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ROGER VICE

11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF SAN JOAQUIN

13 ROGER VICE,
14 Plaintiff,
15 v.
16 STATE FARM MUTUAL
AUTOMOBILE INSURANCE
17 COMPANY, an Illinois corporation;
STATE FARM GENERAL
18 INSURANCE COMPANY, an Illinois
corporation; STATE FARM FIRE AND
19 CASUALTY COMPANY, an Illinois
corporation; and STATE FARM LIFE
20 INSURANCE COMPANY, an Illinois
corporation; and DOES 1 through 20,
21 inclusive,
22 Defendants.

Case No. CV029734

**MEMORANDUM IN SUPPORT OF THE
MOTION OF ROGER VICE FOR
SUMMARY JUDGMENT**

23
24 Plaintiff Roger Vice ("Vice") submits this memorandum in support of his motion to
25 declare that his relationship with State Farm is a franchise under California law. As
26 demonstrated below, the arrangements between Vice and State Farm satisfy the three
27 requirements for a "franchise" under California law—the use of a trademark; the
28

1 prescription by the putative franchisor of a marketing plan or system; and the payment
2 by the putative franchisee of a franchise fee.

3 **Facts**

4 Roger Vice became a trainee agent for State Farm Insurance in approximately
5 1967. Vice became a State Farm trainee largely because his supervisor had told him
6 that a State Farm agency was a "franchise" and that it was "just like a McDonald's." By
7 this, Vice understood that he would have a business of his own; that he would be
8 dependent upon State Farm as his "franchisor," and that he would be able to make
9 substantial money in this business. (Affidavit of Roger Vice ("Vice Aff.") at ¶ 2.)

10
11 Vice went through a training period of two years as a trainee agent (during which
12 time he was an employee) and subsequently became an independent contractor agent
13 in approximately 1969. While he and State Farm have had a number of agreements
14 over the years, they currently do business under a form called the AA4 (Agent
15 Agreement 4), a copy of which is annexed to the Affidavit of Roger Vice as Exhibit 1 (the
16 agreement will be referred to as the "AA4" or the "Agent Agreement"). (Vice Aff. at ¶ 3.)

17
18 Provisions of the Agent Agreement that are of particular interest are as follows:

19 The agents' duties are described in broad terms:

20
21 The Agent will solicit applications for insurance, collect
22 premiums, fees and charges, countersign and deliver
23 policies, reinstate and transfer insurance, assist policyholders
24 and cooperate with adjusters in reporting and handling
claims, avoid conflicts of interest, comply with all laws and
regulations, and cooperate with and advance the interests of
the Companies, the agents, and the policyholders.

25 (AA4 ¶ 1.A.)

26 State Farm maintains control over all advertising, and the use of the State Farm
27 name and trademark:

28

1 We will advertise, provide promotional materials, and
2 participate in the cost of your advertising, in accordance with
3 policies determined from time to time by us. You will not use
any advertisements referring to us or identifying us, directly or
indirectly, without our prior approval.

4 (AA4 ¶ I.F.)

5 State Farm retains the right to prescribe policy forms and provisions and other
6 procedures:

7 We retain the right to prescribe: all policy forms and
8 provisions; premiums, fees, and charges for insurance and
9 services; rules governing the binding, acceptance, renewal
10 rejection, or cancellation of risks, and adjustment and
payment of losses; and limitations on the submissions of
applications by individual agent, by market area, by line of
coverage, by policy type, by Company, or by other means.

11 (AA4 ¶ I.L.)

12 As Vice has testified, State Farm allows him to use its name, trademark and
13 logos, and it allows him to hold himself out as a State Farm agent. (Vice Aff. at ¶ 4.)

14 As an agent, Vice offers insurance policies and advice on insurance to his
15 clients; he has been taught by State Farm to "sell" insurance and in fact does sell State
16 Farm insurance policies. (Vice Aff. at ¶¶ 5-7 and Ex. 2.) Additionally, Vice physically
17 delivers policies to clients. Further, he is authorized to "bind" insurance; that is, if a
18 client executes an application and pays a premium to Vice, Vice may bind State Farm to
19 provide coverage pending the Company's formal approval of the policy. (Vice Aff. ¶ 7.)

