DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80203 **Plaintiff:** **RHC, LLC, a Colorado Limited Liability Company; DAN SERAFIN, individually, SAMIR TAILOR, individually, DANCIN Ventures, Inc., a Colorado Corporation, and DANIEL WALSH, individually** **v.** **Defendants:** **QUIZNO'S FRANCHISING, LLC a Colorado Limited Liability Company; THE QUIZNO'S FRANCHISING COMPANY, LLC a Colorado Limited Liability Company; THE QUIZNO'S OPERATING COMPANY, LLC a Colorado Limited Liability Company** **AND** **Plaintiff: L MAR, LLC, a Delaware Limited Liability Company** **v.** **Defendants: RHC, LLC, a Colorado Limited Liability Company; Daniel Serafin, Jr., Angela Serafin, Samir Tailor, Sejal Tailor and THE QUIZNO'S OPERATING COMPANY LLC**	I. ▲ COURT USE ONLY ▲ Case Number(s): **04CV985** Courtroom: 8

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

THIS MATTER is before this Court for a trial to the Court. The trial commenced on May 16, 2005. After five days of trial, at the Court's direction, Plaintiffs provided the Court with an offer of proof for the remaining witnesses Plaintiffs intended to call. This decision relates on to the claims of RHC, LLC, Dan Serafin, Samir Tailor, DanCin Ventures, Inc., and

Daniel Walsh's claims against Quizno's Franchising, LLC, The Quizno's Franchising, LLC, and The Quizno's Operating Company. The Court now accepted the offer of proof as true for the purpose of this decision and enters the following findings of fact and conclusion of law and order pursuant to C.R.C.P Rule 50.

Some Quizno's franchisees like other small businesses fail. There are a myriad of reasons why a Quizno's franchisee may not achieve profitability. These reasons include factors such as competition, the economy, etc. and some within the franchisee's control such as inadequate management, poor operations or bad site selection.

The parties' rights are set forth in the Franchise Agreements, in which the Parties expressly acknowledged and agreed that Quizno's would not be responsible for the Plaintiffs' failures with respect to the sales achieved at their respective restaurants if such were to occur, including if caused by poor site selection.

The Quizno's Defendants are Colorado limited liability companies that have developed a submarine sandwich restaurant concept known as Quizno's Sub. They have developed the system and operations for these restaurants and they grant the right and license to qualified persons to use their name, marks and system pursuant to the terms of a Franchise Agreement. Plaintiff RHC is a limited liability company authorized to do business in the State of Colorado. Plaintiffs Serafin and Tailor are members of RHC. RHC is a Franchisee of Quizno's. Plaintiff DanCin is a Colorado corporation of which Plaintiff Walsh is the President. DanCin is a Franchisee of Quizno's.

In September 2002, Serafin and Tailor attended a Quizno's meeting for franchise sales. They had no prior franchise experience. Later that month, after other meetings, they signed franchise agreements. As a part of the franchising process, an addendum identifies a "target area." Although the franchise agreement indicates it is for a specific location, no specific location is identified, nor is a specific location part of the franchise agreement. The selection process occurs thereafter.

Serafin and Tailor decided to open Store 4399 at a location at the intersection of Highway 287 and South Boulder Road in Lafayette, Colorado. At the time of this selection, the area was still bare ground under development to become a shopping plaza. RHC submitted a site submittal package to Quizno's and Quizno's approved this site for Store #4399. As part of the site selection, Serafin and Tailor asked a Quizno's representative, Jim Merlo, regarding the proximity (1.4 miles) between a proposed site for store #4399 and an existing store owned and operated by Quizno's, which is located at 1387 South Boulder Road, Unit G, Louisville, CO 80227 (Store #30). Serafin and Tailor were concerned that the owner of Store #30 would object to the close proximity of their Store # 4399, since that owner would have a first right to open the store in that area under his Franchise Agreement. They were assured that would not be a problem and was told there was a management problem at that store.

In October 2003 it became apparent that another proposed new store location in which they were interested could not go forward. Serafin and Tailor were approached by Quizno's agents suggesting that they purchase Store #30 as a "substitute" for the other store (#4392). Quizno's decided to sell seventeen stores owned and operated by Quizno's. Store #30 was one of those stores. Certainly, Quizno's had a financial interest in promoting the corporate owned stores in lieu of a new store at another location. Serafin and Tailor asked about the proximity of Store #30 to Store #4399. They were informed that the two stores would be appealing to different markets and that the prior problems with Store #30 were based on bad management. Serafin and Tailor requested and received sales and financial data about Store #30. It revealed that sales fell approximately 20% after the closure of Kmart, one of the anchor tenants in the plaza.

