

December 05 2008 4:10 PM

The Honorable Susan Serko
KEVIN STOCK
COUNTY CLERK
NO: 08-2-05436-1

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

SHERRI LYNN TANSON, MONKEY BEAN,)	
)	
LLC, a Washington corporation)	Case No.: 08-2-05436-1
)	
Plaintiffs,)	FIRST AMENDED
)	COMPLAINT FOR VIOLATION OF
vs.)	WASHINGTON FRANCHISE INVESTMENT
)	PROTECTION ACT AND
DUGOUT BROTHERS, INC., a Washington)	MISREPRESENTATIONS
)	
corporation; BRAD CARPENTER and LUCINDA)	
)	
(CINDY) CARPENTER, husband and wife;)	
)	
ROBERT GREGG HUTCHINS; BILLIE JO)	
)	
HUTCHINS; ROBERT G. HUTCHINS, PS,)	
)	
Defendants)	
)	

1. Plaintiffs Sherri Lynn Tanson and Monkey Bean, LLC were franchisees of defendant Dugout Brothers, Inc., DBA FORZA COFFEE COMPANY. Plaintiffs Tanson was the sole owner of and Manager of Monkey Bean LLC, which conducted part of the franchised

1 business activities. Plaintiffs resides in and, until January, 2008, operated a Forza Coffee
2 Company franchise in Pierce County, Washington.

3 2. Defendant Dugout Brothers, Inc. (sometimes referred to as “Dugout”) is a Washington
4 corporation with its principal place of business in Pierce County, Washington that offers
5 and sells Forza Coffee Company franchises in Washington.

6 3. Defendant Brad Carpenter is a resident of Pierce County, Washington with an address of
7 5611 134TH ST CT NW, Gig Harbor, WA 98332. On information and belief, defendant
8 Brad Carpenter is an officer and director of Defendant Dugout Brothers, Inc. and was so at
9 all relevant times herein.

10 4. Defendant Lucinda (Cindy) Carpenter, on information and belief, is the wife of Defendant
11 Brad Carpenter. Defendant Lucinda Carpenter’s marital community has benefited from
12 the wrongs committed by Defendant Brad Carpenter herein. Where appropriate,
13 Defendants Brad Carpenter and Lucinda Carpenter are referred to herein collectively as
14 “Carpenter”. Dugout and Carpenter are referred to collectively as “Franchisor
15 Defendants”.

16 5. Defendant Robert Gregg Hutchins is an attorney and resident of and doing business in
17 Pierce County, Washington. Mr. Hutchins is a “person” as that term is defined in the
18 Washington Franchise Investment Protection Act.

19 6. Defendant Billie Jo Hutchins is the wife of Defendant Robert Gregg Hutchins and who, on
20 information and belief, benefited from the wrongs of Defendant Robert Gregg Hutchins
21 on account of their marital community.

22 7. Defendant Robert G. Hutchins PS is a Washington professional services corporation doing
23 business in Pierce County, Washington. Defendants Robert Gregg Hutchins and Robert
24 G. Hutchins PS are collectively referred to as “Lawyer Defendants”.

- 1 8. In 2006, Plaintiffs was a customer of one of Franchisor Defendants' coffee outlets.
2 Plaintiffs became interested in a possible Forza franchise. She spoke with Defendant Brad
3 Carpenter and became more interested in a franchise. .
- 4 9. On about July 14, 2006, Plaintiffs submitted an "application" to the Franchisor Defendants
5 to become a franchisee together with a check for the "nonrefundable application fee" in
6 the amount of \$100.00.
- 7 10. On or about July 14, 2006, plaintiffs received a "Franchise Offering Circular" dated
8 September 30, 2005 from Franchisor Defendants. Plaintiffs never received an updated
9 Franchise Offering Circular from Franchisor Defendants subsequent to the one dated
10 September 30, 2005. Between September 30, 2005 and the date that Plaintiffs became
11 obligated to purchase a franchise, there were material changes in Franchisor Defendants'
12 organization and condition required to be disclosed, including changes in key personnel
13 and in Defendant Dugout's financial condition.
- 14 11. On or about September 20, 2006, Plaintiffs delivered to Franchisor Defendants a check in
15 the amount of \$25,000.00 for an initial franchise fee.
- 16 12. On about January 17, 2007, Plaintiffs signed a franchise agreement with Franchisor
17 Defendants and signed a document entitled "Completion Certificate" which authorized
18 release from the impound account of Franchisor Defendants the initial franchise fee in the
19 amount of \$25,000.00.
- 20 13. On or about April 14, 2007, construction was complete on Plaintiffs' store; on April 15,
21 2007, Plaintiffs' store was open for business.
- 22 14. As a condition subsequent to becoming a Forza franchisee, Plaintiffs invested an
23 additional amount in the franchised business, estimated to be not less than \$300,000.00.
- 24 15. Franchisor Defendants' Washington registration for the version of Franchise Offering
25 Circular given to Plaintiffs had expired on or about September 30, 2006. Between July