20 As a practical matter, Vice must make certain expenditures either to or for the
21 benefit of State Farm in order to be a State Farm agent and to maintain his status as a
22 State Farm agent. Among other things:

- 23
24
25 (a) Vice has to advertise in a number of ways. In particular, he must advertise
26 in the Yellow Pages – an expense of roughly \$1,500 per year. (Vice Aff.
27 ¶10(a) and Ex. 3). Part of this expense is for display advertising that State
28 Farm itself sponsors; if Vice wishes to be part of this advertising, he must
pay State Farm approximately \$600. In addition, Vice must conduct
general advertising in local newspapers and through direct mail.

1 Historically, he has spent as much as \$30,000 per year on direct mail (Vice
2 Aff. ¶10(a));

3 (b) Vice must procure from State Farm promotional items bearing the State
4 Farm trademark or logo, such as pencils, calendars, candy and golf balls.
5 State Farm encourages agents such as Vice to purchase and use these
6 items to assist in maintaining customer relations. These items are not
7 necessary for the operation of an insurance agency, but are necessary for
8 the operation of a State Farm agency. They are not available from any
9 source other than State Farm. Vice spends in excess of \$100 per year on
10 these trademarked items. (Vice Aff. at ¶ 10(b).) Additionally, Vice must
11 expend money on sales brochures that he uses to promote his business,
12 which brochures he has to purchase from State Farm (Vice Aff. ¶ 10(c));

13 (c) Vice had to purchase a sign to announce his presence as a State Farm
14 agency, and he has had to maintain it; these expenses have exceeded
15 \$500. (Vice Aff. at ¶ 10(d));

16 (d) Vice must pay State Farm for computer terminals and printers that State
17 Farm requires and that meet State Farm specifications; in addition, he
18 must purchase printer cartridges and other supplies from State Farm to
19 operate them. The cost of these computers exceeds \$500 per year (Vice
20 Aff. at ¶ 10(e) and Ex. 3));

21 (e) Under the AA4, he must maintain a bank account at his own expense for
22 the deposit of premiums from customers (AA4 ¶ 1.1.); the premiums are the
23 property of State Farm. The principal in such accounts eventually gets
24 forwarded to State Farm, but the expense of maintaining the account is
25 borne by the agent; Vice incurs approximately \$_____ in charges from his
26 bank each year for maintaining this account (Vice Aff. at ¶ ____);

27 Although State Farm does not contractually require Vice to make any of these
28 expenditures, he must do so as a practical matter to be and remain a State Farm Agent.
State Farm regularly requests and encourages him to make these expenditures in order
to promote his business. (Vice Aff. ¶10).

As demonstrated below, Vice's relationship with State Farm constitutes a
franchise under California law.

Argument

1. The Agent Agreement constitutes a franchise under California law

1 The California Franchise Investment Law (CFIL) and California Franchise
2 Relations Act (CFRA)¹ both define a franchise in the following terms:

- 3 (1) A franchisee is granted the right to engage in the business of offering,
4 selling or distributing goods or services under a marketing plan or system
5 prescribed in substantial part by a franchisor; and
- 6 (2) The operation of the franchisee's business pursuant to such plan or system
7 is substantially associated with the franchisor's trademark, service mark,
8 trade name, logotype, advertising or other commercial symbol designated
9 the franchisor or its affiliate; and
- 10 (3) The franchisee is required to pay, directly or indirectly, a franchise fee.

11 Cal. Corp. Code § 31005(a); Cal. Bus. & Prof. Code § 20001.

12 As demonstrated below, these requirements are satisfied.

13 **2. Vice Has The Right to Offer, Sell or Distribute Goods or Services**

14 Vice is an insurance agent. As an insurance agent, he was trained to "sell"
15 insurance to customers; in fact, he was told consistently that he was required to sell
16 insurance; he was consistently sent to courses that taught him how to sell insurance,
17 and his supervisors, who are employees of State Farm, consistently refer to agents as
18 selling insurance. Additionally, State Farm, itself, in its publication for agents called the
19 "Reflector" which is distributed to over 15,000 agents, consistently exhorts agents to
20 "sell" insurance. (Vice Aff. ¶ 5-7; Ex. 2.)