Serafin and Tailor eventually agreed to take over Store #30 and on April 30, 2003, they signed an Asset Purchase Agreement with Defendant Quizno's Operating Company, on behalf of their company, RHC and personally guaranteed performance.

In mid July 2003, Store #4399 opened. Sales in Store #30 fell, and sales in Store #4399 were far below the pro forma projections. The purpose of the pro forma prepared by the franchisees is to assist in obtaining financing. It is suppose to show projections of sale at the particular location. These projections are supposed to be based on estimates of sales at that particular location. However, the pro forma projections made by Serafin and Tailor were not true projections based on anticipated sale. The projections were based on a desired level of profits. Therefore, the pro forma generated by Serafin and Tailor was not useful for comparison with the actual earnings of the franchises. It appears that the Serafin and Tailor in there attempt to properly prepare a pro forma had difficulty in determining the project sales and used a method for determining the rental and CAM cost to profits ratio, which is a method to determine what percentage of the rental and CAM cost were to total profits. The desirable is under 10% and, for malls, 13%. In this case the Serafin and Tailor took the known rental and CAM cost and determined the sale to generate the desirable ratio and used that figure, which is not a projection of sales based on empirical data. When the Quizno's representative reviewed the pro forma they did not disagree with it and felt it was in line with their expectations.

With labor costs continuing and sales declining, Serafin and Tailor closed Store #30 on December 2, 2003. On December 8, 2003, Quizno's terminated the Franchise Agreement. After the closure of Store #30 sales at Store #4399 increased and continued to do well through the time Serafin/Tailor sold the store.

Walsh investigated opportunities to become a Quizno's franchisee, signed a Franchise Agreement in May, 2002, and began searching for a site. After attempting to establish stores at two different sites, Quizno's contacted him about an opportunity at 1170 Highway 287 in Broomfield (Store #3706). Walsh chose to open Store #3706 at a location in the shopping complex referred to as the Broomfield Marketplace. Walsh submitted a site submittal package to Quizno's for approval of this location. Walsh used a similar method used by Serafin and Tailor to prepare the pro forma for store #3706.

While Daniel Walsh was in training and before he opened Store #3706, Quizno's offered Walsh the opportunity to purchase two corporate owned stores referred to as Store #41 and Store #53. Merlo provided demographic information. Davis represented that ownership of the two stores would provide "synergy." "Synergy" is the sharing of resources between multiple stores to reduce cost. After reviewing demographic and historical financial information with respect to

Store #41 and Store #53, Walsh chose to purchase Store #53. Walsh purchased the assets associated with Store #53 from Quizno's. The transaction closed on May 1, 2003 and DanCin immediately began operating Store 53. Walsh opened Store #3706 on June 23, 2003.

Walsh closed Store 3706 in early April 2004. Walsh claims that the location for Store 3706 was not a good location. He claims part of the problem with the location of Store 3706 was the proximity of Store 41. However, Quizno's closed store 41 in late December 2003, **four months** before Walsh closed store #3706.

January 2004, Walsh learned that Quizno's approved a new site selection for a competitor 1.7 miles from Store #53 at 1281 W. 120th Street and Washington, Westminster, Store #2049. Store #2049 and Store #53 are separated by Interstate 25. Further, Quizno's approved another competitor Store #6672 at 120th and Sheridan to replace Store #41. This store is 1.9 miles from Store #53 and approximately 3 miles from Store #3706. Quizno's knew it was going to open these stores before Walsh signed his franchise agreement. This was never disclosed to Walsh. Although sales figures improved above those achieved while Store #53 had been operated by Quizno's, DanCin closed Store #53 in July 2004, approximately **one month** after the opening of the new stores. DanCin and Walsh claim the location for store #53 was a bad location because Quizno's allowed the two other franchisees to open stores near to store #53 after he bought it.

Larry Hay, a terminated Quizno's Vice President on the operations side of the corporation, along with others at Quizno's, believed that the proximity of the stores lead to the failure of the stores. Mr. Hay believed that there was a problem with the number of stores located in the North suburbs.

