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MORGATE LLC, ET AL.

11 SUPERIOR COURT OF CALIFORNIA  
12 COUNTY OF LOS ANGELES  
13 CENTRAL CIVIL WEST

14 MORGATE LLC, et al.

15 Plaintiffs,

16 vs.

17 MAIL BOXES ETC., et al.

18 Defendants.

) CASE NO. BC294647  
) [Assigned to the Hon. William F.  
) Highberger, Dept. 307]

) **PLAINTIFFS' OFFER OF PROOF**  
) **AND PROPOSED EXHIBIT LIST**  
) **FOR BIFURCATED TRIAL OF**  
) **1993 PLAINTIFFS**

) Trial: August 3, 2009  
) Time: 9:00 A.M.  
) Dept.: 307

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23 **A. Legal Principles Governing Inferences, Interpretation, and Construction**

24 1. When a dispute arises over the meaning of contract language, the first question to  
25 be decided is whether the language is 'reasonably susceptible' to the  
26 interpretation urged by the party." *S. Cal. Edison Co. v. Superior Court* (1995) 37  
27 Cal. App. 4th 839, 847-848.

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2. “Whether the contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself or from extrinsic evidence of the parties' intent.” *S. Cal. Edison Co. v. Superior Court* (1995) 37 Cal. App. 4th 839, 848.
3. “Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.”(citation omitted) *Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1343, 1350-1351.
4. The interpretation of a contract involves “a two-step process: ‘First the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine “ambiguity,” i.e., whether the language is “reasonably susceptible” to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is “reasonably susceptible” to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract.’ *Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1343, 1350-1351.
5. “If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean?” *S. Cal. Edison Co. v. Superior Court* (1995) 37 Cal. App. 4th 839, 847-848.

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about the courts should enforce that intent.” (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754.)

12. “The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties’ intentions.” (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189.)

13. “[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in *Corbin on Contracts*, ‘The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party’s earlier words, and acts, can introduce them to support his contention.’ We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party’s conduct.” (*Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851)

14. “[O]ne who is maintaining the same interpretation that is evidenced by the other party’s earlier words, and acts, can introduce them to support his contention.” *S. Cal. Edison Co. v. Superior Court* (1995) 37 Cal. App. 4th 839, 851.

15. “Because there is no evidence in this case of objective manifestations of the parties’ intent, and because the term at issue is undefined in the parties’ contract, the only way to construe the meaning of the term “gross receipts” is to consider the nature of the contract and the circumstances under which the parties negotiated. In this case, both the nature of the contract and the circumstances involved the motion picture industry. The offered evidence of industry custom and usage revealed the term “gross receipts” had more than one possible meaning.

1 Thus, the industry expert's statements of fact were relevant and admissible to  
2 expose the latent ambiguity in the contract language regarding the industry's  
3 customary usage of the term. Held's declaration did not violate the parole evidence  
4 rule, as Disney suggests. On the contrary, the proffered evidence regarding trade  
5 usage and custom was relevant to prove an interpretation to which the agreements  
6 were reasonably susceptible in the entertainment industry context." *Wolf v.*  
7 *Superior Court* (2004) 114 Cal. App. 4th 1343, 1357.

8 16. "The words of a contract are to be understood in their ordinary and popular sense,  
9 rather than according to their strict legal meaning; unless used by the parties in a  
10 technical sense, or unless a special meaning is given to them by usage, in which  
11 case the latter must be followed." Civil Code section 1644.

12 17. "Technical words are to be interpreted as usually understood by persons in the  
13 profession or business to which they relate, unless clearly used in a different  
14 sense." Civil Code section 1645; CACI § 316.

15 18. "[T]he contract must be construed as a whole and the intention of the parties must  
16 be ascertained from the consideration of the entire contract, not some isolated  
17 portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64  
18 Cal.App.3d 319, 324–325.)

19 19. Contracts should be construed as a whole, with each clause lending meaning to  
20 the others. Contractual language should be interpreted in a manner that gives  
21 force and effect to every clause rather than to one that renders clauses nugatory,  
22 inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner*  
23 *& Smith* (1998) 68 Cal.App.4th 445, 473; *Titan Corp. v. Aetna Casualty and*  
24 *Surety Co.* (1994) 22 Cal.App.4th 457, 473–474.)

25 20. "In case of uncertainty not removed by the preceding rules, the language of a  
26 contract should be interpreted most strongly against the party who caused the  
27 uncertainty to exist." Civil Code section 1654; This rules applies to adhesion  
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contracts with peculiar force. *Neal v. State Farm Insurance Co.* (1961) 188 Cal. App. 2d 690, 695.

21. “A contract may [also] be explained by reference to the circumstances under which it was made, and the matter to which it relates.” *Civil Code* § 1647.

22. “Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him.” *Keating v. Superior Court*, 31 Cal. 3d 584, 594; *Fischer v. First Internat. Bank* (2003) 109 Cal. App. 4th 1433, 1446 (Provision in adhesion contract “cannot be enforced if it does not fall within the reasonable expectations of the weaker or ‘adhering’ party.”)

23. “The essence of the good faith covenant is objectively reasonable conduct. ‘[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.’ *Badie v. Bank of America* (1998) 67 Cal.App.4<sup>th</sup> 779, 796.