21 Even if Vice's activities were not a "sale" in a technical sense, he is in the
22 business of offering and distributing insurance. Not only does he offer policies of
23 insurance for liability, fire, and other risks, but he also offers the services of giving
24 advice and counseling clients, advising them on types and levels of coverages available
25

26 _____
27 ¹ California has two franchise acts. The CFIL concerns the franchisor's duty to make full disclosure to
28 prospective franchisees about the franchise investment. The CFRA concerns the franchisor's relationship
with the franchisee.

1 and their personal insurance needs. (Vice Aff. at ¶ 5.) Further, Vice has the authority to
2 “bind” coverage, meaning that if a client comes to his office and makes an application
3 for insurance and pays the first premium, coverage commences, even though State
4 Farm may at some later point decline coverage based upon its underwriting criteria.
5 (Vice Aff. at ¶ 7.)
6

7 Finally, Vice is authorized to actually deliver contracts of insurance to clients
8 upon execution by State Farm. Accordingly, he is authorized to distribute contracts of
9 insurance. (Vice Aff. at ¶ 5.)

10 California courts construe statutes in accordance with the plain meaning that an
11 ordinary person would attach to their words. Day v. City of Fontana, 25 Cal.4th 268,
12 273, 105 Cal. Rptr.2d 257, 19 P.3d 1196 (2001). So construed, Vice offers, sells and
13 distributes insurance and insurance services as contemplated by the franchise statutes.
14 Specifically, the term “sell” means to “give up (property) to another for something of
15 value) as money” or “to offer for sale.” Miriam-Webster’s Collegiate Dictionary at p.1129
16 (11th Ed.). This definition makes it clear that it is not necessary for the “seller” to
17 actually have possession of the thing sold or authority to effectuate a transfer of title—
18 the definition is satisfied merely by a “offer.” Thus, Vice sells insurance just as a real
19 estate agent (who does not own the real estate) sells real estate or an automobile
20 salesman sells an automobile. None of them own the items sold, and none of them
21 have power to effectuate a transfer of title. Yet they “sell” in the ordinary sense of the
22 word.
23

24
25 Vice also has authority to “offer” insurance for sale. Offer means “to present for
26 acceptance or rejection.” Miriam-Webster’s Collegiate Dictionary at p. 861 (11th Ed.).
27 That is exactly what he does. He presents insurance to prospective clients for their
28

1 acceptance or rejection. Finally, Vice also has authority to “distribute” insurance. The
2 definition of “distribute” includes “to give out or deliver.” Miriam-Webster’s Collegiate
3 Dictionary at p. 364 (11th Ed.). Vice does this when he literally hands the policy of
4 insurance to the insured. (Vice Aff. at ¶ 5.)

5
6 For all of these reasons, the first requirement, that the putative franchisee be
7 given the right to engage in the business of offering, selling or distributing goods or
8 services, is satisfied.

9 **3. The Trademark and Marketing System Requirements Are**
10 **Uncontested and, In Any Event, Satisfied**

11 It cannot be seriously contested that the relationship between Vice and State
12 Farm satisfies the requirements in the franchise definition that the putative franchisee’s
13 business is “substantially associated with [State Farm’s] trademark” and that there is a
14 “marketing plan or system” prescribed by State Farm.

15 Vice uses the State Farm name and mark with State Farm’s knowledge and
16 consent. He in fact uses it through signs, stationery and advertising. Hence, the
17 requirement of substantial association with a trademark is satisfied.

18
19 The “marketing plan” requirement is generally satisfied by the franchisor’s
20 specification of prices, pricing systems, sales requirements, sales techniques or
21 advertising. *See, e.g., People v. Kline*, 100 Cal. App. 3d 587, 168 Cal. Rptr. 185 (1980)
22 (marketing plan is satisfied by franchisor’s promise of “total and continuing support” and
23 assistance with advertising). State Farm has extensive requirements concerning
24 advertising and marketing. The AA4 provides:

25
26 We retain the right to prescribe all policy forms and
27 provisions; premiums, fees, and charges for insurance; and
28 rules governing the binding, acceptance, renewal, rejection,
or cancellation of risks, and adjustment and payment of
losses.

1 (AA4 ¶ I.L.) Additionally, State Farm furnishes the Agents with manuals, forms and
2 records; advertises for the Agents; and provides them with promotional materials. *Id.* at
3 Section I, ¶ F.
4

5 For these reasons, the requirements that the putative franchisee operate under a
6 marketing plan or system, and that it be substantially associated with the franchisor's
7 trademark are satisfied.

