STATE OF MICHIGAN

IN THE [redacted] JUDICIAL DISTRICT JUDICIAL CIRCUIT

[redacted].,

Plaintiff,

Case No.[redacted]

Vs. Hon.

[redacted], INC.

Defendant,

[redacted], [redacted]. ([redacted]) [redacted]

Attorney for Plaintiff, Attorney for Defendant,

[redacted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED PURSUANT TO MCR 2.116(C)(10)

Defendant [redacted] Inc.,("[redacted]") requests this Honorable court grant its motion for summary judgment, filed under MCR 2.116(C) (10), and for the reasons outlined in the attached brief in support.

Dated_____

Submitted by,

STATE OF MICHIGAN

IN THE [redacted] JUDICIAL DISTRICT JUDICIAL CIRCUIT

[redacted].,

Plaintiff,

Case No. [redacted]

Vs. Hon.

[redacted], INC.

Defendant,

[redacted]	[redacted]
Attorney for Plaintiff,	Attorney for Defendant,
[redacted]	
[redacted]	
[redacted]	[redacted]

BRIEF IN SUPPORT OF MOTION

Defendant [redacted] states this brief in support of its motion for summary judgment, filed under MCR 2.116(C) (10) as there is no material question of facts.

STATEMENT OF FACTS

[redacted], a franchiser of ice cream and pizza restaurants, with its main office in [redacted], is operated by its President [redacted] ("[redacted]"). [redacted] is in the process of selling franchises throughout the country. [redacted] owns some stores of its own, but it also franchises stores to independent owners. In [redacted], 200[redacted], [redacted] received a notice from [redacted] to appear for a post-judgment deposition. (Exhibit [redacted], [redacted] Affidavit at [redacted]). Until [redacted] received this notice, she was completely unaware of a judgment

against [redacted], and unaware that a lawsuit was filed against [redacted]. (Exhibit [redacted], [redacted] Affidavit at [redacted]).

Upon investigation, [redacted] discovered that [redacted] sued [redacted] for payment due to [redacted] for services it rendered not to [redacted], but to independent franchisees in California. (Exhibit [redacted], Invoices). This California franchise store is not owned by [redacted], but rather is independently owned and operated by [redacted], under a franchisee agreement dated [redacted], 20[redacted]. (Exhibit [redacted], Franchise agreement). It was the franchisee who ordered and used the services from [redacted], and [redacted] was never a party to the agreement.

Moreover, investigation revealed that no responsible party at [redacted] was ever aware of the lawsuit because the sole employee who was served with the complaint intentionally kept it secret in order to hurt the company. (Exhibit [redacted], [redacted] Affidavit at [redacted]). Immediately, [redacted] filed a motion to set aside the default judgment. (Motion, Exhibit [redacted]). The Court granted [redacted]'s motion to set aside the default judgment. Now, [redacted] files this motion for summary judgment, pursuant to MCR 2.116(C) (10).

LEGAL STANDARD

A summary judgment is permitted under MCR2.116(C) (10) when apart from the amount of damages, material facts are not in dispute and when the moving party is entitled to judgment as a matter of law. *Stehlik v. Johnson*, 206 Mich. App. 83,85 (Mich. Ct. App. 1994). Further, the motion tests the factual sufficiency of the complaint. MCR2.116(C)(10); *Quinto v. Cross & Peters Co.*, 451 Mich. 358 (Mich. 1996); *Maiden v. Rozwood*, 461 Mich. 109,119-120 (Mich. 1999). Thus, the motion tests whether there is factual support for a claim or defense. *Adkins v. Thomas Solvent Co*., 440 Mich. 293, 302 (Mich. 1992).

When the Court after considering the affidavits, pleadings, depositions, admissions and other material supporting and opposing the motion, finds that it is impossible for the claim to be supported at trial, *Stevens v. McLouth Steel Products Corp*., 433 Mich. 365, 370 (Mich. 1989),quoting *Rizzo v. Kretschmer,* 389 Mich. 363, 372 (Mich. 1973), then summary judgment is appropriate. *Radtke v. Everett*, 442 Mich. 368, 374 (1993). However, the Court need to consider only the substantively admissible evidence actually proffered relative to a motion for summary disposition. *Maiden v. Rozwood,* 461 Mich. 109,121 (Mich. 1999).

LEGAL DISCUSSION

[redacted] IS NOT RESPONSIBLE FOR THE DEBTS AND CONTRACTS OF THE FRANCHISEE BECAUSE THE DEBT AROSE FROM A SERVICE RENDERED BY [redacted] TO THE INDEPENDENT FRANCHISEE OF WHICH [redacted] WAS NEVER A PARTY

[redacted]'s California franchisee is an independent contractor, (Exhibit [redacted], Franchise agreement) and the alleged debt is incurred by the California franchisee, and [redacted] was never a party to the transaction between [redacted] and the [redacted]. In order to hold a franchisor liable for the debts of a franchisee, there should be a principal agent relationship between the franchisor and franchisee. See *Little v. Howard Johnson Co.,* 183 Mich. App. 675, 679-680 (Mich. Ct. App. 1990). However, it is stipulated in the franchise agreement that the franchisee is an independent contractor of [redacted]. (Franchise Agreement, Exhibit [redacted]). Further, [redacted] was never a party to the transaction from which the alleged debt arose, it was the franchisee who ordered and used the services from [redacted]. Therefore, there are no triable facts to be sent to the jury; hence summary judgment may be granted.

