

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Denver City & County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202</p>	<p>EFILED Document CO Denver County District Court 2nd JD Filing Date: Oct 9 2008 4:31PM MDT Filing ID: 21917048 Review Clerk: Jon M Libid</p>
<p>Plaintiffs: COLORADO COFFEE BEAN, LLC, a Colorado limited liability company, <i>et al.</i></p> <p>Defendants: PEABERRY COFFEE, INC., a Colorado corporation; <i>et al.</i></p> <p>Counterclaim Plaintiff: PEABERRY COFFEE FRANCHISE, INC. a Colorado corporation,</p> <p>Counterclaim Defendants: COLORADO COFFEE BEAN, LLC, a Colorado limited liability company, <i>et al.</i></p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case No. 2006CV4514</p> <p>Courtroom 7</p>
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<p>PEABERRY DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</p>	

THIS MATTER comes before the Court after a trial to the Court. Plaintiffs and Defendants Peaberry Coffee, Inc., Peaberry Coffee Franchise, Inc., Bill Tointon and Jim Orr (the “Peaberry Defendants”) presented evidence and arguments to the Court. The Court has previously dismissed Plaintiffs’ First, Seventh and Eighth Claims for Relief, and the Court now enters its Findings of Fact and Conclusions of Law with respect to Plaintiffs’ remaining Claims and Defendants’ Counterclaims, pursuant to Colo. R. Civ. P 52.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This case involves claims advanced by ten separate Plaintiff-franchisees against the Peaberry Defendants and Perkins Coie related to Plaintiffs' purchase and operation of Peaberry Coffee franchises. Plaintiffs' claims against Perkins Coie have been stayed pending the resolution of their claims against the Peaberry Defendants. The Court conducted a trial regarding Plaintiffs' claims against the Peaberry Defendants over the course of five weeks and now enters the following findings and conclusions based upon those proceedings. These findings and conclusions, to the extent applicable, are binding on Perkins Coie.

A. General Background

2. Coffee Consultants, Inc., the predecessor to Peaberry Coffee, Inc., (collectively "PCI") was formed in 1990 by Bill Tointon, and has at all times operated as a roaster, wholesaler, and retailer of gourmet coffee and espresso beans and drinks.

3. PCI has owned and operated over 20 retail locations around the Denver metro area since 1990, and currently owns and operates five retail locations, as well as a roasting facility and wholesale coffee distribution system.

4. Bill Tointon is the Chief Executive Officer and sole shareholder of PCI. Fred Nielsen was the President of PCI from February 2002 until June 2005. Jim Orr started his employment with PCI in early October 2003 as the Vice President of Franchise Development.

5. Although Plaintiffs presented evidence that PCI had lost substantial amounts of money from 1990 to 2002, Peaberry presented evidence that those losses were related to the rapid growth of the company, that the retail stores were generally profitable with overall and "same store" sales increasing, and that the top tier stores had generated substantial net profits, cash flow, and EBITDA. *See* Tr. Exs. 1109, 1134, 1139, 1142, 1177, 1179.¹

6. In 2002, Mr. Tointon and Mr. Nielsen agreed to develop a franchising program. *See* Tr. Ex. 1127. PCI retained Perkins Coie to provide legal counsel regarding franchising in mid-2002, and Perkins Coie prepared a Uniform Franchise Offering Circular ("UFOC") for Peaberry for the years 2003, 2004, and 2005. Perkins Coie formed Peaberry Coffee Franchise, Inc. ("PCFI") as a wholly-owned subsidiary of PCI in November 2002.

7. PCFI sold ten Peaberry Coffee franchises between December 2003 and June 2004. Plaintiffs Peak Mountain Coffee, Inc. ("Peak Mountain"); CZ-DM, Inc. ("CZ-DM"); Peak Java, LLC ("Peak Java"); JKF, LLC ("JKF"); ABC Sales, Inc. ("ABC Sales"); JKCR, LLC ("JKCR"); Colorado Coffee Bean, LLC ("Colorado Coffee Bean"); and Double R Coffee, Inc.

¹ The trial exhibits that are referenced in these Findings of Fact and Conclusions of Law are identified by their trial exhibit numbers and are included in the set of admitted exhibits the parties submitted to the Court at the close of the case. Transcript excerpts referenced herein are attached as "Exhibit A", "Exhibit B", etc.

(“Double R Coffee”) bought franchises directly from PCFI. Plaintiffs MLT Taylor LLC (MLT Taylor”), and JM, Inc. (“JM”) each bought an existing franchise from G.A. Bitz, Inc.