8 **4. Vice Pays Franchise Fees to Be A State Farm Agent**

9 The last element, the requirement of a franchise fee, is also satisfied here in
10 numerous ways. The Act defines "franchise fee" as any fee a charge that a franchisee is
11 required to pay or agrees to pay for the right to enter into a business under a franchise
12 agreement, including payments for goods and services. Cal. Corp. Code ¶ 31011, Cal.
13 Bus. & Prof. Code § 2007.² Significantly, *the burden is on the putative franchisor, not*
14 *the franchisee, to show any specific exception from the definition.* Cal. Corp. Code Ann.
15 § 31153 (stating that in any proceeding under this law, the burden of proving an
16 exemption or an exception from a definition is upon the person claiming it).
17
18

19 In *Boat & Motor Mart v. Sea Ray Boats, Inc.*, 825 F.2d 1285 (9th Cir. 1987), the
20 Ninth Circuit considered whether a dealer in pleasure boats was a "franchisee" under the
21 California Franchise Relations Act. With respect to the franchise fee issue, the Court
22 observed:

23 The Act itself defines such a fee as "any fee or charge that a
24 franchisee or sub-franchisor is required to pay or agrees to
25 pay for the right to enter a business under a franchise
26 agreement, including, but not limited to any such payments
for such goods and services..." Cal. Bus. & Prof. Code,
20007. The charge can be required "directly or indirectly."

27 ² The CFRA also provides that the amount paid must exceed, on an annual basis, \$100. Cal. Bus. & Prof.
28 Code § 20007(d).

1 Id. 200001. The Guidelines further specify that "a payment
2 by a franchisee, though nominally optional, may in reality be
3 a required one, if the article for which the payment is made is
essential, or if the franchisor intimates or suggests that it is
essential, for the successful operation of the business.

4 825 F. 2d at 1289. (Emphasis added.)

5 The Court went on to observe that the dealer's purchases of

6 video cassettes, films, floats, banners, posters, and
7 brochures arguably constituted a fee in terms of the Act. All
8 of these purchases from Sea Ray were at the behest of Sea
9 Ray. The purchases occurred because Sea Ray asked that
they be made. The purchases were all suggested by Sea
Ray as essential and certainly the purchase of the brochures
was essential.

10 *Id.* at 1290.

11 The *Sea Ray* court did not, ultimately, decide whether the dealer in that case had
12 paid a franchise fee. The Court's observations, however, were based upon guidelines
13 promulgated by the California Department of Corporations, the agency vested with
14 responsibility for administering California's franchise acts. The Department's Guidelines
15 for Determining Whether an Agreement Constitutes a Franchise, California Department
16 of Corporations, Release 3-F, available at www.corp.ca.gov/commiss/ref3f/htm, contains
17 the definitive statement of the Department's view of what constitutes a franchise fee
18 under California law. Among other things, the Guidelines make clear that a franchise fee
19 encompasses any fee paid by the franchisee *for the account of the franchisor, on behalf*
20 *of the franchisor or that benefits the franchisor:*
21

22
23 Payments which the franchisee is required to make under the
24 franchise agreement for the account of the franchisor are
25 equivalent to payments made to the franchisor. Thus, it
26 makes no difference whether payments for the rental of
27 premises are required to be made by the franchisee to the
28 franchisor as the owner and lessor of the premises, or to a
third-party owner where the franchisor is the lessee and the
franchisee the sublessee. Also, payments required in the
franchise agreement to be made by the franchisee for
advertising and promotion to enhance the good will of the

1 franchisor's business, even though the advertising and
2 promotion also benefit the franchisee's business, may be
3 deemed made for the account of the franchisor, especially
4 where the agreement gives the franchisor discretion to
5 determine the manner and content of the publicity. (PL/38F,
6 PL/43F.)

