

## **7-Eleven Franchisees Score Major Victory in the Ninth Circuit**

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Today, the United States Court of Appeals for the Ninth Circuit vacated both of the previous District Court decisions in favor of SEI in this consolidated appeal, and sent the entire matter back to the District Court. Shannon Liss-Riordan of Lichten & Liss-Riordan, P.C., Boston, Massachusetts represented the Plaintiffs on the appeal and will be representing the Plaintiffs going forward.

The first case (the Misclassification Case) was filed in October 2017. The central allegation in the Misclassification Case is that the pervasive controls that SEI exercises over nearly every single aspect of the day-to-day operations of franchised locations makes them employees in the eyes of the law, as well as other legal factors. On March 14, 2018, Judge Walters of the United States District Court for the Central District of California issued a Judgment on the Pleadings, dismissing all of the Plaintiffs' claims. The Plaintiffs promptly appealed to the Ninth Circuit

The second case (the Injunction Case) was filed in June 2018 and sought an injunction against SEI from forcing franchisees to sign releases of claims as a condition of renewing their franchise agreements. The central allegation of the Injunction Case is that such releases of claims are invalid under California law. A different District Court judge, Judge Fischer, heard the application and in October 2018 denied the request for an injunction against such releases. The Plaintiffs then promptly appealed this case as well to the Ninth Circuit, asking that it be considered on an expedited basis.

The Ninth Circuit consolidated and, at the Plaintiffs' request, expedited the appeals. Oral argument was held on the consolidated appeals on February 13, 2019<sup>1</sup> and just two weeks later, the Ninth Circuit issued its Memorandum of Decision.

Here is a summary of the Ninth Circuit decision:

### **Misclassification Case**

- Judge Walters' decision in favor of SEI and against the Plaintiffs was vacated in its entirety, and thus has no longer any legal effect-as if it was never issued in first place.
- The Ninth Circuit said that Judge Walters made two very important errors of law.
  - First, he made his own determination of the persuasiveness of plaintiff's factual allegations rather than the plausibility of their legal claims. This he is not permitted to do at such an early stage of the case.

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<sup>1</sup> You can view the oral argument here: [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000015129](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015129)

- Second, the court focused only on the control exercised by reason of the franchise agreement and ignored Plaintiffs' extensive allegations regarding actual control exercised on a day-to-day basis.
- The Ninth Circuit impliedly criticized Judge Walters for not awaiting the outcome of the Dynamex case, which was decided just six weeks later. Dynamex is a decision of the California Supreme Court which adopted the Massachusetts ABC Test to determine whether a person is an employee or independent contractor. This decision presumes that all workers are employees and shifts the burden to the employer to prove, among other things, that the worker is free from control and direction in connection with the performance of the work.
- The Ninth Circuit left to the District Court the determination of whether or not Dynamex applies to franchisees and whether it should be applied retroactively. The Ninth Circuit strongly suggested that the District Court should await the outcome of the appeal pending in the Ninth Circuit in Vasquez v. Jan-Pro Franchising, which may decide whether Dynamex applies to franchisees. Oral argument on that case was held on December 18, 2018. Attorney Liss-Riordan also represents the plaintiffs in that case and argued the appeal.
- The case was sent back to the District Court for further proceedings.

### **Injunction Case**

- Judge Fischer's denial of preliminary injunctive relief was also vacated by the Ninth Circuit-as if that ruling had also not occurred.
- The Ninth Circuit provided something of a roadmap to the District Court which has been directed to reconsider the Plaintiffs' request for injunctive relief "on an expedited basis".
- In particular, the Ninth Circuit rejected all three of the separate arguments made by SEI regarding the releases it has already secured or is seeking from California franchisees. More specifically, the Ninth Circuit pointed out to the District Court that
  - Case law involving typical releases of claims at renewal of franchise agreements do not apply to wage and hour claims.
  - Such wage and hour claims can only be settled by release and payment-which did not happen here.
  - The contractual obligation to furnish a release upon renewal may not override California's prohibition on contractual waiver of wage and hour claims.

In addition, the Ninth Circuit awarded the cost of the appeal to the Plaintiffs. This aspect of the Memorandum is limited and permits Plaintiffs to recover only filing fees and printing/copying costs of the appeal.

Where does the case go from here? Three steps are likely to take place in the near future:

- The Misclassification Case and the Injunction Case are likely to be consolidated in front of a single judge in the District Court

- The District Court will now decide the release issue, based on the Ninth Circuit's guidance.
- The District Court will likely await the outcome of the Jan-Pro Franchising case, which may provide guidance on the disposition of the Plaintiffs' cases.

In the meantime, we encourage franchisees not to sign a new franchise agreement any earlier than they have to, so as to await the District Court's new ruling on the release issue.