8. The Plaintiffs were generally owned and operated by sophisticated business persons:

- a. Peak Mountain’s officer, Jeffrey Klemann, was a former controller for McDonald’s and Chipotle Mexican Grill who actively participated in drafting Chipotle’s UFOC and franchise agreement. Mr. Klemann acknowledged that he was a sophisticated businessman with respect to franchising, and he had Peaberry’s UFOC reviewed by an attorney.
- b. CZ-DM’s officer, Dennis Miller, was a real estate investor who was experienced in finance concepts such as cash flows and depreciation. Mr. Miller retained legal counsel with respect to forming the business entity that became the franchisee.
- c. ABC Sales’ owner and officer, Annie Johns, relied on the advice of her husband, Stan Johns, who was the former CEO of an insurance company, and who testified that he considered himself a sophisticated businessman. Mr. Johns provided the UFOC to an attorney for review, and advised his wife that ABC Sales should enter into the Franchise Agreement.
- d. JKF’s members, Jerry and Kathleen Frohlich, retained an attorney who reviewed and provided advice regarding the UFOC, and negotiated a lower royalty rate and shorter hours of required operation compared to Peaberry’s standard Agreement set forth.
- e. Double R Coffee’s members include Richard Mauro, a former named partner at the Denver law firm of Parcel, Mauro, Hultin & Spaanstra, P.C. who had prior experience in franchising and securities law, and Robby Gilmore, a CPA and former CFO of two publicly traded companies. They negotiated various concessions from Peaberry in the terms of its Franchise Agreement, including a lower royalty rate.
- f. JKKR’s members include Linda Gould, a former vice president of a bank who managed the bank’s loan operations, understood complex legal contracts, and who retained an attorney to review the UFOC.
- g. Colorado Coffee Bean’s members, Drs. Collin Brones and William Thompson, negotiated various concessions from Peaberry in the terms of its Franchise Agreement.
- h. MLT Taylor’s sole member, Michael Noricks, has a PhD in education administration, and retained both an attorney and a CPA to review documents, including the UFOC, in connection with his decision to purchase an existing franchise from G.A. Bitz, Inc.

- i. JM's officer, Heejin Suh, reviewed its UFOC with the same attorney retained by ABC Sales, Inc., and relied upon that advice and the advice of Mr. and Mrs. Johns in deciding to purchase an existing franchise from G.A. Bitz, Inc.
- j. Peak Java's officers include David and Michelle Harris, who were both practicing attorneys. They provided the Franchise Agreement to their attorney for review, and they negotiated concessions from the standard Peaberry Agreement.

B. Peaberry's UFOC and Franchise Agreements

9. PCFI provided each Plaintiff a copy of its UFOC before any face-to-face meetings took place. The UFOC provided extensive background information regarding Peaberry and the franchise opportunity being offered, including a full unexecuted copy of the Franchise Agreement and addendums. *See, e.g.*, Tr. Ex. 68.

10. Each Plaintiff testified that at least one of its owners or representatives reviewed and understood the provisions of the UFOC, or provided it to an attorney for review.²

11. Exhibit J to Peaberry's UFOC contained an "Earnings Claim" which disclosed the annual gross sales figures for each PCI-owned store, and cautioned each Plaintiff that no one from Peaberry was authorized to provide any additional information, and that they should not rely on any unauthorized information. *See* Tr. Ex. 68.0138-39. Although Plaintiffs' experts testified that the formatting of the chart implied that some of the stores were profitable, each Plaintiff who signed a franchise agreement testified that they understood that Exhibit J made no representations regarding the stores' profitability.³ I find that no representations regarding store profitability are contained in Exhibit J, and that it is not otherwise misleading or deceptive.

12. Jeffrey Klemann of Peak Mountain Coffee and Robby Gilmore of Double R Coffee testified that they prepared store pro forma and break-even analyses using the revenues in Exhibit J along with publicly available coffee shop expense information. Both accurately determined that the break-even revenue point of the stores listed in Exhibit J was approximately

² *See e.g.* Tr. Testimony: 134:6-11 (Peak Mountain); 461:20-462:1 (CZ-DM); 802:13-803:22 (ABC Sales); 1009:10-20 (JKF); 1342:1-6 (Double R Coffee); 1414:7-16 (JKKR); 1556:21-1557:8 (Colorado Coffee Bean); 1636:25-1637:2 (MLT Taylor); 1841:24-1842:20 (JM) and 2084:10-12 (Peak Java) (excerpts attached as Exhibit A).

³ *See e.g.* Tr. Testimony: 305:7-15 (Peak Mountain); 629:9-18 (CZ-DM); 841:3-6 (ABC Sales); 1120:1-7 (JKF); 1277:22-1278:10 (Double R Coffee); 1417:14-17 (JKKR); 1558:25-1559:15 (Colorado Coffee Bean) and 1956:8-14 (Peak Java) (excerpts attached as Exhibit B).

\$450,000 to \$500,000.⁴ Notably, the UFOC itself advised the Plaintiffs submit the information contained therein to an accountant for review. *See* Tr. Ex. 68.0003.