1 14, 2006 (date Plaintiffs received the UFOC described above) and the date that Plaintiffs
2 became obligated as a Forza franchisee, Franchisor Defendants never provided the up-to-
3 date Franchise Offering Circular to Plaintiffs in violation of the Washington Franchise
4 Investment Protection Act (Chapter 19.100 R.C.W.) (“The Act”). Between the date of the
5 Offering Circular given and the date that Plaintiffs became a Forza franchisee, there were
6 material changes in Defendants’ organization and condition, including changes in key
7 personnel required to be disclosed and including material changes in financial condition.
8 There were further undisclosed changes during the period thereafter when plaintiffs could
9 have rescinded the so-called “escrow agreement”.

10 16. The out-of-date Franchise Offering Circular that defendants provided to Plaintiffs in 2006
11 did not comply, in material respects, with the Uniform Franchise Offering Circular
12 Guidelines as required by the Act. Deficiencies, without limitation, include:

- 13 a. No cover page as required by the Federal Trade Commission Franchise Rule¹;
- 14 b. State cover page contains unauthorized marketing material instead of the mandatory
15 cover page language;
- 16 c. Item 1 is almost entirely marketing material and definitions, all of which are
17 prohibited in Item 1 and Item 1 fails to make required disclosures;
- 18 d. Item 2 contains prohibited marketing materials and fails to disclose required
19 information, including the fact that Defendant Brad Carpenter had previously, through
20 defendant Dugout Brothers, Inc., been a licensee of Cutters Point Coffee, Inc.;
- 21 e. The Item 6 disclosure regarding royalties says they were to be calculated on plaintiffs’
22 “purchase price” of all sold items—in fact, they were calculated on plaintiffs’ gross
23 selling price for all items;

24
25 ¹ Plaintiffs understands there is no private right of action under the FTC Rule and makes no such claim herein.

- 1 f. Item 7 did not disclose the true and complete amount of Plaintiffs' required initial
2 investment;
- 3 g. Item 8 omits mandatory disclosures and falsely states: "We do not derive revenue
4 from any vendor or third party supplier, directly or indirectly." In fact, defendants
5 Carpenter and Dugout received kickbacks from at least one vendor that were of
6 material value to defendants Carpenter and Dugout. Defendants failed to disclose, as
7 required, that plaintiffs was required to purchase virtually all inventory and other
8 goods from designated vendors, some of which vendors paid substantial direct and
9 indirect kickbacks to defendants Carpenter and Dugout on account of plaintiffs'
10 purchases;
- 11 h. Item 11 fails to disclose the relevant work experience of persons listed as trainers.
12 Item 11 fails to make disclosures regarding defendant's "software package" as
13 required. Item 11 fails to make mandatory disclosures about the cash register
14 equipment plaintiffs were required to pay for. Item 11 fails to make mandatory
15 disclosures regarding the Operations Manual;
- 16 i. Item 13 fails to make mandatory disclosures regarding the effect of defendant Dugout
17 Brothers, Inc. not having a federal principal register trademark registration;
- 18 j. Item 19 contains part of the language that is required to be on the FTC cover page
19 combined with some information that is not permitted by the Uniform Franchise
20 Offering Circular Guidelines, combined with information that constitutes an earnings
21 claim but does not comply with the Guidelines;
- 22 k. Item 19 incorporates by reference an attached "pro forma" for the franchised business.
23 The attached pro forma does not comply with the Uniform Franchise Offering
24 Circular Guidelines for earnings claims;
- 25

- 1 l. Item 20 misrepresents the number and experience of Defendant Dugout's Forza
2 Coffee franchisees in operation as of December 31 of 2003, 2004 and 2005;
- 3 m. Item 21 is at least one year out of date and does not comply with the UFOC
4 Guidelines and the Washington Franchise Investment Protection Act; and
- 5 n. Item 23 does not comply with the UFOC Guidelines and contains unauthorized
6 language that amounts to a waiver of certain of Plaintiffs's rights.