24. Where, as in this case, a party has the unilateral right to change the terms of a contract, it does not act in an "objectively reasonable" manner when it attempts to "recapture" a forgone opportunity by adding an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into.” *Badie v. Bank of America* (1998) 67 Cal.App.4<sup>th</sup> 779, 796.

25. “Thus, although the terms of the renewal provision did not give Vylene a guaranteed right to renew on a determinable basis, the provision obligated Naugles to negotiate in good faith concerning the terms and conditions of a renewal.” *In re Vylene Enterprises v. Naugles* 90 F.3d 1472 1476-1477 (9<sup>th</sup> Cir. 1996).

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26. *Dayton Time Lock Service, Inc. v. Silent Watchman Corp.*, (1975) 52 Cal. App. 3d 1 (holding the implied covenant of good faith and fair dealing applies with equal vigor to franchise agreements).
27. The court recognized that a franchisor’s offering of a new, different franchise agreement that was commercially unreasonable did not fulfill the franchisor’s obligations to negotiate in good faith. *In re Vylene v. Naugles* 90 F.3d 1472 1476-1477 (9<sup>th</sup> Cir. 1996).
28. “Inference of fact plays an important part in the interpretation and construction of contracts. An example was given above-the inference of intent to accept from the offeree's dropping in the mailbox a letter expressing an acceptance. The act of mailing is not a symbolic expression, yet it is a part of a sequence of conduct which manifests an intention to accept. Another example is the process by which the court infers some purpose or purposes of the parties and then interprets the language of the contract in such a way as to be consistent with the purpose or purposes.” Patterson, Edwin *The Interpretation and Construction of Contracts* 64 Col Law Review 833, 836 (1964).
29. Provisions that limit the obligations of the stronger party not enforced unless such term “conspicuous, plain, and clear.” *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal. 3d 699, 710.
30. The court interprets the form contract to mean what a reasonable buyer would expect it to mean, and thus protects the weaker party's expectation at the expense of the stronger's." (The Court in *Gray v. Zurich Ins. Co.*, (1966) 65 Cal. 2d 263, 271, citing contract scholar Patterson; Patterson, *The Interpretation and Construction of Contracts* (1964) 64 Colum.L.Rev. 833, 858.)

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1 **B. Facts Relevant to Contract Interpretation**

2 1. The Mail Boxes Etc franchise agreement created a unique<sup>1</sup> packing and shipping  
3 business<sup>2</sup> using a business plan<sup>3</sup> built on entrepreneurial independence.<sup>4 5</sup>

4 2. The franchisor induced franchisees to enter into the franchise agreements and then  
5 to actively build the franchise,<sup>6</sup> by granting franchisees the independence to operate Mail Boxes

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16 <sup>1</sup> The 1993 Mail Boxes Etc Franchise Agreement (1993 FA) within the 1993 Uniform Franchise Offering  
Circular (Exhibits 1-3) states:

17 “WHEREAS Franchisor under its trade names, trademarks, logos and service marks hereinafter referred to as Marks  
18 or Trademarks has developed KNOW-HOW, including confidential information and a unique and comprehensive  
system for the promotion and identification of the mark MAIL BOXES ETC USA for the sale of products and  
19 services at MAIL BOXES ETC Centers and;

20 “ WHEREAS Franchisor has developed, operates and licenses a system or business program (hereinafter referred to  
as Program), including KNOW-HOW for conducting and operating a private mail Center under the mark MAIL  
BOXES ETC.”

21 <sup>2</sup> The MBE Strategic Overview (Exhibit 6, p. 6) states that the Mail Boxes Etc’s “core business” is “Pack  
and ship.”

22 <sup>3</sup> The 1993 FA Whereas clause (Exhibits 1-3) provides: “Franchisor has developed, operates, and licenses a  
system or business program (hereinafter referred to as Program), including Know-How for conducting and operating  
23 a private mail Center under the mark Mail Boxes Etc.”

24 <sup>4</sup> The 1993 FA § 15.01 (Exhibits 1-3) provides: Due to the competitive nature of the business involved,  
successful operations of the franchise will primarily depend upon the best efforts, capabilities and management  
abilities of the Franchisee and on efficient operation of the franchised business as well as local marketing conditions.

25 The 1993 FA §17.02 (Exhibits 1-3) provides: “franchisee will be in full control of its business at all times.  
The context of Franchisee’s business shall be determined by Franchisee’s own judgment and discretion, subject only  
26 to the provisions of this Franchise Agreement and MBE’s manuals, as they shall be adopted and revised from time  
to time.”