C. Plaintiffs' Closing Acknowledgements and Representations

13. Each Plaintiff, with the exception of MLT Taylor and JM, executed Closing Acknowledgments prior to executing the Franchise Agreement. *See, e.g.*, Tr. Ex. 68.0142-43. Although they did not sign new franchise agreements, MLT Taylor and JM assumed the rights and obligations of the existing franchise agreements executed by G.A. Bitz, Inc.

14. The Closing Acknowledgments contained representations by each Plaintiff that they had not been given any assurances or predictions of how well their Peaberry franchise would perform and that they were not relying on any information outside the UFOC and Franchise Agreement in their purchase decisions.

15. The Franchise Agreement contained an integration clause that superseded any prior oral agreements and an agreement by each Plaintiff that no representations had been made regarding the future performance of their Peaberry franchises or operational assistance Peaberry would provide other than what was set forth in the UFOC and Franchise Agreement itself, and expressly disclaimed liability for negligent misrepresentation. *See, e.g.*, Tr. Ex. 68.0080.

16. The Franchise Agreement included an additional "Acknowledgment" section, printed conspicuously in all capital letters directly above the signature line, which reiterated the fact that no assurances regarding the potential success of any franchise had been given, and that no statements or representations, communicated in any form, were binding beyond those set forth in the UFOC and Franchise Agreement. *See* Tr. Ex. 68.0082.

17. As noted above, certain Plaintiffs negotiated changes to Peaberry's standard Franchise Agreement. *See e.g.* Tr. Ex. 5. Although these Plaintiffs engaged in substantial negotiations over the terms of the franchise agreements, none requested any modification to the acknowledgements, integration, or non-reliance clauses.

18. Despite the acknowledgements and other related contract provisions, the Plaintiffs gave no indication to Peaberry at closing that they had, in fact, relied on any information other than the UFOC and Franchise Agreement. Mr. Orr testified that if Peaberry had been informed at the time of the closings that Plaintiffs were relying on information outside the UFOC, he would have stopped the closings.

⁴ *See* Tr. Testimony: 322:8-323:4; 1285:16-1286:14 (Excerpts attached as Exhibit C).

D. The Denver Business Journal Article

19. A substantial amount of disputed evidence was presented at trial regarding an article that appeared in the Denver Business Journal dated October 17, 2003. *See* Tr. Ex. 942.

20. All the Plaintiffs except for Double R Coffee, MLT Taylor, and JM testified that they were certain they received the article from Peaberry. Some of the franchisees testified that they received the article during face-to-face meetings, and others testified that they received it in the information packets Jim Orr included with Peaberry's UFOC.

21. Jim Orr testified that he included this article in some of the information packets he sent out to prospective franchisees, although he did not keep a record of which franchisees received it. Mr. Orr testified that he never distributed this article at any of the face to face meetings with prospective franchisees. Bill Tointon testified that he never saw it given by Mr. Orr to a prospective franchisee at any meeting he attended, and that it was never discussed at any meeting he attended. Fred Nielsen testified that he never gave the article to any prospective franchisees at any meetings and that he has no recollection of Jim Orr giving the article out or otherwise discussing the article at any meetings.

22. The article contained the following statements attributed to Peaberry's then-President, Fred Nielsen:

Peaberry is profitable now, Nielsen said, with yearly revenue of about \$12 million. Of that, about \$10.5 million comes from retail stores, which works out to an average of about \$500,000 a year in sales per retail store.

* * *

Funding growth through the company's own cash flow has enabled it to add only two or three locations a year, Nielsen said[.]

* * *

"Our goal is 500 stores by the year 2010," [Nielsen] said. "That's very doable for us."

23. Plaintiffs argue that these excerpts constitute false statements of fact.

24. Jim Orr, Bill Tointon, and Fred Nielsen all testified that Peaberry had a stated goal of growing to 500 stores by 2010. This goal was incorporated into Peaberry's 2004 Strategic Plan. *See* Tr. Ex. 836.0026. Accordingly, I conclude that this representation is not actionable because, at the time it was made and continuing through the time the Plaintiffs purchased their franchises, Peaberry intended to continue expanding in an effort to achieve its stated goal. *See* CJI-Civ. 19:12 (statement of intent to act in the future is not a false representation if the person making the statement intended to take that future action).

25. Plaintiffs argue that the article's reference to "cash flow" implied a representation about Peaberry's profitability. I do not agree. The term "cash flow" is commonly understood as "[a]n analysis of the movement of cash through a venture *as contrasted with the earnings of the*

venture.” *Black’s Law Dictionary*, 149 (6th ed. 1991) (emphasis added). Mr. Tointon testified that Peaberry funded its expansion of corporate-owned stores using cash infusions from personal loans he made to the company. Using this influx of cash, Peaberry opened 22 stores from 1990 to 2002, including 7 stores in 1999 alone. *See* Tr. Ex. 1109.