The Franchise Agreements specifically addressed the relative responsibilities with respect to, among other things, the selection of a site. The Franchise Agreement makes clear that the responsibility rested with the franchisee to select a site.

> 3.1 <u>Franchised Location</u>. Franchisee is granted the right to own and operate a Restaurant at a specific address and location ("Franchised Location"). <u>Franchisee shall choose and acquire a location for its Restaurant</u> within the nonexclusive Target Area set forth in Exhibit 1.

Franchise Agreement, §3.1 (emphasis added). Quizno's reserved the right to approve that site, and agreed that it would not unreasonably withhold its approval:

> Franchisee may operate a Quizno's Restaurant only at a site approved by Franchisor, which will not be unreasonably withheld if the site meets Franchisor's site selection criteria.

Franchise Agreement, §6.1. The Franchise Agreement further provided that Quizno's approval of a site (and the lease between the landlord and the franchisee) was for its own benefit and did not provide any guaranty to the franchisee of the merits of the location.

> Such review is for the benefit of Franchisor, and Franchisee acknowledges that Franchisor's review and approval of a lease for the Franchised Location do not constitute a recommendation, endorsement, or guarantee by Franchisor of the suitability of the Franchised Location or the lease, and Franchisee should take all steps necessary to ascertain whether such Franchised Location and lease are acceptable to Franchisee.

Franchise Agreement, § 6.2. And, the parties agreed to the parameters with respect to any assistance Quizno's provided the franchisee in selecting a site:

> 9.1 **<u>Franchisor's Development Assistance</u>**. To assist Franchisee in establishing the Restaurant, Franchisor and/or its designated representatives shall provide the following:
>
> (a) Assistance related to accepting a site for the Restaurant, although Franchisee acknowledges that Franchisor has no obligation to select or acquire a site on behalf of Franchisee. Franchisor's assistance will consist of, at a minimum, providing general criteria for a satisfactory site and determining whether a proposed site fulfills the requisite criteria prior to formal acceptance of a site selected by Franchisee. Site selection, acquisition, and development shall be the sole obligation of Franchisee, except as set forth in this Agreement or any other written agreement executed by Franchisor. Franchisee acknowledges that Franchisor is under no obligation to provide additional site selection services other than as set forth in a written, executed agreement and that Franchisor's acceptance of the site does not imply or guarantee the success or profitability of the site in any manner whatsoever.

Franchise Agreement, §9.1(a)

The two sets of Plaintiffs selected new sites for one of their stores and submitted the required package to Quizno's for approval. The franchisees knew of existing Quizno's restaurants near the site when they submitted the request and each set of Plaintiffs were required to perform their own due diligence with respect to the demographics, traffic flow, population and other statistics with respect to the restaurants. In both cases, Quizno's approved the franchisees' requested site and after the franchisees had begun the process of building the new restaurant, Quizno's offered each set of Plaintiffs an opportunity to purchase known existing Quizno's restaurants located in the same area. In both cases, at the franchisees' request, Quizno's provided historical financial performance data with respect to those restaurants. In both cases, the franchisees performed their own independent due diligence and chose to purchase the Quizno's store.

The franchisees now blame Quizno's for their business failures. They claim Quizno's should not have approved the sites they chose and by doing so, Quizno's became a guarantor of the success of that restaurant. They claim those sites did not meet Quizno's site criteria, at least when the "competing" stores are considered. They also allege Quizno's representatives told them their chosen locations were viable. Walsh and DanCin Ventures, Inc., further claim that the approval of the sites located near store #53, contributed to that store's failure.

It is obvious that the new stores and the existing store were competing for business in the area. Certainly, if a customer is looking for a Quizno's sandwich, it is not likely that consumer will past up a Quizno's store to go to any of the Plaintiffs' Quizno's stores. However, if that store was not in route to the Plaintiffs' stores, then Plaintiffs would get that sale. Certainly, this principle would apply to any franchise. Quizno's distribution of store is similar to its competitors, such as McDonalds, Subway, etc.

Notwithstanding the obvious competition between the stores, from an evidentiary standpoint, this Court can not find that the competition resulting from the proximity of the stores was the cause of the failure of the stores. However, from a legal standpoint, the paramount question before this Court is whether Quizno's had a duty, besides just good business judgment, to disapprove a site selection if a store on that site had the potential to fail or to adversely impact an existing store because of proximity to that existing store.

