Why It's Tough to Have Hard-and-Fast Rules About Operations Manuals

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A basic requirement of franchise disclosure laws is that franchisees be informed of all material obligations pertaining to a franchise before purchasing. Yet franchisors also have legitimate interests in making periodic modifications to their agreements and in maintaining the confidentiality of their systems. The franchise operations manual is often seen as the best means of addressing these conflicting objectives, but does it really work?

An inherent tension exists between the use of operations manuals to impose obligations on franchisees and franchise statutes and case law in many states. Indeed, if a franchisor materially alters a franchisee's obligations by revising an operations manual, that action could provide grounds for rescinding the franchise agreement in some states. In cases involving changes to promotional programs by Super 8 Motel and Burger King, courts have reached seemingly irreconcilable conclusions about the permissible use of operations manuals.[1]

The current Federal Trade Commission (FTC) Franchise Rule (FTC Rule) and Franchise Disclosure Document (FDD) guidelines suggest that franchisors disclose their operations manual's table of contents or permit prospective franchisees to view the operations manual prior to purchase. But each option has its own risks. Moreover, in some cases, too much disclosure in operations manuals has been cited as running the risk that the franchisor could be held vicariously liable for its franchisees' conduct.

This article surveys the statutes and case law concerning operations manuals and considers how to address inherently conflicting goals: (1) how to maintain uniformity while keeping franchisor and franchisee liabilities separate and distinct and (2) how to preserve confidentiality while complying with disclosure laws.

OPERATIONS MANUALS PLAY AN ESSENTIAL ROLE

Operations manuals have been characterized as "'"a veritable bible for overseeing a [franchise] operation . . . contain[ing] prescriptions for every conceivable facet of the business.'"[2] As the New Jersey Supreme Court elaborated in one typical case,

> "[T]he franchisees [are required] to operate their stores in accordance with a Standard Operating Procedure Manual (SOP). This SOP . . . describes the products which the operators may sell at their store, the advertising which they may use, the color they must paint their store, the hours when they must put on their lights, the amount of insurance they must carry, the colors of their employees' uniforms, and many other details. To the public the individual franchise operator appears to be part of a national organization which manufactures and distributes a limited type of products of uniform quality. . . .
>
> . . . It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product. . . .[3]

The need for an operations manual is readily apparent. A franchise system derives its goodwill from the quality and uniformity of goods and services associated with the franchisor's trademark. But unlike other businesses that deliver products or services, in order to maintain that quality and uniformity, a franchisor depends upon the efforts of its many independent franchisees to replicate the franchise model. The only feasible way to communicate to all franchise constituents the details of the operations they need to know is through the use of manuals.

Manuals may evolve over time to help franchise systems address changes in consumer preferences, replace outmoded computer or information technology systems, comply with new regulations, or deal with other events. Yet that is when disputes typically arise—when a franchisor updates its image or products through the use of operations manuals or announces new specifications or marketing programs in revised manuals. This is particularly true if the changes impose new financial or other burdens on franchisees.[4] Whether operations manuals are up to the task varies widely from state to state and court to court.

HOW MUCH CAN MANUALS BE CHANGED?

Franchise statutes in several states limit a franchisor's ability to modify franchise agreements. In California, the Franchise Investment Law generally provides:

> [I]t is unlawful to solicit the agreement of a franchisee to a proposed material modification of an existing franchise without first delivering to the franchisee a written disclosure . . . identifying the proposed modification, either five business days prior to the execution of any binding agreement by the franchisee to the modification or containing a statement

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> that the franchisee may, by written notice mailed or delivered to the franchisor or a specified agent of the franchisor within not less than five business days following the execution of the agreement, rescind the agreement to the material modification.[5]