26. The article does not represent that Peaberry opened its corporate-owned stores by reinvesting its own profits or earnings, and I conclude that it would be unreasonable to rely on a general statement regarding “cash flow” as a representation of profitability. In light of Mr. Tointon’s testimony regarding his cash investments in the company, and the common definition of “cash flow,” I find that the representation in this article regarding Peaberry’s “cash flow” is not an actionable false statement of fact.

27. The statement that Peaberry’s approximate average sales per retail store was \$500,000 is also not an actionable false statement of fact. Each Plaintiff testified it received, read, and understood Peaberry’s UFOC. The \$500,000 approximation set forth in the article is consistent with the store revenue average identified in Peaberry’s 2003 UFOC. While the average identified in Peaberry’s 2004 UFOC is lower than the approximation in the article, it was clear that the article was published in 2003, and that the 2004 UFOC contained more recent and accurate numbers. Therefore, I find that the article’s statement of approximate average revenue per store does not constitute an actionable false statement of fact.

28. The statement that “Peaberry is profitable now” is vague and ambiguous. It does not refer to any specific level of profitability. The statement is followed by references to Peaberry’s store revenue and its overall company revenue, but it does not indicate whether the phrase “profitable now” is related to Peaberry’s store operations alone, or to its overall operations. Fred Nielsen testified that the statement regarding profitability pertained to the aggregate profitability of PCI’s corporate-owned stores, which was a positive figure at the time. Given the ambiguity in the way the statement appears in the article, and Mr. Nielsen’s testimony regarding his intent with respect to the statement, I find that the ambiguity was unintentional.

29. Mr. Orr testified that he had no knowledge of the financial condition of PCI or its corporate-owned stores, and that he had no reason to doubt the accuracy of the statements contained in the article. Mr. Tointon testified that although he saw the article at the time it was published, he was unaware that Mr. Nielsen had instructed Mr. Orr to include it in the information packet given to prospective franchisees.

E. Other Alleged Statements by Peaberry

30. Plaintiffs Peak Mountain Coffee, MLT Taylor, JM, and Double R Coffee have not alleged any oral misrepresentations by the Peaberry Defendants during the marketing process.

31. Plaintiffs CZ-DM and JKF have alleged certain statements that are predictive of future events:

- Dennis Miller (CZ-DM) testified that Jim Orr said his store would do \$500,000 in revenue in its first year and \$750,000 in its second year. Mr.

Miller also testified that Jim Orr mailed him a pro forma that showed projected profits for a hypothetical franchise store.

- Jerry Frohlich (JKF) testified that Jim Orr said its store would generate \$500,000 in revenue its first year, and that Bill Tointon said its store would generate at least as much revenue as an average corporate-owned store and compared its store site to PCI's Aurora store.

32. These predictions are not actionable under Colorado law. *Ballow v. PHICO Ins., Co.*, 875 P.2d 1354, 1362 (Colo. 1993).

33. With respect to the training pro forma which the Millers testified was mailed to them by Peaberry, *see* Tr. Ex. 542, the evidence showed that it had been given to Mr. Bitz on the day G.A. Bitz, Inc. executed its franchise agreement, and that Mr. Bitz's fax number was printed across the top. Based upon this evidence, I find that the Millers almost certainly received this document from Mr. Bitz or an intermediary, and not from anyone at Peaberry.

34. Colorado Coffee Bean alleged that Jim Orr stated Peaberry was "going well" and "moving forward." These constitute vague statements of opinion that are also not actionable under Colorado law. *Id.*; *Colorado Interstate Gas Co., Inc. v. Chemco, Inc.*, 833 P.2d 786, 793 (Colo. App. 1991); *see also, Vaughn v. General Foods Corp.*, 797 F.2d 1403, 1411 (7th Cir. 1986).

35. The following Plaintiffs presented further testimony regarding inaccurate factual statements allegedly made to them during the franchise marketing process by Peaberry representatives:

- Dennis Miller (CZ-DM) testified that Bill Tointon stated that PCI was profitable.
- Stan Johns (ABC Sales) testified that Mr. Orr said PCI's stores made money after three months, that all of PCI's corporate-owned stores were making money, and that PCI was financially strong with no significant liability. Mr. Johns further testified that Bill Tointon affirmed that PCI was financially strong with no significant liability. Mr. Johns also testified that he wrote these statements down inside his UFOC either at the time they were made or shortly after. Finally, Mr. Johns testified that Mr. Orr stopped Bill Tointon from saying anything about store earnings or customer counts during one of their meetings.
- Jerry Frohlich (JKF) testified that Bill Tointon said PCI's Aurora store was one of its most profitable.
- Linda Gould (JKKR) testified that Jim Orr said that PCI was a profitable company, and that all but two of its stores were profitable.

- David Harris (Peak Java Company) testified that Jim Orr said PCI and its retail stores were profitable.