The interpretation of a contract is a question of law. *Coors v. Security Life of Denver Ins. Co.*, 2003 WL 22019815 (Colo. App.) "It is a court's duty to interpret a contract in a manner that effectuates the manifest intention of the parties at the time the contract was signed. A touchstone in determining the intention of the parties to a contract is the language of the written agreement. If the language is plain, clear and unambiguous, a contract must be enforced as written." *Randall & Blake, Inc. v. Metro Wastewater Reclamation District*, 77 P.3d 804, 806 (Colo. App. 2003) "Court's possess no authority to rewrite contracts and must enforce unambiguous contracts in accordance with their terms." *Id.*; *Shaw v. Sargent School Dist. No. RE-33-J ex rel. Board of Education*, 21 P.3d 446, 449 (Colo. App. 2001) (stating that if the language of the document is plain, its meaning clear, and no absurdity is involved, it must be enforced by the court as written). *See also In re Parsons*, 272 B.R. 735, 753 (D.Colo. 2001) (unless there is ambiguity in contract's terms, under Colorado law a court should avoid strained interpretations, give effect to the terms according to their ordinary meaning, and enforce the contract as written).

A party is presumed to know the contents of a contract he signs and, absent fraud, is not relieved from the obligations contained within the contract. *B&B Livery, Inc. v. Riehl*, 960 P.2d 134, 138 n . 5 (Colo. 1995); *Rasmussen v. Freehling*, 412 P.2d 217 (Colo. 1996) (holding that a party is not permitted to claim she is not bound by terms of a contract she signed but failed to read); *Cordillera Corp. v. Heard*, 592 P.2d 12 (Colo. App. 1978), *aff'd*, 612 P.2d 92 (Colo. 1980) (holding that a party is presumed to know the contents of a contract signed by that party). Moreover, a party is bound by the terms of a contract even if he later concludes he entered into a bad deal. *Roberts v. Adams*, 47 P.3d 690 (Colo. App. 2001) (holding that a court is not permitted to relieve a party of her obligations under a contract even when that party struck a bad bargain);

Corporate Finance Associates Paduch, Inc. v. Rathbone, 680 P.2d 859 (Colo. App. 1984) (same).

It is critical that courts enforce the clear terms of contracts. Parties must be able to rely on enforcement of the terms of their agreements so that they may confidently and appropriately allocate rights, responsibilities and risks:

> The right of private contract is no small part of the liberty of the citizen, and . . . the usual and most important function of courts of justice is …to maintain and enforce contracts.

Francam Building Corp. v. Fail, 646 P.2d 345, 349 (Colo. 1982) (quoting *Baltimore & Ohio Southwestern RY v. Voyght*, 176 U.S. 498, 505 (1900).

The Plaintiffs' have filed claims asserting franchise fraud, bad faith, deceptive trade practices and the wanton and willful misrepresentations by Defendants (collectively "Quizno's").

Plaintiffs claim Quizno's breached the implied covenant of good faith and fair dealing by approving sites they claim were not economically viable because of the proximity with another Quizno's restaurant. They also claim that Quizno's approval breached the implied covenant because the site did not meet all of Quizno's site criteria it uses in determining whether to accept a site, which are set forth in a guidebook provided to franchisees. Quizno's disputes that the sites were not viable and that the sites did not meet its site selection criteria. The Plaintiffs claim of breach of implied covenant of good faith and fair dealing must fail because the parties expressly agreed that Quizno's owed them no duty with respect to site selection and that the site selection criteria did not form part of the contract.

As set forth above, the parties agreed in the Franchise Agreements to the allocation of rights and responsibilities with respect to selection of the franchisee's site. The express terms of the Franchise Agreements place the responsibility for site selection solely on the franchisee. Franchise Agreement, §§ 3.1 and 9.1. Quizno's reserved the right to approve the site and agreed not to unreasonably withhold its approval. "Franchisee may operate a Quizno's Restaurant only at a site approved by Franchisor, which will not unreasonably be withheld if the site meets Franchisor's site selection criteria." (Franchise Agreement, §6.1). Quizno's approval of a site provides no "recommendation, endorsement, or guarantee by [Quizno's] with respect to the suitability of the Franchise Location." See §6.2. And the Franchise Agreements provide that the franchisee has no territorial protection with respect to the location of other Quizno's stores. *See* §§3.1 and 3.5. In short, the Franchise Agreements are clear that Quizno's approval of a site was in no way a guarantee as to the suitability of the location or as to its future success and also that Quizno's retained the right to open franchises anywhere else it chose. (*See* §§3.5, 6.1, 6.2, 6.3, 9.1)