Franchisors that are otherwise exempt from California's registration requirements are required to follow a similar procedure and to identify any material modifications, after which the franchisee may rescind "if the franchisee, within 10 business days after the receipt of such writing identifying the material modification, notifies the franchisor in writing that the agreement to such modification is rescinded."[6] North Dakota and Tennessee have enacted similar statutes,[7] and car dealership franchise statutes in many states also include comparable procedural disclosure and acceptance requirements before material changes to franchise agreements may be implemented.[8]

A number of franchise laws in other states permit modification to franchisees' obligations under franchise agreements only if they are "not material," the implication being that material modifications would require some form of disclosure and acceptance procedure.[9] Other states may prohibit the use of operations manuals to alter or supplement franchise agreement terms only to the extent that the practice amounts to unreasonable implementation of standards or termination without cause. Under the New Jersey Franchise Practices Act, a franchisor cannot "impose unreasonable standards of performance upon a franchisee." This has been an issue when the allegedly unreasonable standards were imposed in operations manuals.[10] Connecticut, Hawaii, and Nebraska have similar statutory prohibitions on "unreasonable standards."[11]

Some of these statutory rights, particularly California's notification and rescission procedures, might look like an enormous impediment to a franchisor's ability to change its systems. How, for example, can a franchisor be expected to address the realities of necessary and perhaps costly updates to software systems if it needs to go through the cumbersome process of obtaining franchisee consent and offering the opportunity to rescind? In practice, however, what the statutes give franchisees, the statutes may also take away or, at the very least, severely limit.

In *In re ConocoPhillips Co. Service Station Rent Contract*,[12] upon renewing gasoline service station dealers' franchise agreements, a franchisor sought to increase the dealers' rent and to charge credit card processing fees. The dealers argued, among other things, that the change in terms violated § 31101 of the California Franchise Investment Law regarding modifications to franchise agreements. The *ConocoPhillips* court found that § 31101 did not give rise to a claim. According to the court, all the statute provides is that if a franchisor gives notice of material modifications, franchisees can object and leave the system, or they can acquiesce to the change. They do not have a right to pursue a suit for monetary damages based on the franchisor's failure to make disclosures required by the statute.[13]

ALTERING FRANCHISEE OBLIGATIONS

In most of the cases involving modifications to franchise agreements, parties and the courts have assumed without analysis that franchisors may unilaterally alter franchisee obligations through the use of operations manuals. Yet, when courts have directly addressed whether it is permissible for a franchisor to do so, the outcomes have varied widely.

At one extreme are cases such as the recently decided *Bird Hotel Corp. v. Super 8 Motels, Inc.*[14] In *Bird Hotel*, Super 8's original franchise agreement required franchisees to comply with the franchisor's existing rules of operation as well as any revisions to the rules that the franchisor adopted from time to time. The franchisor had an existing promotional program in which Super 8 franchisees were required to pay a 2 percent room rate fee and offer 10 percent discounts to patrons who participated in the program. Years later, a successor to the original franchisor required franchisees to participate in a new rewards promotional program that offered patrons redeemable points that could be used in exchange for various perks, including free overnight stays at the franchisees' lodgings or other establishments in the franchisor's other franchise systems. Although franchisees no longer had to offer participants rooms at a 10 percent discount, they had to pay a fee of 5 percent of gross room rates to participate in the new rewards program.

A franchisee objected to the new fee and filed a class action in South Dakota federal court. The franchisor contended that the franchise agreement permitted changes to its system through modifications to its rules of operation. Specifically, the agreement provided the following:

> FRANCHISOR and FRANCHISEE recognize that the wisdom and practicality of all rules for the operation of the System may require amendment from time to time as a result of experience, and they therefore agree that FRANCHISOR may, from time to time, make revisions in or amendments to such rules of operation which FRANCHISOR shall apply uniformly to all Super 8 Motels, including those owned and operated by FRANCHISOR, and FRANCHISEE agrees to comply with all such revisions and amendments.[15]

The franchisor also cited a number of cases in which revisions to systems were accomplished through use of manuals. The *Bird Hotel* court agreed with the franchisee that use of operations manuals to implement a new fee was impermissible:

> Even if Super 8 has retained the right in the Agreement to change its system standards and rules of operation and its customer loyalty program detailed therein, it may not unilaterally impose a fee for the operation of that program greater than what is provided for in the language of the Agreement. . . . The Court agrees with Bird Hotel and finds that [increasing the fee] amounts to a unilateral revision of the terms of the contract and not, as argued by Super 8, to a revision of the system standards and rules of operation.[16]

A similar conclusion was reached, at least initially, in *Bores v. Domino's Pizza LLC.*[17] In *Bores*, the franchise agreement permitted franchisees to use alternatives to the franchisor's computer system, but the franchisor contended that its amended operating manual mandated the use of the franchisor's system only. The federal district court rejected the franchisor's argument, holding that "Domino's cannot circumvent the clear and express language of Section 8.2 [allowing alternative computer systems] simply by deeming PULSE a 'Standard' in the Operating Manual."[18] On appeal, the Eighth Circuit reversed the decision on other grounds concerning interpretation of the original franchise agreement. Significantly, however, the appeals court avoided resting its decision on whether operations manual amendments might also justify Domino's conduct, implying it may have viewed the lower court's opinion in that regard as correct.

At the other end of the spectrum are cases such as *Trail Burger King, Inc. v. Burger King of Miami, Inc.*[19] In *Trail*, the franchisor modified standards concerning the amount of meat to be included in hamburgers, among other standards. Although plaintiff contended that such modifications could only be made by mutual agreement in writing, the *Trail* court disagreed. According to the court, an object of the franchise agreement was to achieve uniformity among Burger King restaurants. To accomplish that uniformity, the agreement permitted Burger King to dictate the standards and specifications that franchisees were required to follow or else face termination.[20]

Although *Trail* was decided before the enactment of the FTC Rule and state relationship statutes, it continues to be cited by those courts that have found nothing wrong with franchisors altering their systems, even to the financial detriment of franchisees.[21]

A similar outcome was reached in the post–FTC Rule opinion *Remus v. Amoco Oil Co.*[22] In *Remus*, a gasoline dealer franchise implemented a new program providing a discount to patrons who purchased gas for cash instead of by credit card. Plaintiff argued that the change violated Wisconsin's Fair Dealership Law. The *Remus* court rejected the argument. According to the court, the law was not meant to require that franchisors seeking to implement systemwide changes obtain unanimous consent of their franchisees: "Such a law [would] completely transform the relationship of franchisor and franchisee—much as a law which said that a company could not alter its prices or products without its employees' consent would completely transform the employment relationship. . . ."[23]

The *Remus* court then pointed out that the franchisees' contention that their consent was required would not serve franchisees as a whole. Even if a proposed change in the system would benefit most franchisees, a "handful of dissenters" could block it.[24]

More recently, in *La Quinta Corp. v. Heartland Properties LLC*, a hotel franchise decided to upgrade its computerized reservations system, which necessarily imposed costs of purchase, installation, and training on franchisees. One of the franchisees that objected on various grounds ultimately never implemented the new system and was terminated for that reason. The terminated franchisee argued that the new system "effected 'significant changes' and imposed additional demands on franchisees such as itself, beyond those contained in the License Agreement."[25] Because the franchisor had not obtained the franchisee's consent to the material changes that were imposed, the franchisee asserted that the franchisor committed an anticipatory breach of the agreement, thereby excusing further performance by the franchisee. The Sixth Circuit rejected the argument:

> Baymont's implementation of the [Reservations] System with its attendant costs was fully contemplated and permitted under the unambiguous terms of the License Agreement. [T]he License Agreement expressly gave Baymont the right to add, amend, and/or delete System Standards, including the reservation system, and required Heartland to participate in and bear such costs.[26]

Accordingly, the *La Quinta* court held that the franchisee, not the franchisor, had breached the contract. The court also rejected the franchisee's claim for breach of the covenant of good faith and fair dealing.[27]