36. Bill Tointon and Jim Orr denied making any of these statements or predictions, or otherwise providing any information regarding PCI's financial history or the performance of its corporate-owned stores beyond the information contained in the UFOC. Their testimony is consistent with the testimony from several Plaintiffs who testified that no one from Peaberry would provide this information if requested, and is also consistent with the cautionary and limiting language of the UFOC itself.

F. Post-Sales Developments

37. Double R Coffee was the first franchise store to open in July 2004, and its initial sales were far below expectations. At about the same time, Peaberry launched the "FroJo", a new product developed to compete with Starbucks' "Frappuccino" drinks. The sales results from this product launch were very disappointing.

38. In September 2004, Peaberry's advisory board recommended that PCFI put franchise sales on hold to identify and resolve the problems affecting Double R Coffee's performance, and to focus on getting stronger opening results from the remaining franchisees that were scheduled to open in late 2004 and early 2005.

39. In November 2004, Fred Nielsen requested an annual bonus, citing his successful cash control as one reason supporting his request. *See* Tr. Ex. 765. In December 2004, Pat Fish informed Bill Tointon that, contrary to Fred Nielsen's prior statements, PCI faced a \$750,000 cash shortage at the 2004 year-end.

40. Historically, Bill Tointon and his father Bob Tointon had provided cash contributions to PCI in order to finance the company's growth and operations. Bill Tointon approached his father in late 2004 to discuss a loan to cover the \$750,000 cash shortage, and Bob Tointon suggested that Bill should consider financing alternatives.

41. In January 2005, Bill Tointon engaged the services of Trinity Capital, LLC ("Trinity") to explore alternative financing options to cover the \$750,000 cash shortage, including the possibility of selling the company as a whole. Trinity's efforts led to a letter of intent, executed in July 2005, with Starbucks for the purchase of certain corporate-owned leasehold interests. PCI thereafter entered into an Asset Purchase Agreement with Starbucks in November 2005. The proposed Starbucks transaction was subject to contingencies until late February of 2006, well after Peaberry's public announcement of the deal in January 2006.

42. In early 2005, Trinity prepared an information memorandum that contained certain revenue projections and predictions regarding Peaberry's future growth through franchising. Mr. Tointon testified at trial that although Peaberry had placed the sale of franchises on hold just prior to the time these projections were prepared, Peaberry intended to re-start its franchising initiative once it solved the sales problems that affected its first group of franchisees.

43. The Franchise Agreements between Plaintiffs and PCFI do not prohibit the sale of PCI's corporate-owned stores to Starbucks.

G. Lack of Justifiable Reliance (Second, Third, and Fourth Claims for Relief)

44. Plaintiffs' Second and Fourth Claims for Relief are based on allegations that one or more of the Peaberry Defendants provided inaccurate or misleading information regarding the profitability of PCI, the profitability of PCI's corporate-owned stores, predictions regarding the potential revenues of their franchised stores, or statements about Peaberry's plans to grow to 500 stores by 2011. These claims require proof that Plaintiffs justifiably relied on the alleged misrepresentations. *Brody v. Bock*, 897 P.2d 769, 776 (Colo. 1995) (fraud); *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587 (Colo. App. 2000) (negligent misrepresentation).

45. Plaintiffs' Third Claim for Relief is based on Plaintiffs' allegation that the Peaberry Defendants improperly failed to disclose information regarding the profitability of Peaberry's company stores, and the overall profitability of PCI. This claim also requires proof that Plaintiffs reasonably relied on the assumption that the undisclosed facts did not exist or were different from what they actually were. *CJI-Civ. 19:2; Nielson v. Scott*, 53 P.3d 777, 780 (Colo. App. 2002).

46. As described below, each of these claims fails here because none of the Plaintiffs have persuaded me that they reasonably relied on the alleged misstatements and omissions.

1. Acknowledgements and Non-Reliance Clauses

a. *Second and Fourth Claims for Relief*

47. A party may not rely upon a statement to prove fraud in the inducement where he "avowedly did not rely on the statement." *Morrison v. Goodspeed*, 68 P.2d 458, 463 (Colo. 1937). Based on my review of the documents and the testimony of the Plaintiffs, I find that Plaintiffs have not met their burden of proof on the element of reasonable reliance.

48. All of the Plaintiffs testified that they reviewed the UFOC, the Closing Acknowledgments, and Franchise Agreement carefully, and that they understood the information contained in these documents. *See* Exhibit A. The UFOC expressly instructed the Plaintiffs not to rely upon any unauthorized information outside the UFOC, and the Plaintiffs expressly stated in the Closing Acknowledgments and Franchise Agreements that they were not relying on such information. Taken together, these acknowledgments, and non-reliance clauses preclude Plaintiffs' reasonable reliance on information outside the UFOC and Franchise Agreement. "[I]t is simply unreasonable to continue to rely on representations after stating in writing that you are not so relying." *Hardee's of Maumelle, Ark., Inc. v. Hardee's Food*, 31 F.3d 573, 576 (7th Cir. 1994). *See also Konold v. Baskin-Robbins, Inc.*, No. 95-1251, 87 F.3d 1327, 1996 WL 346607,

