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Terminations

Eleventh Circuit Affirms Franchisor's Termination of Franchise Agreement for Nonpayment

In *Valpak Direct Marketing System, Inc. v. Maschino*, 2009 WL 2942716 (11th Cir. Sep. 15, 2009), the Eleventh Circuit affirmed a trial court's decision granting summary judgment to franchisor Valpak Direct Marketing Systems, finding that its former franchisees had failed to pay fees and were properly terminated. The franchisees, Mr. and Mrs. Maschino, had been issued a notice of default for nonpayment and were subsequently terminated when they failed to pay within the cure period set forth in the notice – even though they had made the payment prior to the date Valpak issued the notice of termination. Valpak then sued the couple for breach of contract in federal district court. The franchisees filed a counterclaim for wrongful termination, but it was dismissed by the district court, which found that the franchisees had not timely cured their default. Shortly after the deadline to amend the pleadings, Mrs. Maschino was killed in a car accident. Several months later, her husband moved to amend his answer to add the affirmative defense of satisfaction of the debt and a counterclaim for breach of the covenant of good faith and fair dealing. The district court rejected the motion, finding that the franchisee had not shown good cause for the late filing and could not do so because all of the facts that formed the basis for the proposed answer and counterclaim could have been ascertained prior to the deadline. Valpak then filed a motion for summary judgment on its breach of contract claim. In granting the motion, the court rejected the franchisee's argument that the franchisor had terminated the franchise agreement merely to prevent the sale of the franchise and had misappropriated \$80,000 in profit from a mailing that the franchisee had prepared just prior to the termination on the grounds that these allegations were merely "an attempted repackaging of the claims he had unsuccessfully sought to bring in an amended response to Valpak's complaint."

The Eleventh Circuit affirmed the district court's ruling, rejecting the franchisee's contention that he should have been allowed to file an amended answer, affirmative defenses, and counterclaim over seven months after the deadline to amend due to his wife's death and his inability to communicate about the case with his attorney. The court noted that the facts underlying the proposed amendment were known or could have been discovered in advance of the amendment deadline.