A MIDDLE GROUND

Somewhere in the middle are those cases in which courts have allowed franchisors to modify franchisee obligations through the use of operations manuals only if the new standards are reasonable or imposed in good faith, whether based on franchise statutes[28] or based on similar common law principles. As one court observed, "It is without doubt that if a franchisor manipulates the system causing a franchisee's breach so that a Franchise Agreement is terminated, the termination occurs without good cause. . . ."[29] Thus, if a franchisor were to establish new impossible standards as a ruse to justify terminating a particular franchisee, the consensus is that such standards would be impermissible. However, where there is no egregious conduct of that sort by a franchisor, will changes to the franchise system that are accomplished through the use of operations manuals nevertheless be held unreasonable and therefore invalid? Does a franchisee have to establish that the franchisor actually implemented the changes in bad faith?

In *Huang v. Holiday Inns, Inc.*,[30] the parties' agreement required compliance with a "Standards Manual" and specifically contemplated "'substantial modernization, rehabilitation and other 'upgrading' of the Inn from time to time,' subject to the caveat that any change in the standards shown to be arbitrary and capricious would be rescinded by the Licensor."[31] The *Huang* court enforced the agreement according to its terms, holding that only newly adopted conditions "by which a franchisor might extort its own profit at the expense of the profits of the franchisee" would be unenforceable. Because the violations at issue concerned maintenance, cleanliness, and safety of the hotel, the court found that "the defendant was merely insisting on compliance with lawful requirements set forth in the License Agreement with plaintiffs, and provided plaintiffs with a reasonable period of time in which to bring the hotel into compliance."[32]

Usually, these cases concern not only claims that the franchisor's altered standards were unreasonable or arbitrary but that they also resulted in significant financial hardship to the franchisee. For example, in *Beilowitz v. General Motors Corp.*,[33] a franchisee had been an authorized distributor of GM auto parts without territorial restriction for twenty-three years. In 2002, GM introduced a new marketing program that would call for severe restrictions on the territory in which the franchisee could sell the GM products. As a result of the new program, the franchisee would be sacrificing $11 million, or 40 percent, of its overall sales. Relying on the New Jersey statute proscription against "impos[ing] unreasonable standards of performance upon a franchisee," the *Beilowitz* court ruled in the franchisee's favor: "It is clearly an 'unreasonable standard of performance' within the meaning of the [New Jersey franchise statute] to require a franchisee to operate at a substantial financial loss while the franchisor attempts to implement a new and unproven marketing strategy."[34]

More recently, in *Burger King Corp. v. E-Z Eating, 41 Corp.*,[35] the court reached the opposite conclusion regarding the imposition of financial burdens on the franchisees. In *E-Z Eating*, Burger King had introduced a new "Value Menu" as a modification to its operating manual's standards, specifications, and procedures. Previously, franchisees had generally been permitted to determine the price of menu items in their market. Now they were required to offer the Value Menu at uniformly set, low prices, arguably causing them to incur losses. Although no statute specifically prohibited or limited the imposition of new standards, the franchise agreement provided that the franchisor's discretion to impose new standards could not exceed the bounds of good faith. Some of the franchisees that were terminated for failing to adopt the Value Menu filed a lawsuit in a Florida district court. Burger King moved for summary judgment.

The franchisees argued that (1) adopting the Value Menu frustrated the purpose of the franchise agreements, and (2) Burger King breached the covenant of good faith and fair dealing in refusing to grant them exceptions to the new pricing. The district court and the Eleventh Circuit on appeal rejected plaintiffs' arguments. As the Eleventh Circuit pointed out, the franchise agreements contemplated that changes in standards and procedures would be made as necessary in the future, and franchisees agreed in advance to "accept and comply with such modifications, revisions and additions to the . . . Manual which [Burger King] in the good faith exercise of its judgment believes to be desirable and reasonably necessary."[36] Accordingly, the court held that Burger King "had the power and authority under the Franchise Agreements" to require that franchisees implement the Value Menu.[37]