The sole purpose of the implied covenant of good faith and fair dealing is to effectuate the intent and reasonable expectations of the parties, not to rewrite the contract. *Bayou Land Co. v. Talley*, 924 P.3d 136, 154 (Colo. 1996). *See also CKH, LLC v. The Quizno's Master, LLC*, slip opinion dated March 25, 2005, pp. 4-5, and Franchise Agreements, 21.4. Adding an implied duty from Quizno's to its franchisees with respect to its acceptance of a site would modify the contract and would be opposite to the parties' intentions and their reasonable expectations under the contract. *See Grossman v. Columbine Medical Group, Inc.*, 12 P.3d 269, 271 (Colo. 2000) (stating that the implied covenant cannot be used to contradict the express terms of the contract). Courts throughout the country consistently reject similar claims by franchisees for breach of the implied covenant of good faith and fair dealing premised on alleged acceptance of sites too close together when, like here, the franchise agreement grants absolutely <u>no</u> territorial exclusivity to the franchisee. *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp, ITT*, 139 F.3d 1396, 1403 (11th Cir. 1998) (noting weight of cases hold that when the parties to a franchise agreement include contract language unambiguously stating that a franchisee can expect no exclusive territory, the implied covenant will not defeat those terms). In *Burger King Corp. v. Weaver*, 169 F. 3d 1310, 1318 (11th Cir. 1999), the Eleventh Circuit rejected the argument of a non-exclusive franchise owner that the franchisor incurred a duty to refrain from encroaching on its territory by licensing new franchises in the area under the implied covenant of good faith and fair dealing. The court refused to recognize an independent cause of action for breach of the implied covenant in derogation of the parties' express contract and where no breach of an express term of the parties' contract was alleged. *Id.*; *see also*, *Nibeel v. McDonald's Corp.*, 1998 U.S. Dist. LEXIS 13245 (N.D. Ill. August 27, 1998) (finding argument without merit that implied covenant "modifies" agreement by preventing the franchisor from doing exactly what the agreement permitted it to do). To hold otherwise, would effectively rewrite the parties' agreement and defeat the purpose of the implied covenant in giving effect to the parties' reasonable expectations.

Plaintiffs also claim Quizno's breached a duty of competence in approving sites they claim were not economically viable. There is no support for Plaintiffs' claim that a franchisor owes a duty of competence to a franchisee.

Even if Colorado law recognized, which it does not, this alleged duty from a franchisor to a franchisee, the economic loss rule would bar Plaintiffs' breach of a duty of competence claim. Colorado has expressly rejected the claim that a party can be liable in tort for economic loss when the parties have entered into a contract whose terms set forth the parties' duties. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66 (Colo. 2004). *See also Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256 (Colo. 2000) (holding that a party suffering any economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law). In *BRW*, the Colorado Supreme Court held that a court must look to the contract between the parties and if the contract addresses the relative duties on an issue, there can be no claim other than breach of contract, "[o]ur economic loss rule requires the court to focus on the contractual relationship between the parties, rather than their professional status, in determining the existence of an independent duty of care." *Id.* at 71. As long as the contract addresses the duty, any alleged breach must be presented as a breach of contract and cannot be brought in tort. *Id.* This ensures the policy of permitting contracting parties to allocate risks and costs and be able to predict the economic consequences of a breach. *Id.*

Here the parties entered into a written, comprehensive fully integrated contract that provides all of the duties Quizno's owed to Plaintiffs as franchisees. That contract specifically addresses the relative responsibilities with respect to selecting a site for the restaurant and sets forth in certain and clear terms that the responsibility for selecting a site is on the franchisee. Franchise Agreement, §3.1, quoted above. The Franchise Agreement also provides the standard under which Quizno's is to accept a site, "Franchisee may operate a Quizno's Restaurant only at a site approved by Franchisor, which will not be unreasonably withheld if the site meets Franchisor's site selection criteria." (Franchise Agreement, §6.1) The Franchise Agreement further provides that Quizno's acceptance of a site is for its own benefit and does not provide any guaranty to the franchisee of the merits of the location. Franchise Agreement, § 6.2, quoted above. *See also* § 9.1(a), quoted above.