7 17. The Lawyer Defendants are "persons" as that term is used and defined in the Washington
8 Franchise Investment Protection Act. Lawyer Defendants were retained by Franchisor
9 Defendants in about May, 2005, for the express purpose of preparing a Uniform Franchise
10 Offering Circular (UFOC) and other documents necessary to lawfully offer and sell
11 franchises in Washington and elsewhere. Lawyer Defendants knew or reasonably should
12 have known that Franchisor Defendants were going to use and distribute the UFOC for the
13 purpose of offering and selling Forza Coffee franchises to prospective investors. Lawyer
14 Defendants knew or reasonably should have known that prospective investors in Forza
15 Coffee franchises were entitled to rely upon the accuracy and completeness of the
16 disclosures made in the UFOC and upon their being made in full compliance with the
17 Washington Franchise Investment Protection Act and other applicable law. Lawyer
18 Defendants knew, or reasonably should have known, that the UFOC they prepared
19 contained misrepresentations of material facts and failed to disclose facts necessary in
20 order to make statements that were made not misleading. Lawyer Defendants knew or
21 reasonably should have known that the UFOC they prepared did not comply in material
22 ways with the UFOC Guidelines. Lawyer Defendants knew or reasonably should have
23 known that persons investing in Forza Coffee franchises based upon the
24 misrepresentations and omissions that he participated in providing to those investors could
25 suffer economic and other damages on account of making the investment.

- 1 18. Although Franchisor Defendants never provided Plaintiffs with an up-to-date franchise
2 offering circular, they did, on September 26, 2006, provide Plaintiffs with a document
3 entitled “Dugout Brothers, Inc. Summarized Financial Information for a Single Store
4 Forza Franchise for the Year Ending December 31, 2007 (Projected)”. The document,
5 bearing a cover letter from an accountant, constitutes earnings claims—given outside of
6 any Uniform Franchise Offering Circular. The document provided does not comply with
7 the earnings claims requirements of the Uniform Franchise Offering Circular Guidelines
8 as required by the Act.
- 9 19. Had Plaintiffs known the truth regarding the many misrepresentations and omissions of
10 material facts described herein, she would not have invested in the franchise and would
11 not have incurred debt and liabilities for a real estate lease and to purchase equipment and
12 tenant improvements. Plaintiffs invested in a franchise and, on account of Defendants’
13 misrepresentations and omissions suffered damages, including but not limited to the
14 payment of initial fees in the amount of \$25,100.
- 15 20. Defendants’ actions and omissions described herein constitute violations of and are
16 “unlawful” under the Act.
- 17 21. Because Defendants induced Plaintiffs to invest in the Forza Coffee Company franchise
18 by violating the Act, the franchise and other agreements so induced are illegal and
19 unenforceable under Washington law.
- 20 22. But for Defendants’ wrongful actions described herein, Plaintiffs would not have invested
21 in the franchise, paid the initial franchise fee and royalties and advertising fees, purchased
22 equipment, signed a real estate lease, and incurred debt to cover store development and
23 operational losses.
- 24 23. Defendants’ wrongful actions described herein have caused damages to Plaintiffs in an
25 amount not yet fully known but which are estimated to exceed \$350,000.00.

1 24. If the Court determines that rescission is an appropriate remedy for some of
2 Plaintiffs' claims herein, Plaintiffs hereby demand rescission and hereby
3 conditionally tender to Defendants all tangible items in their possession and
4 control received from Defendants, conditioned upon tender back from
5 Defendants of all items and moneys heretofore delivered to Defendants. In that
6 circumstance, Plaintiffs seek the Court's guidance as to how to accomplish
7 rescission.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs respectfully ask the Court for relief as follows:

10 1. For a declaration that Defendants violated the Washington Franchise Investment
11 Protection Act ("the Act") by offering and selling a franchise to Plaintiffs using a Uniform
12 Franchise Offering Circular that did not comply with the Act and which contained false
13 representations of material facts or omitted to state facts necessary in order to make statements
14 made not misleading.

15 2. For a declaration that Defendants' violations of the disclosure requirements of
16 the Act were willful.

17 3. For a declaration that any agreements executed by the parties as a result of
18 Defendants' violations of the Act are unlawful, illegal, void and unenforceable in their entirety
19 by Defendants.

20 4. For an award of Plaintiffs' damages caused by or resulting from Defendants'
21 violations of the Act.

22 5. For an award of Plaintiffs' damages caused by or resulting from Defendants'
23 misrepresentations and omissions of material facts.

24 6. In the alternative, for an order confirming and defining rescission of any
25 agreements executed by the parties as a result of Defendants' violations of the Act, plus an
award of damages suffered by Plaintiffs to the extent not duplicative of the remedy of
rescission as permitted by the Act (RCW 19.100.190).