Despite the *E-Z Eating* opinion, an association of Burger King franchisees again raised questions about the Value Menu's legitimacy in *National Franchisee Ass'n v. Burger King Corp*.[38] One of the first questions the court had to decide was whether the issue had already been resolved by *E-Z Eating*. The Florida district court held that, in part, the issue had already been determined. But it went on to hold that the fact that the franchise agreement gave Burger King the power and authority to impose prices did not resolve the question of whether Burger King actually exercised good faith in doing so, based on the new facts alleged. In this case, plaintiffs alleged that Burger King had admitted that its subsequent inclusion in the Value Menu of double cheeseburgers for $1 could lead to some franchisees' bankruptcy. Unlike other items that had previously been included in the Value Menu, a double cheeseburger cost more than $1 to make, so losses on those sales were guaranteed. Given the additional allegations and the alleged admission that Burger King was aware that the new program could result in franchisees' bankruptcy, the *Burger King* court allowed the case to go forward.[39]

VICARIOUS LIABILITY

The most extensively litigated issue involving franchise operations manuals has concerned whether a franchisee may be considered to be the franchisor's agent and, therefore, whether vicarious liability may be imposed on the franchisor for the franchisee's acts. The conventional wisdom is that the more exhaustive the operations manual is about how the franchised venture is to be run, the more this demonstrates control by the franchisor over the manner of the franchisee's performance, therefore providing a stronger basis for holding the franchisor liable for the franchisee's acts.[40]

For example, in *Viado v. Domino's Pizza, LLC*,[41] a pizza franchise's operations manual contained detailed rules on how to run the business and said that one goal was to ensure that pizzas were delivered within thirty minutes. Plaintiff, a motorcyclist who had been injured by a franchisee's delivery driver, argued that the franchisor should be vicariously liable for his damages just as the franchisee would be as an employer of the driver. The Oregon Court of Appeals found that the operations manual might establish an agency relationship between franchisor and franchisee. But it went on to draw a distinction between an agency relationship between two businesses and that between an employer and an employee. According to the *Viado* court, where an agency relationship is not that of an employer and an employee, vicarious liability can only be established if the principal intended or authorized the manner or performance of the agent's act. The court held that although the franchisor established certain hiring criteria, that was a separate issue from whether it controlled the physical details of the driving of the franchisee's employee. Because the injury was alleged to be the result of the driving of the franchisee's employee, not because of any negligence regarding the franchisor-imposed hiring process, the *Viado* court held that vicarious liability of the franchisor could not be established.[42]

Although not all jurisdictions follow precisely the same reasoning adopted in *Viado*, cases in which franchisors have ultimately been held liable on agency principles based on the terms of the operations manual appear to be a minority. As one California court observed, "The cases, taken as a whole, impliedly recognize that the franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent."[43]

Nevertheless, in apparent concern about the potential imposition of vicarious liability, some franchisors have contended that their operations manuals merely contain suggestions and advisory guidelines, not mandatory rules.[44] Such contentions, however, can be problematic. A franchisor might encounter problems later trying to enforce policies and rules in its operations manual if the franchisor has conceded that the manual's terms are just suggestions about how to run the franchise. For example, courts accepting the contention that an operations manual does not impose mandatory obligations on a franchisee also might be persuaded that the franchisor could not "terminate the license agreement if a franchisee failed to meet specific . . . standards set forth in the [operations manual]."[45]

DISCLOSURE UNDER THE FTC RULE

The current FTC Rule adopted in 2007 and made mandatory as of July 1, 2008, largely incorporated the disclosure guidelines concerning operations manuals that had been in place under the pre-2007 requirements of the North American Securities Administrators Association, Inc. (NASAA). Specifically, the FTC Rule requires the following in Item 11 of the FDD:

> Disclose the table of contents of the franchisor's operating manual provided to franchisees as of the franchisor's last fiscal year-end or a more recent date. State the number of pages devoted to each subject and the total number of pages in the manual as of this date. This disclosure may be omitted if the franchisor offers the prospective franchisee the opportunity to view the manual before buying the franchise.[46]

One significant change from the NASAA guidelines concerned the alternative procedure in the last sentence of the paragraph. As the FTC explained,

> Under the UFOC Guidelines, a franchisor must disclose the table of contents of its operating manual unless "the prospective franchisee views the manual before purchase of the franchise." Because a franchisor is not likely to know whether a prospective franchisee has in fact viewed the manual, we can assume that many franchisors will elect to disclose the table of contents in all instances. Rather, to make this option meaningful, we believe the franchisor should be able to opt out of this disclosure if it provides a prospective franchisee with the opportunity to review the operating manual.[47]

One commentator voiced the opinion that with the revised language, the FTC Rule did not go far enough in ensuring that franchisees actually reviewed operations manuals before they signed on. In response, the FTC commented that it believed there would always be problems of proof in determining whether a prospective franchisee actually reviewed a manual. Even requiring that a franchisee initial each page of a manual would not necessarily establish that the prospect actually read the pages initialed. Accordingly, the FTC reasoned that the most it could require a franchisor to do would be to give a prospective franchisee the opportunity to review the manual.[48] However, going through the motions of offering a review of the manual would not suffice. As the FTC further wrote, "[T]he 'opportunity to review' a manual must be a reasonable one. A franchisor would not satisfy its disclosure obligation if, for example, it offered to show the manual to a prospect only if the prospect agreed to fly across country to the franchisor's corporate headquarters."[49] To satisfy its disclosure obligation, therefore, a franchisor would either have to provide a copy of the manual to the prospect in person or make it available online, and it would have to ensure that the prospect had enough time for a meaningful review of its contents.[50]

The FTC's inclusion of the alternative requirement that a franchisor offer franchisees the opportunity to review operations manuals is actually more solicitous of franchisees' concerns than some courts had been prior to the enactment of the new FTC Rule. In *Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc.*,[51] franchisees were terminated for failing to stock required products and for selling unauthorized products. The franchisees argued, among other things, that their franchise agreement was unconscionable and therefore unenforceable. In Colorado, unconscionability entails consideration of, among other factors, "lack of opportunity to read or become familiar with the document before signing it, . . . use of fine print . . . [and] unfair surprise and notice."[52] The franchisees argued that the agreement was unconscionable because they were not provided with the operations manual that included the standards that they were alleged to have violated. The *SDMS* court rejected that argument. According to the court, the franchisees were sophisticated parties, were represented by counsel, and "the Franchise Agreement clearly refers to [the] manual and tells franchisees that they must abide by it. Thus, Defendants were on notice of this and could have requested a copy."[53]

It is uncertain whether the *SDMS* holding would be considered good law under the revised FTC Rule. In light of the FTC's commentary, it is unlikely that a franchisor could simply wait and see if a prospective franchisee asks for a copy of the manual, if that is the way it intends to satisfy its disclosure obligations.

On the other hand, if a franchisor chooses to make the manual available to prospective franchisees, it will need to take precautions to ensure that sensitive information is kept confidential. At a minimum, prospective franchisees would have to execute a nondisclosure agreement before having access to the information. Controls would also have to be in place to guard against the prospect of exploiting the opportunity to copy the materials. If the prospect's access is to be through the Internet, this would mean that the franchisor would need to employ a system with sufficient encryption technology and tracking abilities. Choosing this option would definitely entail a host of added costs in the disclosure process.

However, it is not clear that disclosing only the manual's table of contents is the best choice. Even though the FTC Rule expressly provides for that option, such disclosure would not necessarily satisfy a franchisor's obligations under the FTC Rule in a given case. If the table of contents is written in the most general of terms, franchisees might contend that they were not alerted to significant costs or other burdens that were only spelled out in the text of the manual. Franchisors doing business in registration states may also be wary of disclosing too much detail in the descriptions in the table of contents, given that such portion of the document may be viewed by the public on the state's website. Franchisors must weigh these costs and risks associated with each alternative in determining how to address their disclosure obligations.