7 * * *

8 (i) Some Examples

9 The Commissioner's opinions have considered the following
10 types of payments as constituting a "franchise fee":

11 Performance guarantee or deposit (Comm. Op. Nos. 72/25F,
12 73/10F, 75/6F);

13 Deposit of money (Comm. Op. Nos. 73/15F, 74/3F, 74/5F,
14 74/6F);

15 An initial or set-up fee (Comm. Op. Nos. 72/23F, 73/15F);

16 Fee for advertising (Comm. Op. Nos. 72/11F, 73/17F);

17 Nonrefundable bookkeeping charge (Comm. Op. No.
18 72/13F);

19 A payment for training and school expenses (Comm. Op.
20 Nos. 71/60F, 73/39F);

21 Royalty or percentage of gross receipts (Comm. Op. Nos.
22 72/47F, 73/23F, 73/24F);

23 Charges for sales kits, brochures, programs, forms, decals,
24 shirts, displays and announcements (Comm. Op. Nos.
25 71/49F, 73/29F, 82/1F);

26 Rental or lease fee (Comm. Op. Nos. 73/26F, 73/50F);

27 Payment for services, such as consulting or management
28 fees (Comm. Op. Nos. 73/25F, 73/41F, 77/1F, 79/2F).

(Emphasis added.) As *Sea Ray* and the Guidelines make clear, then, a franchise fee encompasses any fee paid to or on behalf of the franchisor that is necessary or at the behest of the franchisor, unless it is specifically excluded by statute or regulation. In this case, Vice's payments for his premium fund account, for required signage, for

1 computers, for advertising for promotional materials, and for sales brochures are all
2 franchise fees.

3
4 **(a) Advertising Expenses**

5 The Agent Agreement requires that agents advertise:

6 The expense of any office, including . . . advertising . . . shall
7 be incurred at your discretion and paid by you.

8 * * *

9 We will advertise, provide promotional materials, and
10 participate in the cost of your advertising, in accordance with
11 policies determined from time-to-time by us. You will not use
12 any advertisements referring to us or identifying us, directly or
13 indirectly, without our prior approval.

14 (AA4.)

15 As a practical necessity, agents, and specifically Vice, must advertise; this
16 requirement includes actual placement of advertising as well as distribution of
17 advertising materials and sales brochures. Additionally, as a practical matter, State
18 Farm has required that Vice purchase sales brochures from it. (Vice Aff. ¶¶ 10(a), (b).)

19 As discussed above, the Ninth Circuit recognized that advertising and purchases
20 of promotional materials may constitute franchise fees in *Sea Ray*; the California
21 Corporations Commissioner has expressly held that advertising expenditures are
22 franchise fees.

23 Yellow Pages display advertising is a specific category of advertising that Vice is
24 required to pay for in order to be a State Farm Agent. Vice pays State Farm over a
25 thousand dollars a year for Yellow Pages advertising. (Vice Aff. ¶ 10(a).) Additionally,
26 State Farm has created a separate category of agent called "Select Agents" who meet
27 certain purported criteria. Each year, State Farm runs display advertising in local Yellow
28 Pages that prominently display the photographs of these agents. Because this is display

1 advertising that carries the State Farm logo conspicuously, it attracts more attention than
2 a simple listing in the Yellow Pages. State Farm makes available to the non-Select
3 Agents, such as Vice, the opportunity to be included in this display advertising but
4 charges them for it. Thus, Vice must pay approximately \$600 per year for such
5 advertising. If he did not pay for this advertising, he would not be included in this display
6 advertising with the Select Agents. In addition, Vice incurs expenses of over a hundred
7 dollars a year for sales brochures—precisely the type of expense that the court in *Sea*
8 *Ray* found could be a franchise fee. (Vice Aff. ¶ 10(a).)

10 State Farm has failed to carry its burden of showing that these expenses are not
11 franchise fees or that they fall within any statutory exception. Expenses for advertising
12 are franchise fees.

13
14 (b) **Payments for Promotional Materials are a Franchise Fee**

15 Agents must pay State Farm for promotional materials, such as golf balls,
16 calendars, road maps, greeting cards and the like that bear State Farm's logo. Like
17 advertising, agents need to use these materials in order to promote their businesses; as
18 a practical necessity, agents must purchase them if they want to do business as State
19 Farm agents. (Vice Aff. ¶ 10 (b).)