27 <sup>5</sup> Senoff Depo, Vol. 1 dated July 14, 2005, p. 22:1-24, [Exhibit 10]

28 <sup>6</sup> Q You spent millions of dollars and a couple of decades building up the brand name Mail Boxes Etc.,  
didn't you? A. Yes. (DeSio Depo, p. 46:25-47:3, [Exhibit 7])

1 Etc stores<sup>7</sup> within an exclusive territory<sup>8</sup>, set their own prices<sup>9 10</sup> and select the vendors with  
2 whom the franchisees did business.<sup>11</sup>

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5 <sup>7</sup> Q. But is it fair to say that it was the parties' expectations in entering into these franchise agreements that  
6 the franchisees would, within your guidelines, be operating their own independent businesses? A. Yes. (DeSio  
7 Depo p. 44:25-45:4, [Exhibit 7])

8 <sup>8</sup> In the 1993 FA § 9.0, the Mail Boxes Etc. franchise awarded the franchisee an "Individual Franchise area."  
9 (Exhibits 1-3)

10 <sup>9</sup> The 1993 FA § 1.03.D (Exhibits 1-3) provides: "Franchisee shall offer these products and services in  
11 accordance with his own published price, which Franchisee, in his sole discretion, may change from time to  
12 time."

13 "Q Did you ever require the franchisees to offer a particular shipping vendor's services first? A. Not to  
14 my knowledge." (DeSio Depo, p. 39:23-25, [Exhibit 7])

15 The Mail Boxes Etc. Strategic Overview slide titled "Multiple Carrier Advantages": - Increased co-op  
16 marketing opportunities; - Ability to attract a larger customer base; - MBE is the "consultant to the consumer" when  
17 it comes to shipping alternatives; - Competition for MBE's shipping volume results in lower costs to franchisees and  
18 increased profitability; - Network package volume now exceeding 40 million shipments yearly. (Mail Boxes Etc  
19 Strategic Overview, p. 76, [Exhibits 6])

20 "Q What about the prices that the franchisees would charge? Did Mail Boxes Etc. as the franchisor  
21 exercise any control over the prices that the franchisees could charge at retail?

22 A No. We were prohibited from price fixing. So we were not able to control pricing, with the exception of where  
23 we had established national accounts and that the customer was -- the paying customer was the national account, in  
24 which case we would offer whatever that pricing was to the franchisee, and he had the option of accepting it or not  
25 accepting the business." (DeSio Depo, p. 14:9-19, [Exhibit 7])

26 "Q. Do you consider setting their own prices to be an important part of running their own independent  
27 businesses?

28 THE WITNESS: Yes. I think that we were aware of the fact that different franchisees whose stores were  
in different types of locations would have to be able to adjust their prices to be able to reflect the costs associated  
with operating in that particular location. If a franchisee was in downtown New York City, he might have to charge  
higher prices than if he were out in Poway or somewhere here. (DeSio Depo, p. 45:12-25, [Exhibit 7])

Q. Do you consider that it was a competitive advantage of Mail Boxes Etc. franchisees that they could  
services from a variety of shipping vendors? [Objection]\* The Witness: Yes. I think that one of the advantages that  
we could talk about, as opposed to talking into the post office, for example, is that we could offer other carriers. And  
if you went to the post office, you could only ship through the post office. [DeSio 33:16-25]

Mr. DeSio was Mail Boxes Etc. Chief Executive Officer from 1983 to 1998; He was the CEO when the  
1993 franchise agreement was drafted, consummated and performed. [DeSio10:13-11:10; 93 Mail Boxes Etc. UFOC  
p. 2]

<sup>10</sup> Senoff Depo, Vol. 1 dated July 14, 2005, p. 27:20-24, p. 29:12-14, p. 30:11-19, p. 31:24-25, p. 32:1-6, p.  
33:25, p. 34:1-25, p. 38:4-17, p. 42:3-19, p. 46:14-20, p. 66:16-25, p. 67:1-7, [Exhibit 10]

<sup>11</sup> The 1993 FA §5.01 (Exhibits 1-3) provides: "The Franchisee is not required to purchase or lease from  
MBE or any designated source of any goods [or] services [except for Business Management]."

Q Let's talk about shipping services for a minute. What were the list of approved shipping vendors that your  
franchisees could offer? THE WITNESS: Well, it was the post office. There was UPS. There was Federal Express,  
Airborne. Post office. Just about any legitimate carrier that, you know, that service was considered to be reliable  
we would provide. (DeSio Depo, p. 13:20-14:3, [Exhibit 7]) (Objection made)

Excerpt from the Mail Boxes Etc. Strategic Overview slide titled "Purchasing Power":

- Strategic relationships with premier shipping service vendors (DHL, FedEx, USPS, UPS, Yellow Freight) (Mail  
Boxes Etc. Strategic Overview, p. 14, [Exhibit 6]); Franchisee limited live testimony; Expert witness limited live  
testimony.

1           3.       Franchisees were induced to make a long term commitments to building the Mail  
2 Boxes Etc system<sup>12</sup> under the franchise agreement renewal clause,<sup>13</sup> which granted franchisees  
3 the right to renew the original 10 year term for successive 10 year periods.<sup>14 15</sup>

4           4.       The right to renew induced franchisees to make substantial investments in their  
5 franchises, the MBE system and the brand based on the expectation that franchisees would be  
6 able to operate their franchises long enough to recoup their investments.<sup>16</sup>

7           5.       Franchisees were also given the right to transfer their franchisees.<sup>17</sup>

8           6.       While the franchisor retained the right to make changes in the system, such  
9 changes had to be in the best interests of both franchisees and franchisors,<sup>18</sup> directed at  
10 improving the Mail Boxes Etc. system,<sup>19</sup> and could not place unreasonable burdens on the