Plaintiffs do not allege Quizno's breached a duty of care by unreasonably withholding approval for their requested site. Indeed, such a claim could only be brought as a breach of contract because of the economic loss rule. *Parr v. Triple L&J Corp*, 204 Colo. App. Lexis 2123 (Nov. 18, 2004) (holding that economic loss rule barred tenant from bringing tort claim of tortuous interference with prospective business advantage against landlord for unreasonably withholding consent to assign lease). Rather, Plaintiffs attempt to create a duty from Quizno's approval of their chosen location. The economic loss rule bars the Plaintiffs' attempt to create a duty of competence with respect to Quizno's approval of the locations. *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000); *Scott Co. of Calif. v. MK-Ferguson Co.*, 832 P.2d 1000, 1005 (Colo. App. 1992) (no claim stated for negligence since no duties independent of contractual duties were alleged to have been breached).

Plaintiffs also claim Quizno's approval of sites they allege were not economically viable breached a fiduciary duty and that Quizno's breached a fiduciary duty when its representatives allegedly told them the site was economically viable. Plaintiffs also claim Quizno's breached a fiduciary duty by "self-dealing" when it assigned the leases for the company owned store to Plaintiffs. Not only does the economic loss rule bar this claim, but also this claim fails because Colorado law does not recognize a fiduciary relationship between business persons, like franchisor and franchisee.

A fiduciary relation exists between two persons only when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. *Moses v. Diocese of Colo., 863 P.2d 310, 321* (Colo. 1993). And to be liable, the superior party must assume a duty to act in the dependent party's best interest and deal solely for the benefit of the dependant party. *Moses,* 863 P.2d at 322 and 323. An unequal relationship does not automatically create a fiduciary duty. *Id.*; *First Nat'l Bank of Meeker v. Theos,* 794 P.2d 1055, 1060-61 (Colo.App.1990).

In *Mr. Steak, Inc. v. Belleview Steak, Inc.*, 38 Colo. App. 278, 555 P.2d 179 (1976), the Colorado Court of Appeals refused to recognize a fiduciary relationship arising from a franchise contract alone. The court held that recognizing such a fiduciary relationship "would render long established principles of contract law meaningless in the franchise context, and we find no judicial or legislative authority supporting such a result." *Mr. Steak, Inc.*, 555 P.2d at 181. *See also*, *CKH, LLC v. The Quizno's Master, LLC* (attached hereto), p. 9 (holding that both the language of the franchise agreement and Colorado law are fatal to the plaintiff franchisee's breach of fiduciary duty claim in that Quizno's and its franchisees do not have "the type of close, confidential relationship that would have 'induced [plaintiffs] to relax the care and vigilance

[they] would normally exercise in dealing with a stranger.'" Citing *First Nat'l Bank in Lamar v. Collins*, 61 P.2d 154, 56 (Colo. App. 1980)).

Indeed, "[t]he vast majority of jurisdictions that have addressed the issue in the context of franchise agreements have held that a franchise agreement cannot alone establish a fiduciary relationship." *Devery Implement Co. v. J.R. Case Co.*, 944 F.2d 724, 731 (10th Cir. 1991); *see e.g.*, *Pizza Management, Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1183 (D. Kans. 1990) ("The franchisor-franchisee relationship 'is an arms-length, commercial one' with the performance of each governed and regulated by the typically exhaustive terms of written franchise agreements. … Fiduciary obligations should be extended reluctantly to commercial or business transactions.") (internal citations omitted); *see also* 52 A.L.R. 5th 613 (1997-2004) ("The great majority of courts to consider the issue have refused to recognize the existence of fiduciary obligations between a franchisor and franchisee in an ordinary franchise relationship.") *See also*, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998) (citing cases from various jurisdictions and holding that franchisees could not bring a breach of fiduciary duty claim against a franchisor because a franchise relationship, without more, does not give rise to a fiduciary relationship); *Branch Banking & Trust, Co. v. Thompson*, 418 S.E. 2d 694, 699 (N.C. App. 1992) (stating, "parties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract and the duties set forth in the U.C.C."); *Thrifty Rent-A-Car System, Inc.*, 229 F.3d 1165 (10th Cir. 2000) (unpublished opinion); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 485 (5th Cir. 1984).