21 *Sea Ray* is directly on point; there, the dealer had to buy such materials from the
22 manufacturer, and the Ninth Circuit held that these very well could constitute a franchise
23 fee. The California Commissioner of Corporations, moreover, has opined that payments
24 for advertising materials that benefit the franchisor – in this case, the materials bear the
25 State Farm logo and thus benefit it – are franchise fees.

26
27 (c) **Payments for Required Signage are Franchise Fees**

28

1 Vice had to purchase and repair signs with the State Farm logo in order to
2 advertise his business. ^(See HH P 10) For over 35 years, State Farm has as a practical matter required
3 its agents to have signs; indeed agents cannot serve the interests of their policyholders
4 without signs—how would policyholders find them? (See AA4 ¶ I.E.) ~~State Farm~~
5 ~~provides agents with a list of start-up expenses that include a sign costing \$1,300.~~
6

7 Payment for a sign therefore is a payment that the Agent makes in order to enter
8 into the business of being a State Farm agent. The sign is a necessity. Payment for a
9 sign is like the advertising payments that the California Corporations Commissioner
10 recognized as payments for advertising and promotion “to enhance the goodwill of the
11 franchisor’s business.” It is in the same category as charges for sales kits, brochures,
12 programs, forms, decals, shirts, displays, and announcements that the Commissioner
13 has expressly recognized as within the definition of a franchise under California law.
14

15 Finally, payments for a sign do not fall within the scope of any exception to the
16 broad definition of a franchise fee. In this regard, State Farm has failed to carry its
17 burden of proof of showing that the franchise law does not apply to it. Payments for
18 signs are franchise fees.
19

20 **(d) Expenses for Computers**

21 Until 1996, State Farm agents were required to lease computer equipment from
22 State Farm. Since 1996, State Farm has provided agents with a standard package of
23 computer equipment at no charge. Agents are specifically prohibited from attaching any
24 of their own equipment to the equipment required to be purchased from State Farm.
25 Agents are also prohibited from installing any of their own software on computers
26 required by State Farm. Agents typically require more equipment and software than is
27 provided by State Farm and thus must lease additional equipment themselves from
28

1 State Farm. Vice does exactly this, at a cost of approximately \$500 per year. (Vice Aff.
2 at ¶ 10(d).)

3 Under the teachings of *Sea Ray*, Vice's payments for additional computer
4 equipment are franchise fees. It is equipment that is necessary for his business.
5 Indeed, required payments for such equipment fall squarely into the definition of
6 payments that are required for the franchisee to enter into the business.
7

8 (e) **Payments for the Premium Fund Account**
9 **Are Franchise Fees**

10 California has expressly recognized that a fee may be paid to a third party on
11 behalf of a franchisor. California Guidelines, supra.

12 It is undisputed that agents must maintain a separate bank account for the benefit
13 of State Farm, into which they deposit premium payments and other monies that belong
14 to State Farm. This account is known as a "premium fund account." The Agent
15 Agreement acknowledges that these funds are held by the agent in trust for State Farm;
16 the account, moreover, is "for State Farm's benefit." (AA4 ¶ ____.) Vice has paid his
17 bank approximately \$_____ for maintaining this account.
18

19 The only way in which the agents benefit from the payment of the fees associated
20 with the premium fund account is that it permits them to be in the business of being State
21 Farm agents. They have no access to the account; they have no control over the
22 account. The maintenance of the account, therefore, in accordance with the teachings
23 of the California Corporation Commissioner's Guidelines, is that it is a fee paid "on behalf
24 of" the franchisor and is therefore a franchise fee.
25

26 Additionally, the Premium Fund Account benefits the franchisor, not the
27 franchisee. It is akin to the required payments for advertising, promotion and sales
28

1 materials, that benefits the franchisor, as explicitly recognized by the California
2 Commissioner of Corporations.

3 For all of these reasons, the fees franchisees pay to maintain the premium fund
4 account are franchise fees.

5
6 **Conclusion**

7 As demonstrated above, Vice has shown that his relationship with State Farm
8 constitutes a "franchise" under both the CFIL and CFRA as a matter of law. Accordingly,
9 this Court should grant him summary judgment and issue a declaration that his
10 relationship with State Farm is a franchise.

11
12 DATED: July 24, 2007

DADY & GARNER, P.A.