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11 <sup>12</sup> Former MBE CEO testified the Mail Boxes Etc brand name: Q. You spent millions of dollars and a couple  
12 of decades building up the brand name Mail Boxes Etc, didn't you? Yes.[objection\*] (DeSio Depo, p. 46:25-47:3,  
[Exhibit 7]);

13 The 1993 Uniform Franchise Offering Circular, Exhibit C, (1993 UFOC, Exhibit 4) Estimated Start Up Costs  
14 between \$53,000 and \$92,000 (1993 FA 4.0); Franchisees assumed the financial obligations under the 1993 FA to  
15 do the following: (1) Fees for Training of Personnel; (2) Lease Payments; (3) Insurance; (4) bond payments; (5)  
16 Initial Payment; (6) Design Fees; (7) Service Fees; (8) Royalty Fees; (9) Marketing Fees; (10) Renewal and Transfer  
17 Fees, and (11) Financing costs. (1993 FA §§ 1.01.B, 1.01.G, 1.02, 1.02B, 2.01, 3.01, 3.02, 3.03, 3.05, 4.0, 7.0, and  
18 8.02, [Exhibits 1-3])

19 <sup>13</sup> The 1993 FA § 14.01.B gave franchisees the right to renew Mail Boxes Etc. franchise. (Exhibits 1-3)

20 <sup>14</sup> The 1993 FA § 14.01.B gave franchisees the right to renew their Mail Boxes Etc. franchise. (Exhibits 1-3)

21 <sup>15</sup> Senoff Depo, Vol. 1 dated July 14, 2005, p. 51:10-25, p. 52:1-25, p. 53:1-9, p. 59:1-16, p. 74:12-24, p.  
22 86:9-25, p.87:1-2, [Exhibit 10]

23 <sup>16</sup> The 1993 UFOC Exhibit C Estimated Start Up Costs between \$53,000 and \$92,000 (1993 FA 4.0);  
24 Franchisees assumed the financial obligations under the 93 FA to do the following: (1) Fees for Training of  
25 Personnel; (2) Lease Payments; (3) Insurance; (4) bond payments; (5) Initial Payment; (6) Design Fees; (7) Service  
26 Fees; (8) Royalty Fees; (9) Marketing Fees; (10) Renewal and Transfer Fees, and (11) Financing costs. (Exhibit 4).  
27 (The 1993 FA §§ 1.01.B, 1.01.G, 1.02, 1.02B, 2.01, 3.01, 3.02, 3.03, 3.05, 4.0, 7.0, and 8.02, [Exhibits 1-3]);  
28 Plaintiffs limited live testimony; Franchise Expert limited live testimony.

<sup>17</sup> The 1993 FA § 14.04.B.1 gave franchisees the right to transfer their Mail Boxes Etc. franchise. (Exhibits 1-3)

<sup>18</sup> The 1993 FA § 21.01 (Exhibits 1-3) provides: "Franchisee understands and agrees that due to changes in  
competitive circumstances, presently unforeseen changes in the needs of customers and/or presently unforeseen  
technological innovations the MBE System must not remain static in order that it best serve the interests of  
Franchisor and Franchisee."

<sup>19</sup> The 1993 FA § 21.01 (Exhibits 1-3) provides: "Franchisee understands and agrees that due to changes in  
competitive circumstances, presently unforeseen changes in the needs of customers and/or presently unforeseen  
technological innovations the MBE System must not remain static in order that it best serve the interests of  
Franchisor and Franchisee."

1 franchises.<sup>20</sup>

2 7. The franchisor and franchisees operated under these terms from the time of the  
3 execution of the agreements in 1993 until the dispute arose in 2003<sup>21</sup> when Defendants attempted  
4 to force renewal pursuant to the UPS Store agreement.<sup>22</sup>

5 8. During the period from 1993 to 2003, franchisees regularly renewed their Mail  
6 Boxes Etc franchisees under the then current MBE Center franchise agreement, which typically  
7 contained some changes by the franchisor as permitted and as limited  
8 by the agreement.<sup>23</sup>

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11 <sup>20</sup> The 1993 FA § 21.01 (Exhibits 1-3) provides franchisor changes to franchise agreement cannot materially  
and unreasonably increase Franchisee's obligation under Franchise Agreement.

12 <sup>21</sup> The Uniform Franchise Offering Circulars, dated 1994 to 2002 (Exhibit 5);

13 Q. What was your understanding of the franchisee's right of renewal under the franchise agreement?  
(objection) The Witness: My-basically, the franchisee has a right a perpetual right to renew provided he was in  
14 compliance with all of the terms of the agreement. That's basically the intent of the paragraph. (DeSio Depo, p.  
36:1-8, [Exhibit 7])

15 Q. And if I could direct your attention to the sentence the eighth line down, quote, "Franchisee must  
execute and be bound by the then current franchise agreement for the sale of new MBE centers," close quote. Do  
16 you see that language? A. Un-huh. Q. What did that mean?[objection]\* The Witness: As we went on year after  
year, as said earlier, there were changes made to the franchise agreement, and we wanted to have the most current  
17 franchise agreement in effect at renewal time. But, again, this was to make sure that all of those changes got  
incorporated at the time of renewal. That's what that provision was there for." [DeSio 36:10-25-37:1