*4 (10th Cir. June 25, 1996); *Intelligent Office System, LLC v. Performance Consulting, Inc. et al.* (Case No. 2007CV4619), Denver District Court (Judge Larry Naves).⁵

49. In my summary judgment orders, I concluded that the integration and non-reliance clauses in the UFOCs and franchise agreements might not be a defense to Plaintiffs' intentional fraud claims, and that the claims could not be dismissed by summary judgment. *See* Order re Defendants Motion for Partial Summary Judgment of CZ-DM, Inc., MLT Taylor, LLC., ABC Sales, Inc., JM, Inc., and Peak Java Company's Claims for Relief, pp. 2-3. Additionally, Plaintiffs have repeatedly cited authorities in support of the proposition that a contract provision excusing a party from intentional fraud is unenforceable on the grounds of public policy. *See generally*, Restatement (Second) of Contracts §195(1); *Rhino Fund, LLLP v. Hutchins*, 06CA1172, --- P.3d ---, 2008 WL 2522308 (Colo. App. June 26, 2008).

50. The contract provisions here do not purport to excuse, or "exculpate," a party from fraudulent conduct.⁶ Rather they seek to ensure, prior to executing the franchise agreements, that the franchisee is relying only upon authorized and verified information and not anything that could result in a mistaken understanding of the facts. As Mr. Orr testified, these acknowledgments and non-reliance clauses are included in franchise agreements to ensure that franchisees are not relying on any ambiguous or unauthorized information as part of their decision to enter into a franchise agreement.

51. "A non-reliance clause is not identical to a truthful disclosure, but it has a similar function: it ensures that both the transaction and any subsequent litigation proceed on the basis of the parties' writings, which are less subject to the vagaries of memory and the risks of fabrication." *Rissman v. Rissman*, 213 F.3d 381, 384 (7th Cir. 2000). "If there is a public policy interest in truthfulness, then that interest applies with more force, not less, to contractual representations of fact." *ABRY P'Ship V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1057 (Del. Chanc. 2006). Accordingly, I find that the contractual acknowledgements and non-reliance clauses are valid and enforceable, and do not violate public policy.

⁵ In light of the Plaintiffs' testimony at trial that they did rely on information outside the UFOC and Franchise Agreement in purchasing Peaberry franchises, these contractual provisions also constitute prior inconsistent statements. Based upon these inconsistencies and the evidence that Mr. Tointon and Mr. Orr told several of the Plaintiffs that they could not provide any financial information beyond that contained in the UFOC, I do not find Plaintiffs' testimony regarding these statements to be credible.

⁶ However, the Colorado Supreme Court has held that an integration clause may preclude a party from bringing a negligent misrepresentation claim so long as the clause is "couched in clear and specific language." *Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69, 73 (Colo. 1991). Consistent with *Keller*, I separately conclude that the clear and express disclaimer of liability for negligent misrepresentation set forth in the franchise agreement's integration clause bars Plaintiffs' Fourth Claim for Relief. *See* Tr. Ex. 68.0080.

52. Without ignoring the various disclaimers, acknowledgements and non-reliance clauses in the franchise agreements, which the Plaintiffs testified they read and understood, I simply cannot find in Plaintiffs' favor. Parties to a contract may negotiate and agree to any terms they choose, and the most equitable outcome of this difficult dispute is to honor the terms of the agreements that the parties signed, and I am required to do so here. As the Colorado Supreme Court has stated: "Equity cannot make a new contract for the parties, but must enforce the contract according to its terms or not at all[.]" *Mestas v. Martini*, 155 P.2d 161, 166 (Colo. 1944) (internal citation omitted).

53. All of the Plaintiffs testified that their interest in buying a Peaberry franchise was largely driven by their very positive experience with Peaberry coffee stores as customers, and that they read and understood the franchise agreements. In light of this testimony, and the multiple acknowledgements and non-reliance clauses contained in the franchise agreements, I find Plaintiffs did not justifiably rely on any representations outside their UFOCs and Franchise Agreements. Accordingly, I find in favor of all Defendants with respect to Plaintiffs' Second and Fourth Claims for Relief based on Plaintiffs failure to prove the element of reasonable reliance.

b. *Third Claim for Relief*

54. Plaintiffs' Third Claim for Relief is based on Defendants' failure to disclose the profitability of Peaberry's company stores, and the overall profitability of PCI. A claim for fraudulent concealment on non-disclosure also requires proof that Plaintiffs justifiably relied on the assumption that the undisclosed fact did not exist or was different from what it actually was. CJI-Civ. 19:2; *Nielson*, 53 P.3d at 780.