CONCLUSION

In each step of the franchising process in which operations manuals play an important part—whether it is compiling original manuals, initiating new standards through revised manuals, or disseminating their contents to potential franchisees—franchisors should be aware that competing goals are at play. Although a franchisor may seek to insulate itself from any potential liability for franchisee conduct under an agency theory, the franchisor must also consider whether designating standards as mere guidelines may undermine the franchisor's ability to enforce its standards. If failure to meet an obligation imposed under a standard is material enough to warrant termination, calling that standard an advisory guideline may be inappropriate.

Similarly, although operations manuals can allow a franchise system the flexibility to adapt quickly to changes in the franchise market, implementation of new programs that impose extreme financial or other burdens on franchisees might run afoul of the FTC Rule and state disclosure statutes and procedures. Consideration should therefore be given to whether disclosing the manual's table of contents alone is adequate to put franchisees on notice of additional obligations and expenses that may be required if standards or programs change.

This is not to suggest that offering an opportunity to review the entire manual is the only option in every case. If the franchise agreement itself sufficiently alerts franchisees to the nature of additional obligations and the range of costs that are contemplated, that may be sufficient, if the cases addressed previously are guidance. Moreover, if a franchisor does opt to disclose a manual's entire contents, the FTC's commentary regarding "meaningful" opportunity to review the manual should be kept in mind. If a meaningful opportunity for out-of-state franchisees can only be had via the Internet, the disclosing franchisor must take additional steps to ensure security.

ENDNOTES

1. Bird Hotel Corp. v. Super 8 Motels, Inc., 2010 WL 572741 (D.S.D. Feb. 16, 2010); Trail Burger King, Inc. v. Burger King of Miami, Inc. , 187 So. 2d 55 (Fla. Dist. Ct. App. 1966).

2. Viado v. Domino's Pizza, LLC, 217 P.3d 199, 207 n.6 (Or. Ct. App. 2009) (quoting Parker v. Domino's Pizza, Inc., 629 So. 2d 1026, 1029 (Fla. Dist. Ct. App.1993)).

3. Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 151 (N.J. 1992) (quoting Susser v. Carvel Corp., 206 F. Supp. 636, 640 (S.D.N.Y. 1962)).

4. *See*, *e.g.*, McLaughlin v. Krystal Co., 2009 WL 2514210, at *7 (S.D. Ala. Aug. 14, 2009).

5. Cal. Corp. Code § 31125(b).

6. Cal. Corp. Code § 31101(c)(2).

7. *See* N.D. Cent. Code. § 51-19-04; Tenn. Code Ann. § 47-25-1505.

8. *See, e.g.*, Fla. Stat. Ann. § 320.63; 815 Ill. Comp. Stat. 710/4; N.Y. Veh. & Traf. Law § 463(2)(ff); S.D. Codified Laws § 32-6B-69.

9. *See* Haw. Rev. Stat. § 482E-4; Mich. Comp. Laws Ann. § 445.1506 ; R.I. Gen. Laws § 19-28.1-6.

10. *See* N.J. Stat. Ann. § 56:10-7(e); Beilowitz v. Gen. Motors Corp., 233 F. Supp. 2d 631, 643 (D.N.J. 2002).

11. *See* Conn. Gen. Stat. Ann. § 42-133l; Haw. Rev. Stat. § 482E-6; Neb. Rev. Stat. § 87-406.

12. 2010 WL 2231875 (N.D. Cal. June 2, 2010).

13. *Id.* at *3.

14. 2010 WL 572741 (D.S.D. Feb. 16, 2010).

15. *Id.* at *7.

16. *Id.* at *8.

17. 489 F. Supp. 2d 940 (D. Minn. 2007), *rev'd on other grounds*, 530 F.3d 671 (8th Cir. 2008).

