independently owned businesses.

The court should clarify that the franchisor/franchisee relationship has less legal significance than a parent/subsidiary relationship for determining “place of operations.” The underlying purpose of diversity jurisdiction is to protect out-of-state corporations from local prejudices. Danjaq, 979 F.2d at 774. This purpose is no less important for out-of-state franchisors than it is for out-of-state parent

corporations or affiliates. This court should reverse the district court to the extent it considered relevant the business activity of DirectBuy's franchisees.

## **V Conclusion**

The district court erred in considering the activities of DirectBuy's franchisees relevant to determining DirectBuy's "place of operations" under a diversity jurisdiction analysis. This court should clarify that franchisors are distinct legal entities from their franchisees, and, therefore, the activities of franchisees are irrelevant in determining the principal place of business of franchisors.

Dated this 22nd of June, 2009.

/s/ Michael D. Zimmerman

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June 22, 2009

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,588 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point, Times New Roman font.

Dated: June 22, 2009

/s/ Michael D. Zimmerman  
Michael D. Zimmerman  
*Attorney for Amicus Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 22, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants of the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Dated: June 22, 2009

/s/ Michael D. Zimmerman

Michael D. Zimmerman  
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