Mail Boxes Etc. Strategic Overview, slide titled "Center Renewals":

18 - Renew Franchisees at 10-year intervals; - Upgrade centers to current specifications; - 150 renewals annually (90  
percent renewal rate vs. average franchise industry rate of 80 percent) (Mail Boxes Strategic Overview, p. 47,  
19 [Exhibit 6])

20 <sup>22</sup> Gold Shield National Rollout Frequently Asked Questions (Exhibit 15); 8 February 2003 Summary of New  
Gold Shield Program (Exhibit 14); Gold Shield Amendment to MBE Franchise Agreement (Exhibit 16); Mail Boxes  
Etc. Center Operations Manual Gold Shield Program-The UPS Store Program (2/12/03), (Exhibit 17); February  
21 2003 Gold Shield Legal Memorandum (Exhibit 21).

22 Q. Have you ever renewed your franchise agreement? No I have attempted to. When did you attempt to  
do so? My ten year renewal date was April of 2004. \*\*\* Why were you told you couldn't renew, assuming that you  
were told that you couldn't renew, assuming that you were told you couldn't renew? A. I was told if I wanted to  
23 renew, I had to renew as a The UPS store. (Sanford Depo, p. 52:18-53:2, [Exhibit 9]).

24 <sup>23</sup> The Uniform Franchise Offering Circulars, dated 1994 to 2002 (Exhibit 5);

25 Q Did you have any understanding that Mail Boxes Etc. could make any changes it wanted in the  
franchise agreement and then require a renewing franchisee to accept it? (objection) THE WITNESS: No. I think  
26 what we -- as I said earlier, the changes that we would make typically were not material. And this was an attempt on  
our part to have fairly standardized agreements and not have different agreements out there all the time. And so I  
think that that was the reason we put that in there. (DeSio Depo, p. 37:3-14, [Exhibit 7])

27 Q. Is it fair to say you didn't intend that then to include material changes to the agreement? THE  
WITNESS: Yes. I think that we did not anticipate requiring that there would be material changes in the franchise  
28 agreement in order to renew. (DeSio Depo, p. 37:16-23, [Exhibit 7])

1           9.       Under the Mail Boxes Etc. franchise agreement the franchisor and franchisees  
2 built Mail Boxes Etc into the largest and most successful mail and shipping business in the world  
3 <sup>24</sup> with over 4500 stores in place worldwide by 2000.<sup>25</sup>

4           10.       United Postal Service, Inc. (UPS), a Mail Boxes Etc. vendor, acquired the Mail  
5 Boxes Etc. franchisor in 2001<sup>26</sup> and suddenly and unilaterally imposed drastic  
6 changes to the franchise agreement<sup>27 28</sup>  
7 that destroyed the Mail Boxes Etc brand,<sup>29</sup> took away the independence of the franchisees to set  
8 price<sup>30</sup> and select vendors,<sup>31</sup> and changed the franchise business plan from a multi-shipping

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14 <sup>24</sup> Mail Boxes Etc. Strategic Overview, pp. 5, 7-10 (Exhibit 6); 15 March 2001 UPS Acquisition of Mail  
Boxes Etc. Board of Director Briefing, p. 7 (Exhibit 19).

15 <sup>25</sup> MBE Strategic Overview-MBE is the largest non-food franchisor with retail Centers in the U.S., -In its 20<sup>th</sup>  
year, MBE is larger than McDonald's was in its 20<sup>th</sup> year, - MBE's closure and turnover rates are below  
16 industry averages Mail Boxes Etc. Strategic Overview, p. 7, (Exhibit 6);

17 Excerpt from Mail Boxes Etc. Board of Directors Briefing: "- World's largest franchisor of independently  
owned and operated business, communication and postal service centers. (15 March 2001 UPS Acquisition of Mail  
Boxes Etc Board of Director Briefing, p.7, [Exhibit 19]);

18 Q Now, Mail Boxes Etc. was successful in the sense that it expanded greatly while you were president,  
correct, the franchise network? A. Yes. I don't think there's any question of the fact that it was one of the fastest-  
19 growing franchises in the franchise industry. (DeSio Depo, p. 15-13-18, [Exhibit 7])

20 <sup>26</sup> 2 March 2001 Mail Boxes Etc., and United Parcel Service General Services Co., Asset Purchase  
Agreement. (Exhibit 20)

21 <sup>27</sup> Gold Shield National Rollout Frequently Asked Questions (Exhibit 15); 8 February 2003 Summary of New  
Gold Shield Program (Exhibit 14); Gold Shield Amendment to MBE Franchise Agreement (Exhibit 16); Mail Boxes  
Etc. Center Operations Manual Gold Shield Program-The UPS Store Program (2/12/03), (Exhibit 17); February  
2003 Gold Shield Legal Memorandum (Exhibit 21).