55. Plaintiffs have admitted that they knew the undisclosed financial information regarding PCI and its corporate-owned stores existed. Peaberry's UFOC made clear that Peaberry was only disclosing the gross sales information for PCI's corporate-owned stores, and audited financials for PCFI but not PCI. Plaintiffs knew that information regarding the profitability of PCI and its stores existed, but that it was not being provided to them in the UFOC. Accordingly, Plaintiffs cannot and have not argued that they assumed that this information did not exist.

56. Additionally, Plaintiffs could not have justifiably relied on the assumption that this information was different from what it actually was. All Plaintiffs were told that this information was not being disclosed, and they acknowledged they were not relying on any other information at the time they entered into their Franchise Agreements. Accordingly, they had no reasonable basis to assume anything about PCI's or the store's profitability, so they could not have justifiably relied on the assumption that it was different from what it actually was.

57. Stated simply, Plaintiffs expressly disclaimed reliance on all of the information that could have arguably led to a mistaken assumption about the financial performance of PCI or its stores, and they therefore have not demonstrated the element of justifiable reliance necessary to prevail on their Third Claim for Relief.

2. Publicly Available Information

58. Jeffrey Klemann of Peak Mountain Coffee and Robby Gilmore of Double R Coffee both testified that they prepared break even analyses using the revenues in Exhibit J along with publicly available store expense information. Both accurately determined that the break-even revenue point of the stores listed in Exhibit J was approximately \$450,000-\$500,000. Both also developed pro forma analyses to determine profitability at different levels of revenue to determine the revenues they needed to achieve in order to obtain certain returns on their investments. The information to perform this analysis was publicly available and any Plaintiff could have obtained this information.

59. A party has no right to rely on allegedly false representations where he has “access to information that was equally available to both parties and would have led to the true facts[.]” *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994). Thus, where reasonable due diligence would reveal accurate information, a plaintiff cannot prove justifiable reliance on alleged inaccuracies. *Id.* (citing 1 George F. Palmer, *Law of Restitution* § 3.19, at 350-51 (1978)).

60. I therefore conclude that Plaintiffs cannot prove justifiable reliance on any alleged misrepresentations regarding the profitability of PCI’s corporate-owned stores because this information is publicly available. The UFOC explicitly set forth the gross revenue for these stores, and reviewing publicly available information regarding operating expenses would have allowed any Plaintiff to determine the profitability of those stores.⁷

H. Lack of Intent (Second and Third Claims for Relief)

61. Plaintiffs’ Second and Third Claims for Relief both require proof of the element of intent. *CJI-Civ. 19:1, 19:2; Denver Bus. Sales Co. v. Lewis*, 365 P.2d 895, 898 (Colo. 1961) (noting general rule that actions based on fraud involve corrupt motives on the defendant’s part). As with all the elements of fraud, the element of intent must be established with “clear, precise and indisputable” evidence. *Bassford v. Cook*, 380 P.2d 907, 910 (Colo. 1963). As described below, I conclude that Plaintiffs have not proven the element of intent with respect to any of the Defendants.⁸

⁷ The public availability of the store profitability information obviously does not address the question of whether Plaintiffs had a right to rely on alleged misrepresentations regarding PCI’s financial condition. As discussed in paragraphs 78-96 below, I have separately concluded that none of the Peaberry Defendants was under a duty to disclose PCI’s financial information, and that this information was not material.

⁸ Plaintiffs have argued that “recklessness” is also a standard by which fraud may be found. However, under Colorado law, a misrepresentation or omission is only actionable when made “either with knowledge of its untruth, or recklessly and willfully made without regard to its consequences, and with an intent to mislead and deceive the plaintiff.” *Rhino Linings USA, Inc.*

(Footnote cont’d on next page)

1. Bill Tointon

62. In my summary judgment orders, I concluded that fact questions remained regarding whether the creation of PCFI was for the illegitimate purpose of concealing PCI's financial records. Mr. Tointon testified that he formed PCFI to create a new business entity to carry out his new franchising venture, to provide for the option of employee stock ownership in the future, and to save the cost of auditing PCI's financial statements. Mr. Tointon testified that he did not consider the marketability of franchises when he made the decision to form PCFI or what financial information should be included in the UFOC. Plaintiffs presented no evidence that Mr. Tointon formed or otherwise used PCI or PCFI to perpetrate a fraud, or that he decided to disclose only store revenue information in Exhibit J. I find Mr. Tointon's testimony to be credible, and I conclude that his dealings with Perkins Coie regarding the information to be disclosed in the UFOC did not involve any fraudulent purpose or intent.

63. With respect to the franchise sales process, the evidence is consistent that Mr. Tointon had turned operational control of Peaberry over to Fred Nielsen, and that Mr. Tointon did not supervise the activities of Jim Orr or Fred Nielsen with respect to the franchise sales process. Although Plaintiffs testified that Mr. Tointon was an "active participant" in some of the marketing meetings with Plaintiffs, he did not direct the activities of the franchise marketing process. Accordingly, I conclude that Mr. Tointon's liability is limited to his own knowledge, statements, and actions. *Hoang v. Arbess*, 80 P.3d 863, 869 (Colo. App. 2003).