The test for determining the existence of a principal-agent relationship is whether the franchisor had the right to control the day-to-day operations of the franchisee. *Id.* at 680; See also.,*Van Pelt v. Paull,* 6 Mich. App. 618 (Mich. Ct. App. 1967). [redacted] is not liable for the debts of the independent contractor, since [redacted] has not exercised control over the operations of the independent contractor. In *Little,* 183 Mich. App. 675, the court examined the defendant's control of the franchisee in terms of the defendant's right to take part in the daily operations of the restaurant business in analyzing whether a principal-agent relationship existed. *Id.* at 682. After examining the facts the Court found that no agency relationship existed. *Id.* The franchise agreement mainly focused on the uniformity and standardization of products and services offered by a Howard Johnson restaurant. The Court observed that such obligations did not affect the control of daily operations. *Id.* Additionally, when defendant retained the right to control matters such as construction, furnishings and equipment, and advertising, defendant did not retain any power to control the details of the restaurant's day-to-day operations. *Id.* Defendant did not have control over hiring and firing or supervision of the employees. *Id.* Thus the Defendant's control over the franchisee was minimal; even it didn't have control over the daily maintenance of the premises other than to obligate the franchisee to maintain the premises clean and systematic. *Id.* On the other hand, it was the franchisee who controlled the methods and details of maintenance. *Id.* Irrespective of whether defendant had the right to conduct inspections or not, defendant's actual control was limited to the right to hold the franchisee in breach of the franchise agreement for any deviation. *Id.* The court found that plaintiff failed to present a triable issue concerning defendant's right to control the day-to-day operations of the franchisee. *Id.* Like in *Little,* in the current

case there is no triable issue, because the California franchisee store is not owned or operated by [redacted], rather it is independently owned and operated by [redacted] and [redacted] under a franchisee agreement dated January [redacted], 200[redacted]. (Exhibit [redacted], Franchise agreement).

The differentiating factor between an independent contractor and a servant or an agent is not the fact of actual interference with the control rather it is the right to interfere. *Van Pelt,* 6 Mich. App. 618, 624. In the current case, neither in the franchise agreement nor in any other circumstance, [redacted] has not retained a right to interfere with the franchisee's business. The ownership and operations of the store is completely under the franchisee's control. (Franchisee agreement, Exhibit [redacted]). In, *Taxi-Rockford v. GMC*, 2006 Mich. App. LEXIS 1777 (Mich. Ct. App. 2006) (Unpublished), the question was focused on whether KH, a third party defendant was an independent contractor or agent of defendant, GM. The Court found that even though the Master agreement held out KH as an independent contractor, there were several other provisions in the agreement, as well as other documentary evidence which showed that GM had substantial control over KH. *Id.* at 1797. However, the franchise agreement in the current case has not only a specific clause holding out California franchisee as an independent contractor, the language of the franchise agreement throughout is clear on the fact that the store is not owned by [redacted], but rather is independently owned and operated by the California franchisee.

Further, [redacted] cannot be held vicariously liable under a theory of ostensible agency. There is a three-part test done by courts in determining if the principal is vicariously liable under an ostensible agency. *Little,* 183 Mich. App. 675, 683. Firstly, "The person dealing with the agent must do so with belief in the agent's authority and this

belief must be a reasonable one"; secondly, "such belief must be generated by some act or neglect of the principal sought to be charged"; and thirdly, "the third person relying on the agent's apparent authority must not be guilty of negligence." *Id.* at 683. Ultimately, there should be a representation made by the alleged principal which leads the Plaintiff to believe that there is an agency relationship and the Plaintiff should suffer harm due to his/her reliance on this representation. *Id.* In the current case, [redacted]'s service was hired independently by the California franchisee, and [redacted] is a stranger to this transaction. (Exhibit [redacted], Invoices). Further, [redacted] has not made any representation to [redacted], which leads [redacted] to believe that there is an agency relationship. And [redacted] has not produced any evidence to show that there exist an ostensible relationship between [redacted] and the franchisee and that the harm suffered by it was due to a representation made by [redacted]. It is observed that a Plaintiff must have shown evidence at first in support of the theory. *Dinkins v. Hutzel Hosp.*, 1996 U.S. App. LEXIS 3480, 3493 (6th Cir. 1996) (Unpublished); *Bucyrus-Erie Co. v. General Products Corp*., 643 F.2d 413,420 (6th Cir. 1981). However, [redacted] has not produced any evidence at first to show the existence of the theory. Consequently, an ostensible agency does not exist between [redacted] and the California franchisee. Thus, there is not triable question of fact in this case.

RELIEF REQUESTED

THEREFORE**,** Defendant requests this Court to grant its Motion for Summary Disposition in its favor, as material facts are not in dispute, and award all costs, including attorney fees, incurred in this matter.

Respectfully Submitted,

[redacted]