The Franchise Agreements specifically provide that Quizno's and Plaintiffs' relationship was a normal arms-length business arrangement, and that they did not stand in a fiduciary relationship:

> 19.1 Independent Businesspersons. The parties agree that each of them is an independent businessperson, their only relationship is by virtue of this Agreement, and no fiduciary relationship is created under this Agreement.

Franchise Agreement, § 19.1. And, as noted above, the parties expressly agreed that Quizno's accepted sites solely for its benefit and that its acceptance did not constitute a guaranty or endorsement of the site. These terms make clear that Quizno's did not knowingly accept the role of acting on behalf of and in the best interest of the Plaintiffs. *Moses,* 863 P.2d at 323.

In *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.,* 62 P.3d 142, 147 (Colo. 2003), the Colorado Supreme Court held that stating a claim under the Colorado Consumer Protection Act ("CCPA") was a two pronged inquiry. First, a plaintiff must show defendant engaged in a deceptive trade practice defined as knowingly making a misrepresentation that has the capacity to deceive. *Id.* at 148. Second, a plaintiff must show "the defendant's challenged practice significantly impacts the public." *Id.* at 149. When the claim involves a failure "to perform a promise mutually bargained for and agreed upon by parties" to a contract, then the appropriate remedy is an action for breach and not under the CCPA. *Id.* at 148. A misrepresentation which is an essence a failure to meet a contractual obligation, is not an actionable "deceptive trade practice" within the meaning of the CCPA. *Id.* at 147 (claim not actionable where distributor's contractual relationship offered theory of recovery). *See CKH, LLC v. The Quizno's Master, LLC* (attached hereto) p. 10 (dismissing plaintiff franchisee's CCPA claims because "all the rights plaintiffs seek to assert under the CCPA are addressed by the terms of their franchise agreements [and] plaintiffs cannot supplement or supply the terms of those contracts by reformulating their claims under the CCPA.")

Here, the Plaintiffs' claims and evidence relate only to the contractual rights and obligations of two unrelated franchisees and therefore, cannot constitute an actionable deceptive trade practice. *Rhino Linings* at 149-150 (alleged breach of dealer's contractual territorial exclusivity did not constitute a deceptive trade practice). The public injury requirement is also missing because only two franchisees are implicated. At the time of the alleged deceptive practices in late 2002 and early 2003 Quizno's had approximately 1750 open franchised stores and an additional 1940 franchisees who had not yet opened their stores. (*See* Item 20 at pp. 54-58 of Quizno's Franchising LLC Franchise Offering Circular with issuance date of January 27, 2003, attached to Quizno's Motion for Summary Judgment as Exhibit 9. *Id.* at 150 ("three affected dealers out of approximately 550 worldwide does not significantly affect the public."). *See also Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998); *Travelers Ins. Co. of Il. v. Hardwicke*, 339 F.Supp.2d 1127, 1132-33. Plaintiffs deceptive practice claim utterly fails to meet the requirements set out in *Rhino* and should be dismissed.

Serafin and Tailor claim Quizno's made two fraudulent promises to them. First, they claim Quizno's told them that the proposed site of the store #4399 was not too close to the existing store #30. They claim they relied on this statement in deciding to open store #4399 in that location and the purchase of the exiting store #30. Second, they were told that store #30 was not being managed properly and that if they purchased store #30 it would improve with good management, which they relied on in purchasing the existing store #30. Although it is true that Joe Davis, told them that the store was not too close, in his site evaluation he did state that the closeness of the two stores was a negative. Concerning the previous management at store #30, the veracity of that statement was not contested in the evidence, other than Hay's opinion that Davis would say anything too close a deal.

In order to prove fraud, a plaintiff must establish: (1) a false representation of a material ***past or present fact***; (2) knowledge on the part of the one making the representation that it is false; (3) that the representation was made with the intention plaintiff would rely on the representation; (4) plaintiff ***justifiably*** relied on the misrepresentation; and (5) damage caused by the reliance. However, a statement about what will or will not happen in the future is a false representation only if it turns out to be false and the person making the statement claimed to have special knowledge to support the statement that he or she did not have or had special knowledge that he or she failed to disclose and which he or she knew would make the future event unlikely to happen.