22 <sup>28</sup> Senoff Depo, Vol. 1, dated July 14, 2005, p. 127:5-24, p. 133:18-25, p. 134:3-8, p. 140:15-25, p. 141:1-2,  
p. 143:12-15, p. 170:11-25, p. 171:1-12, p. 172:1-21, p. 200:4-18, p. 201:1-2, p. 236:3-10, p. 248:22-25, p. 249:1-5,  
23 [Exhibit 10] and Senoff Depo, Vol. 2, dated December 16, 2008, p. 312:1-25, p. 313:1-10. [Exhibit 10]

24 <sup>29</sup> Q Why do you think that they should give you the money back? (objection) THE WITNESS: I'm paying  
for a name that doesn't exist. (McDougal Depo, p. 197:8-12, [Exhibit 8])

25 Gold Shield Amendment to MBE Franchise Agreement ¶ 2 (Exhibit 16); Gold Shield Amendment to MBE  
Franchise Agreement, p. 5 (III. 2), [Exhibit 16]), 8 February 2003 Summary of New Gold Shield Program (Exhibit  
14).

26 <sup>30</sup> Gold Shield Amendment to MBE Franchise Agreement ¶ 3 (Exhibit 16); Gold Shield National Rollout  
Frequently Asked Questions, p 5, [Exhibit 15]; 8 February 2003 Mail Boxes Etc., Summary of New Gold Shield  
Program, p. 6 (III ¶ 3 ), [Exhibit 14].

27 <sup>31</sup> Mail Boxes Etc., Inc. Franchisee UPS Incentive Program Contract Carrier Agreement, p. 2, ¶ 4, (Exhibit  
13); Mail Boxes Etc. Center Operations Manual Gold Shield Program-The UPS Store Program (2/12/03), Provide  
28 the UPS Shipping Service Solution, (Exhibit 17).

1 model to one that mandates shipping through UPS.<sup>32</sup>

2 **C. Limited Live Testimony**

3 Franchisees will testify they were induced to make a long term commitments to building  
4 the Mail Boxes Etc system as the result of the franchise agreement renewal clause because it  
5 granted them the right to renew the original 10 year term for successive 10 year periods. They  
6 will also testify that the right to renew every ten years coupled with the right to transfer also  
7 induced them to make the long term commitment to building their franchises and the franchise  
8 system as a whole because the right to transfer gave them the ability to build long term value into  
9 their franchise.

10 The franchisees will testify they were induced to enter into the franchise agreements and  
11 then to actively build the franchise, by the fact that they would and did enjoy independence  
12 before UPS took over to operate their Mail Boxes Etc stores, within an exclusive territory, set  
13 their own prices and select the vendors with whom the franchisees did business.

14 Franchise Expert Kushell will testify that renewal clause is used in the industry to induce  
15 franchisees to make the long term commitment to build the franchise. He will testify that the  
16 right to renew is used to induce franchisees to make substantial investments in their franchises,  
17 the franchise system and the franchise brand name by creating an expectation that the franchisees  
18 would be able to operate their franchises long enough to recoup their investments. The franchise  
19 expert will also testify that the right to renew is coupled with the right to transfer in order to  
20

21 <sup>32</sup> Mail Boxes Etc., Inc. Franchisee UPS Incentive Program Contract Carrier Agreement, p. 2, ¶ 4, (Exhibit  
22 13); Mail Boxes Etc. Center Operations Manual Gold Shield Program-The UPS Store Program (2/12/03), Provide  
the UPS Shipping Service Solution, (Exhibit 17).

23 Q. Why aren't you considering converting and selling as a UPS store? THE WITNESS: When we  
24 purchased our franchise, we bought a business model that allowed us to be independent business owners. We could  
25 set our own prices. We could use the vendors that we chose. We could set our hours. We could wear what we  
26 wanted to wear and have our employees wear what we wanted them to wear. The Gold Shield program requires a  
27 different model. It allows my franchisor now to set my prices in shipping. I have to use the vendors they select.  
28 They tell me what to wear. They tell me what hours to be open. They tell me even how I must address my  
customers when they come in the front door. Prior to Gold Shield, I had a franchisor that protected my name brand,  
a brand that I relied upon when I purchased my Mail Boxes Etc. They advertised the name brand and they spent  
considerable amount of effort to enhance the name brand. In short, they cherished the name brand. Moreover, they  
provided me marketing materials where I could do the same thing to enhance the name brand for my customers in  
my territory. I now have a franchisor that no longer advertises the name brand, no longer provides me marketing  
materials of any quality. The few things that they have provided me have been of either poor quality, a regurgitation  
of things from the past or they're in UPS colors. (Sanford Depo, pp. 73:6-25-74:12, Exhibit 9)]

1 induce franchisees to make the long term commitment to their franchises and the franchise  
2 system by building a long term value in their franchises which they can realize by selling or  
3 transferring it in the future.

4 **D. Plaintiffs' Exhibit List for Trial**

5 Plaintiffs G.I. McDougal, Inc., Martin Senoff, Inc. and Sanford Industries, Inc.

6 (“Plaintiffs”) their Proposed Exhibit List for the bifurcated phase one of trial as follows:

7 Ex. 1 G. I. McDougal, Inc.’s Mail Boxes, Etc. Franchise Agreement, version FA/REG  
8 0693.

9 Ex. 2 Martin Senoff, Inc.’s Mail Boxes, Etc. Franchise Agreement, version FA/REG  
10 0693.

11 Ex. 3 Sanford Industries, Inc.’s Mail Boxes, Etc. Franchise Agreement, version  
12 FA/REG 0693.

13 Ex. 4 1993 Uniform Offering Circular.

14 Ex. 5 1994 Uniform Offering Circular-2002 Uniform Offering Circular.

15 Ex. 6 Document entitled Mail Boxes Etc. Strategic Overview.

16 Ex. 7 Deposition of Anthony DeSio, dated June 2, 2004, p. 13:20-14:3, p. 14:9-19, p.  
17 15:13-18, p. 36:1-8, p. 37:3-14-23, p. 39:23-25, p. 44:25-45:4, p. 45:12-25, p. 46:24-47:3.

