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## BLOGS

Franchise Sales/Transactions

# Federal Court Holds Disclaimer Can Preclude Only Part of Financial Performance Representation Claim Under New York Law

A federal court in the Southern District of New York recently granted in part and denied in part a franchisor's motion to dismiss claims brought by a franchisee related to financial performance representations (FPRs) allegedly made by the franchisor. *Governara v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) ¶ 15,368 (S.D.N.Y. Aug. 20, 2014). Governara asked the court to consider whether 7-Eleven's written and oral financial performance representations complied with the required FDD disclosures under Section 683 of the New York Franchise Act (NYFA), and whether its written statement of nonreliance on verbal statements would defeat the franchisee's claim that 7-Eleven violated Section 687 of the NYFA by making alleged misrepresentations. Governara claimed that as part of the franchise sales process, a 7-Eleven employee provided him with information regarding store revenues in the New York market in addition to 7-Eleven's Item 19 FPR, that the written FPR did not describe the methodology used to derive the additional representations, and that such omissions were a violation of the NYFA. In addition, Governara brought a claim based on the same statements for a violation of Section 687 of the NYFA, which prohibits acts or practices by a franchisor designed to defraud a prospective franchisee in connection with the offer or sale of a franchise.

The court only agreed in part with Governara. It declined to dismiss the Section 683 claim, finding that the additional representations and the underlying methodology and computation for them made by 7-Eleven's employee were not included in the FDD as required by Section 683 of the NYFA. It also found that reasonable reliance was not a required element of this section of the NYFA. The court did, however, grant 7-Eleven's motion to dismiss the Section 687 claim, however, holding that Governara could not establish reasonable reliance on the alleged misrepresentations because of the disclaimer of reliance contained in the Franchise Agreement, in which Governara confirmed that he did not rely on statements contrary to, or outside of, the FDD. In reaching its decision, the court rejected Governara's argument that the nonreliance disclaimer violated the NYFA's non-waiver provision. The court stated that the disclaimer merely affirmed that the franchisee did not rely on any financial representations other than those provided in the FDD, as opposed to waiving any rights under the NYFA. This federal court decision on the enforceability of the nonreliance disclaimer diverged from New York state appellate court's

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decisions that contractual nonreliance disclaimers in franchise agreements may not be enforceable.