18. *Id.* at 948.

19. 187 So. 2d 55 (Fla. Dist. Ct. App. 1966).

20. *Id.* at 58.

21. *See* La Quinta Corp. v. Heartland Props. LLC, 603 F.3d 327, 337–38 (6th Cir. 2010) (collecting cases in which franchisor unilaterally altered franchise agreement terms). Cases cited in *La Quinta* may not have gone as far as implied by the Sixth Circuit's summary reference, however. In *Economou v. Physicians Weight Loss Centers of America*, 756 F. Supp. 1024 (N.D. Ohio 1991), for example, the opinion turned on a failure of proof by the franchisee that the alteration of standards in a diet system was causally connected to the damages claimed. *Id.* at 1028. This suggests that had damages been established, the use of manuals to accomplish franchisee obligations would have given rise to a claim.

22. 794 F.2d 1238 (7th Cir. 1986).

23. *Id*. at 1241.

24. *Id.*

25. *La Quinta*, 603 F.3d at 335.

26. *Id.* at 336–37.

27. *Id.* at 338–39.

28. *Id*.

29. Dunkin' Donuts Inc. v. Dough Boy Mgmt., Inc., 2006 WL 20521, at *11 (D.N.J. Jan. 3, 2006).

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30. 594 F. Supp. 352 (C.D. Cal. 1984).

31. *Id*. at 353–54 (quoting Franchise Agreement ¶ 5).

32. *Id.* at 358.

33. 233 F. Supp. 2d 631, 643–44 (D.N.J. 2002).

34. *Id.*

35. 572 F.3d 1306 (11th Cir. June 30, 2009).

36. *Id*. at 1308.

37. *Id*. at 1314.

38. 715 F. Supp. 2d 1232 (S.D. Fla. May 20, 2010).

39. *Id.* at 1245; *cf.* Oil Express Nat'l, Inc. v. Burgstone, 958 F. Supp. 366, 370 (N.D. Ill. 1997) (franchisor had wide discretion to revise operations manual but allegedly abused that discretion in bad faith).

40. *See, e.g.*, Billops v. Magness Constr. Co., 391 A.2d 196, 198 (Del. 1978) (detailed operating manual created a triable issue of fact regarding the existence of an agency relationship); *see also* Butler v. McDonald's Corp., 110 F. Supp. 2d 62, 67 (D.R.I. 2000) (same); Parker v. Domino's Pizza, Inc., 629 So. 2d 1026 (Fla. Dist. Ct. App. 1993); Link v. Bakshi, 539 F. Supp. 2d 846, 848 (W.D. Va. 2008) (denying motion to dismiss on similar grounds).

41. 217 P.3d 199 (2009).

42. *Id.* at 212.

43, Cislaw v. Southland Corp., 4 Cal. App. 4th 1284, 1292 (1992); see also Oliveira-Brooks v. Re/Max Int'l, Inc., 865 N.E.2d 252 (Ill. App. Ct. 2007) (affirming summary judgment in franchisor's favor); Wu v. Dunkin' Donuts, Inc., 105 F. Supp. 2d 83, 91 (E.D.N.Y. 2000) (regarding degree of franchisor's control over security measures).

44. *See* Walker v. Pac. Pride Serv., Inc., 2007 WL 4209445, at *4 (N.D. Cal. 2007); VanDeMark v. McDonald's Corp., 904 A.2d 627, 631–32 (N.H. 2006).

45. *VanDeMark*, 904 A.2d at 632.

46. 16 C.F.R. pt. 436.5(k)(6) (Item 11).

47. Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule (16 C.F.R. pt. 436) 139 n.442 (Aug. 2004) (citations omitted).

48. 72 Fed. Reg. 15,491 (Mar. 30, 2007).

49. *Id.*

50. *Id.*

51. 2007 WL 4268962 (D. Colo. Nov. 30, 2007).

52. *See id*. at *5.

53. *Id*. at *6 & n.1.