18 Ex. 8 Deposition of Gil McDougal, dated June 17, 2005, p. 22-24, p. 26-27, p. 31-34, p.  
19 45-47, 57-58, 69, p. 132, 196-198.

20 Ex. 9 Deposition of Gene Sanford, dated July 12, 2005, p. 52:18-53:2, p. 73:6-25-74:12.

21 Ex. 10 Deposition of Martin Senoff, v. 1 dated July 14, 2005, p. 22:1-24, p. 27:20-24, p.  
22 29:12-14, p. 30:11-19, p. 31:24-25, p. 32:1-6, p. 33:25, p. 34:1-25, p. 38:4-17, p. 42:3-19, p.  
23 46:14-20, p. 51:10-25, p. 52:1-25, p. 53:1-9, p. 59:1-16, p. 66:16-25, p. 67:1-7 p. 74:12-24, p.  
24 86:9-25, p. 87:1-2, p. 127:5-24, p. 133:18-25, p. 134:3-8, p. 140:15-25, p. 141:1-2, p. 143:12-15,  
25 p. 170:11-25, p. 171:1-12, p. 172:1-21, p. 200:4-18, p. 201:1-2, p. 236:3-10, p. 248:22-25, p.

26 249:1-5; Deposition of Martin Senoff, v. 2 dated December 16, 2008, p. 312:1-25, p. 313:1-10.

27 Ex. 11 Deposition of Stuart Mathis, dated March 16, 2006, p. p. 1:1-5:25, p. 8:1:25, p.  
28 9:1-25, p. 11:12-25, p. 12:1-7, p. 15:20-25, p. 16:1-3, p. 18:17-25, p. 19:1-5, p. 35:25, p. 36:1-8,

1 p. p. 37:4-12, p. 38:1-16, p. 85:15-25, p. 86:1-23, p. 90:8-23, p. 91:20-25, p. 92:1-19, p. 126:12-  
2 25, p. 127:1-16, p. 143:24-25, p. 144:1-25, p. 145:1.

3 Ex. 12 Amendment to Plaintiffs' franchise agreement providing for the establishment of  
4 the National Media Fund, bated MBEM0140156 through MBEM0140164.

5 Ex. 13 Copy of the UPS Carrier Contract Agreement presented to MBE franchisees in  
6 February 2003 as part of the Gold Shield conversion, Bates numbered DTWO001209 –  
7 DTWO001218.

8 Ex. 14 Copy of the document entitled "Summary of New Gold Shield Program," as part  
9 of the Gold Shield conversion dated February 8, 2003, Bates numbered UPS-01-0001 – UPS-01-  
10 0014.

11 Ex. 15 Copy of the Gold Shield Frequently Asked Questions dated February 8, 2003,  
12 provided to franchisees as part of the Gold Shield conversion, Bates numbered UPS-03-0001-  
13 UPS-03-0011.

14 Ex. 16 Copy of the Gold Shield Amendment to the MBE Center Franchise Agreement  
15 provided to franchisees as part of the Gold Shield conversion, Bates numbered UPS-01-0016-  
16 UPS-01-0020.

17 Ex. 17 Copy of portions of the UPS Store Center Operations Manual, as produced by  
18 Defendants in this litigation, bates numbered UPS-NB-00089-UPS-NB00055.

19 Ex. 18 2005 UPS Store Uniform Franchise Offering Circular.

20 Ex. 19 Document entitled UPS Acquisition of Mail Boxes Etc. Board of Director  
21 Briefing, dated March 15, 2001, Bates numbered, UPS-02-001-UPS-02-024.

22 Ex. 20 Relevant portions of the Mail Boxes Etc., and United Parcel Service General  
23 Services Co., Asset Purchase Agreement dated March 2, 2001, bates numbered MBEM-  
24 0046944-MBEM0047080. (Due to the length of this document, Plaintiffs herein are submitting  
25 only a portion of the Asset Purchase Agreement. If the court or the parties require the entire  
26 document, Plaintiffs will lodge the entire document with the court.)

27 Ex. 21 February 2003 Gold Shield Legal Memorandum, bates numbered MBE-N 21444  
28 through MBE-N 21449.

1 Ex. 22 UPS Retail Channel Management Strategy Development Project Update, dated  
2 December 7, 2001, bates numbered UPS-12-0067-UPS-12-0095.