13
14
15 By: _____

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ROGER VICE

SUPERIOR COURT OF CALIFORNIA
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ROGER VICE,
Plaintiff,

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY, an Illinois corporation;
STATE FARM GENERAL
INSURANCE COMPANY, an Illinois
corporation; STATE FARM FIRE AND
CASUALTY COMPANY, an Illinois
corporation; and STATE FARM LIFE
INSURANCE COMPANY, an Illinois
corporation; and DOES 1 through 20,
inclusive,

Defendants.

Case No. CV029734

**AFFIDAVIT OF ROGER VICE IN
SUPPORT OF HIS MOTION FOR
SUMMARY JUDGMENT**

Roger Vice, being duly sworn, deposes and says:

1. I am the Plaintiff in this action and I make this Affidavit in support of my motion for summary judgment to declare that my relationship with State Farm is a franchise under California law. I am not a lawyer and my role here is limited to attesting

to facts of which I have personal knowledge.

2. I own a State Farm agency in Lodi, California where I have done business for the past 20 years. I originally became a State Farm agent in 1969 after 2 years of training by State Farm. I became a State Farm trainee largely because my then-supervisor, Vern Galloway, told me that a State Farm agency was a “franchise” and it was just like a “McDonald’s.” I understood by this that I would have a business of my own, that I would be dependent upon State Farm as my franchisor and that I would be able to make substantial money as a State Farm agent. My office at that time was in San Jose, California.

3. I executed a Form AA4, the Agent Agreement, in approximately 1987. The form of this Agreement is attached as Exhibit 1, although I do not possess a signed copy of it. Nonetheless, State Farm and I have done business according to its provisions since 1987. I have not signed any subsequent agreements or any other documents that I understand change this agreement.

4. Since I became an agent, State Farm has authorized me to use its name, signs and logo and to hold myself out as a “State Farm” representative.

5. In my role as an agent, I must offer and sell policies of insurance—auto insurance, life insurance, fire insurance and other policies—to prospective clients. Also in my role as a State Farm agent, I must follow the contract’s directive to “assist policyholders and cooperate with adjusters.” That means, among other things, that I must, and do, advise prospective clients on the availability of different types of policies, their costs, and whether they are appropriate for that prospective policyholder’s needs, and I must provide assistance when a policyholder has sustained a loss and seeks coverage. Additionally, I physically deliver policies to clients when they are delivered to

me by State Farm, countersigned by an officer of the Company.

6. My role, as has been the role of agents for many years, has been to be the “face” of State Farm to the public. Significantly, until recently, State Farm offered insurance only through its authorized and exclusive agents, such as myself; there was no other way for a member of the public to obtain a State Farm policy of insurance. As the face of State Farm, I was trained to “sell” insurance, have continually been urged to “sell” insurance; and have been told that my job is to sell insurance. State Farm, in fact, publishes a magazine called the “*Reflector*” in which it has continuously urged us, as agents, to “sell” insurance. Copies of the *Reflector* with articles on this subject are annexed hereto as Exhibit 2.

7. I also have the power to “bind” policies of insurance. What that means is that if, for example, a person comes to my office for liability insurance on their automobile, and they complete an application, pay the premium, and have an automobile accident immediately after leaving my office, they are covered by the policy regardless of whether our Company has reviewed their application. In the ordinary course, the application for the policy will be passed on to State Farm, which will review it, and if it meets the underwriting criteria, State Farm will formally issue a policy.

8. The Agent Agreement to which I am party contains various provisions that give State Farm the right to prescribe policy premiums, fees and charges for insurance. State Farm provides advertising, promotional materials and participates in the cost of our advertising, and we are required to follow its guidelines with respect to the use of its trademarks, advertising and the offering and marketing of insurance.

9. In order to remain a State Farm agent and to be successful as a State Farm agent, it is necessary that I make certain expenditures for particular items. Some

of these expenditures are made directly to State Farm and are deducted from commissions that State Farm pays me. Attached as Exhibit 3 are copies of the pages of the compensation statements showing deductions that State Farm has furnished to me for the six months ending June 30, 2006 and the years ending 2005 and 2004. I direct the Court specifically to the lines entitled "Yellow Pages Trademark Advertising," which shows amounts I paid to State Farm for Yellow Pages advertising, and to the line "Agents Computer Rental Lease" which reflects amounts I have paid to State Farm for leasing computers and related equipment.