Regarding Joe Davis statement concerning closeness of the two stores, although he had expressed the proximity of the two stores was a concern, he believe the store would be successful. There is insufficient evidence to prove that Joe Davis's opinion was false and that he knew it was false at the time the statement was made. In essence, the statement is giving an opinion that the closeness of the sore will not impact the **future** success of the two stores. The second state is also an opinion that good management would improve the future success of the store #30. Statements purporting to promise future events or action do not qualify as representations of ***existing facts*** and are therefore legally insufficient to support a claim of fraud. *See e.g.*, *Branscum v. American Community Mut. Ins. Co.*, 984 P.2d 675, 680 (Colo. App. 1999) (an alleged promise by a representative of the insurer that the rider would be lifted automatically in a year did not support a claim for negligent misrepresentation). *High Country Movin', Inc. v. U.S. West Direct Company*, 839 P.2d 469, 471 (Colo App. 1992); *see also*, *Burman v. Richmond Homes Ltd.*, 821 P.2d 913, 921 (Colo. App. 1991) (an action for fraud must be based on a false representation of a past or present material fact, and not the happening of a future event); *Payne v. McDonald's Corp.*, 957 F.Supp. 749, 761 (D. Md. 1997) (granting motion to dismiss franchisee's fraud claim where alleged fraud related to projections of future costs and performance and promises with respect to impact of new restaurant on existing franchisee because such statements are promises of future events).

Moreover, there can be no reasonable reliance on a conditional promise. *Nelson v. Elway*, 908 P.2d 102, 110 (Colo. 1995). As Justice Vollack wrote:

> It would be manifestly unreasonable for a party to rely on a promise that may or may not bind the promisor depending on whether or not a condition occurs. We hold that when a defendant makes a conditional representation to a plaintiff, any detrimental change of position on the part of the plaintiff prior to the occurrence of the condition is unreasonable as a matter of law.

Id. at 110. Here, Plaintiffs allege Quizno's made a conditional promise that the stores will succeed ***if they managed it properly***.

Further, under Colorado law a plaintiff cannot justifiably rely on an alleged misrepresentation when that plaintiff has access to information that was equally available to both parties and would have led to discovery of the true facts. *Balkind v. Telluride Mountain Title Company*, 8 P.3d 581, 87 (Colo. App. 2000) (finding no justifiable reliance where plaintiffs were on notice of restrictive covenant in deed to property prior to consummating purchase of property). Here, the RHC Plaintiffs knew of the location of Store #4399 when they agreed to purchase Store #30 and they had available to them all of the demographic information associated with Store #30, as well its historical sales performance.

Further, the terms of the Franchise Agreement belie any claim of reasonable reliance with respect to the location of other franchises. The parties agreed and understood that Quizno's retained the right to open its own stores or approve other franchises to be located anywhere other than the specific address of the Plaintiffs' location. *See* §§ 3.1 and 3.5. Further, the parties expressly agreed that Quizno's was not providing any guaranties of success and could not provide any guaranties with respect to the suitability of the location or lease. *See* §§ 6.1, 6.2, 9.1 and Disclosure Acknowledgement Statement. And, Plaintiffs could not have reasonably relied on the terms or implementation of Quizno's site criteria inasmuch as they agreed that any policies that Quizno's adopts or implements to guide in its decision making are subject to change, not part of the franchise agreement and not binding on Quizno's. *See* § 23.2.

Plaintiffs only evidence relating to their theory that the proximity of other Quizno's franchise stores caused the lower sales volume is the historical sales experienced at each location before and after opening of the alleged competing restaurant. Plaintiffs have absolutely no evidence addressing the myriad of other potential causal factors associated with the sales performance of their respective restaurants. Under Colorado law, Plaintiffs simply do not have sufficient evidence to prove causation.

IT IS THEREFORE ORDERED that judgment is entered in favor of the Defendants Quizno's Franchising, LLC, The Quizno's Franchising, LLC, and The Quizno's Operating Company and against the Plaintiffs RHC, LLC, Dan Serafin, Samir Tailor, DanCin Ventures, Inc., and Daniel on all of their claims.

IT IS FURTHER ORDERED that this matter shall be reset for trial on Defendants Quizno's Franchising, LLC, The Quizno's Franchising, LLC, and The Quizno's Operating Company's counterclaims and Plaintiff L MAR, LLC's claims.

DONE IN OPEN COURT this 19th day of July, 2005.

BY THE COURT

/s/ R. Michael Mullins

R. MICHAEL MULLINS
District Court Judge