3 Ex. 23 Deposition of Mark Siris, dated September 30, 2005, p. 1:1-5:25, p. 6:1-25, p.  
4 7:1-20, p. 10:15-25, p. 11:1-12, p. 12:13-25, p. 13:1-25. p. 14:1-25, p. 15:11-25, p. 16:1-25,p.  
5 17:1-25, p. 118:14-25, p. 119:1-25, p. 120:1-13, p. 158:13-25, p. 159:2-8, p. 172:23-25, p. 173:1-  
6 3, p. 174:22-25, p. 175:1-5, p. 176:1-3, p. 177:6-20, p. 178:14-178, p. 179:1.

7 Ex. 24 Deposition of Bruce Mack, Volume 1, May 23, 2006, p. 1:1-6:9, p. 8:1-18, p. 9:5-  
8 18, p. 11:1-25, p. 14:5-19; Deposition of Bruce Mack, Volume 3, May 24, 2006, p.257:1-25, p.  
9 258:1-25.

10 Ex. 25 Deposition of Jim Amos, dated June 15, 2006, p. 1:1-5:25, p. 18:20-25, p. 19:1-  
11 25, p. 24:21-25, p. 41:16-25, p. 54:19-23, p. 60:9-24, p. 61:6-24, p. 66:6-11, 20-25, p. 67:1-7, 14-  
12 23, p. 93:13-25, p. 94:1-13, p. 97:22-25, p. 98:1-25, p. 99:1-17, p. 100:1:17, p. 101:10-25, p.  
13 102:9-25, p103-106:21, p. 111:15-25, p. 112:1-9, p. 113:21-25, p. 114:1-8, p. 115:1-7, p. 121:15-  
14 22, p. 124:24-25, p. 125:1-25, p. 125:1-26, p. 127:1-8, p. 138:7-25, p. 140:15-25, p. 141:1-6, 13-  
15 22, p. 15:12-17, 23-25 p. 151:1-20, p. 163:14-24, p. 164:1-25, p. 165:1-22, p. 173:13-24 p.  
16 176:17-25.

17 Ex. 26 Deposition of Sherrie Wehner, dated April 21, 2006, p. 128:1-25, p. 129:1-25, p.  
18 130:1-87.

19 Ex. 27 Deposition of Thomas Crockett, dated January 13, 2009, p. p. 1:1-6:25, p. 7:15-  
20 25, p. 8:1-25, p. 9: 8-25, p. 10:1-25 p. 11:1-19, p. 17:16-20, p. 24:1-25, p. 25:1-6, p. 26:2-22, p.  
21 47:1-7, p. 48:1-25, p. 49:1-25, p. 67:16-20, p. 148:5-25, p. 149:1-25, p. 150:1-25, p. 151:4-25, p.  
22 154:4-25, p. 206:10-25, p. 207:1-25, p. 265:22-25, p. 267:1-25.

23 Ex. 28 BCG Report produced by Defendants, bates numbered BCG 000924, BCG  
24 000945, BCG 000958, TMBE001126-1135, TMBE001220, TMBE001453.

25 Ex. 29 Deposition of Craig Stewart, dated April 4, 2006, p. 1:1-5:5, p. 6:1-25, p. 7:13-20,  
26 p. 8:10-14, p. 14:9-25, p. 15:1-12, p. 153:5-23.


27 Ex. 30 2003 UPS Store Uniform Offering Circular.  
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Dated: June 5, 2009

GORDON & REES LLP

By:   
H. Scott Sirlin  
Amy Darby  
Attorneys for Plaintiffs  
Morgate LLC, et al.

1 PROOF OF SERVICE

2 I am a resident of the State of California, over the age of eighteen years, and not a party  
3 to the within action. My business address is: 633 West Fifth Street, Suite 4900, Los Angeles,  
4 CA 90071. On June 5, 2009, I served the within documents:

5 **PLAINTIFFS' OFFER OF PROOF AND PROPOSED EXHIBIT LIST FOR**  
6 **BIFURCATED TRIAL OF 1993 PLAINTIFFS**

7 \*\*exhibits to be personally served

8  by transmitting via electronic mail the document(s) listed above to the e-mail address  
9 set forth below on this date before 5:00 p.m.

10  by placing the document(s) listed above in a sealed envelope with postage thereon  
11 fully prepaid, in United States mail in the State of California at Los Angeles,  
12 addressed as set forth below.

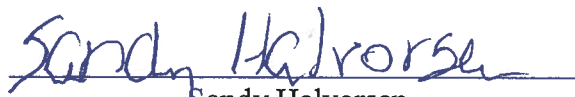
13  by placing a true copy thereof enclosed in a sealed envelope, at a station designated  
14 for collection and processing of envelopes and packages for overnight delivery by  
15 FedEx as part of the ordinary business practices of Gordon & Rees LLP described  
16 below, addressed as follows:

17 Jane H. Barrett  
18 Mark R. McDonald  
19 Morrison & Foerster LLP  
20 555 West Fifth Street, 35th Floor  
21 Los Angeles, CA 90013-1024  
22 Telephone: (213) 892-5200  
23 Fax: (213) 892-5454  
24 Jbarrett@mofocom  
25 mmcdonald@mofocom

26 I am readily familiar with the firm's practice of collection and processing correspondence  
27 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same  
28 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
motion of the party served, service is presumed invalid if postal cancellation date or postage  
meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above  
is true and correct.

Executed on June 5, 2009, at Los Angeles, California.

  
Sandy Halvorsen