10. Expenses I have incurred to be a State Farm agent include the following:

(a) As an agent, I must advertise in a number of ways. A central way in which we advertise, that is absolutely necessary and that State Farm requests that we do, is in the local Yellow Pages, where customers look to find an insurance agent. As shown on Exhibit 3, I incur well over a thousand dollars a year in payments to State Farm for Yellow Pages advertising. A portion of this advertising is for display advertising that State Farm provides, a copy of which is annexed hereto as Exhibit _____. This advertising shows photographs of agents and a prominent State Farm logo. This advertising is provided free to so-called "Select Agents," who are agents that have satisfied certain criteria of State Farm. I am not a Select Agent, and because of that, and I must pay at least \$600 a year in order to include my name and listing in this display advertising. Yellow pages advertising and participation in this display advertising in particular is necessary as a matter of practical necessity to be a State Farm agent, as opposed to an independent agent or an agent for another company. An independent agent typically purchases only a listing in the Yellow Pages—not a display ad—at a much lower cost. While I could do that, it would lump my State Farm agency with independents and those of other companies, and I would not enjoy the prominence that the display ad creates, nor would I have my picture in it. It is worth pointing out, in this regard, that agents cannot use the State Farm mark and logos in Yellow Pages advertising without State Farm's express permission. Thus, the advertising in State Farm's display advertising in the local Yellow Pages is a practical necessity for me to remain a State Farm agent and requires expenditures that go well beyond those that would be required to simply be an independent agent. In addition to Yellow Pages advertising, I must pay for general advertising in local newspapers and through direct mail. Historically I have spent, for example, as much as \$30,000 a year on direct mail.

- (b) Similarly, as an agent, in order to promote my State Farm business and to encourage customers to come back, I must purchase from State Farm trademarked and logoed items such as pencils, calendars, candy and golf balls. These items are not at all necessary to conduct the business of the agency—we do not play golf in the agency; we have our own pencils that we can buy at Staples or Office Depot (at a much lower price) and we can use an ordinary calendar. Nonetheless, in order to be a State Farm agent, we must purchase these logoed items to give to customers and insured persons in order to remind them that we are not simply an insurance agent, but a State Farm insurance agent. State Farm not only makes these items available, but encourages us regularly to buy them in order to maintain customer relations. Use of these logoed items not only includes the prominent display of the State Farm name and mark but also the logo of hands clasping and shaking and the State Farm tag line “Like a Good Neighbor, State Farm is There.” Consistent with this neighborly approach, we furnish customers and prospective customers with these logoed items so that they will come back to us and renew policies with us or purchase new policies with us. We cannot obtain them elsewhere. I spend over \$100 per year on these items. In a similar vein, we must make direct expenditures to State Farm for sales brochures to give to prospective customers to assist us in selling insurance. I spend over \$100 per year on sales brochures.
- (c) It was also necessary for me to purchase and maintain a sign to announce the presence of my agency in the neighborhood. While I purchased this sign from a third party supplier, I did so for the benefit of myself and for the benefit of State Farm. The cost of the sign, and its maintenance, exceeded \$500.
- (d) Until 1996, State Farm required agents to lease all of their computer equipment directly from State Farm. Since that time, State Farm has supplied, at no charge, a standard computer package and terminal. However, this is not sufficient for my needs. I need two additional work stations, and I am required to lease those work stations from State Farm. I cannot get the computers from another supplier; I cannot attach my own equipment to that supplied by State Farm, and I cannot run my own software on them. I must lease the additional computer equipment from State Farm. As shown on Exhibit 3, my computer leasing expenses from State Farm run approximately \$500 per year. Additionally, I must buy printer cartridges and supplies for all of my computers, and incur that additional expense, through State Farm.
- (e) Finally, as noted in the Agent Agreement, I must maintain a bank account at my own expense for the deposit of premiums for customers, which are the property of State Farm. The principal on such accounts eventually gets forwarded to State Farm, but the expenses of maintaining the account is borne by me. This expense has amounted to \$ _____ dollars over the past _____.

For all of the reasons set forth above, I respectfully request that the Court find that my relationship with State Farm constitutes a franchise under California law.

Dated: _____

Roger Vice

Subscribed and sworn to before me
This _____ day of July, 2007.

Notary Public