64. Among the ten Plaintiffs, only ABC Sales, CZ-DM, and JKF testified that Mr. Tointon made any oral representations to them. CZ-DM and ABC Sales testified that Bill Tointon made affirmative misrepresentations to them regarding the profitability of PCI or its stores, and JKF testified that Mr. Tointon predicted that their store would perform comparably, in the future, to an existing Peaberry company store. However, predictions of future events are not actionable in Colorado. *Ballow*, 875 P.2d at 1362; Thus, the only testimony alleging actionable misrepresentations by Mr. Tointon in this case came from ABC Sales and CZ-DM.

65. Mr. Tointon and Mr. Orr denied that Mr. Tointon made any of the alleged statements to these Plaintiffs. In light of all of the evidence, including the acknowledgments and disclaimers contained in the UFOC, the Closing Acknowledgments, and the Franchise Agreements in which Plaintiffs generally stated in writing that such statements had not been made during the sales process, I find that Mr. Tointon's testimony is more credible. Accordingly, I conclude Plaintiffs have not met their burden of proof that Mr. Tointon intentionally misrepresented facts about Peaberry or its company stores to Plaintiffs.

(Footnote cont'd from previous page.)

v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 147 (Colo. 2003) (emphasis added) (internal citation and quotation omitted). Thus, even under a standard of reckless indifference, Colorado law requires proof of an "intent to mislead and deceive the plaintiff." *Id.*

66. The disputed statements in the Denver Business Journal article were made by Mr. Nielsen, not Mr. Tointon. Mr. Tointon testified that although he saw the article, he was not aware that it was being distributed as a part of the franchise marketing materials. Accordingly, the Denver Business Journal article does not provide a basis to conclude that Mr. Tointon intended to mislead the Plaintiffs.

2. Jim Orr

67. Mr. Orr's liability is also limited to his own knowledge, statements, and actions. *Hoang*, 80 P.3d at 869. Double R Coffee, MLT Taylor, and JM do not allege that Jim Orr misrepresented any facts to them, or provided them with the Denver Business Journal article. Accordingly, these Plaintiffs have presented no evidence that would support misrepresentation claims against Mr. Orr.

68. All Plaintiffs except for Double R Coffee, MLT Taylor, and JM testified they were certain Jim Orr gave them the Denver Business Journal article as a part of their marketing process. Although the statement in the Denver Business Journal article that "Peaberry is profitable now" is arguably confusing and ambiguous, I have already concluded that this ambiguity was unintentional, and the ambiguity itself did not result from any actions taken by Mr. Orr.

69. Furthermore, Mr. Orr testified that he had no knowledge of PCI's finances or of the profitability of its stores during the relevant time period, and was therefore unaware of the accuracy of the statements made in the Denver Business Journal article. Plaintiffs have failed to present any contrary evidence regarding Mr. Orr's knowledge, and I therefore find that the use of the Denver Business Journal article does not support a claim of intentional misrepresentation with respect to Mr. Orr.

70. With respect to Mr. Orr's alleged oral representations to Plaintiff, several Plaintiffs presented evidence that Mr. Orr had made misrepresentations to them:

- CZ-DM testified that Mr. Orr gave them a pro forma showing projected profits for a hypothetical store.
- ABC Sales testified that Mr. Orr said all of PCI's corporate-owned stores were making money and that PCI was very strong with no significant liability.
- JKKR testified that Mr. Orr said PCI was profitable, and that all of PCI's corporate-owned stores were profitable but two that would be closed.

- Peak Java testified that Mr. Orr said both PCI and its corporate-owned stores were profitable.⁹

71. Mr. Orr denied making these statements or providing the Bitz training pro forma to the Millers. In light of all of the evidence presented in Plaintiffs' case, including the statements contained in the UFOC, the Closing Acknowledgments, and the Franchise Agreements in which Plaintiffs generally stated in writing that such statements had not been made during the sales process, I find Mr. Orr's testimony to be more credible.

3. PCI and PCFI

72. The testimony of Bill Tointon and Michael Zeeb, the Defendants' accounting expert, established that Peaberry's same-store sales figures had increased on a year-to-year basis in the years leading up to Mr. Tointon and Mr. Nielsen's decision to franchise. *See* Tr. Ex. 1179. This in itself provided an ample factual basis for the defendants to believe that franchising would be a successful endeavor. It would be entirely illogical for the defendants to have made the substantial investment in resources to launch a franchise program simply to collect a \$35,000 franchise fee from each Plaintiff. Accordingly, I am not persuaded that the Defendants embarked on a franchising program as part of a scheme to defraud Plaintiffs.

73. Although the statements in the Denver Business Journal article are arguably confusing, in light of all of the testimony, I find that any misstatement or inaccuracy was unintentional, and that the use of this article does not support a finding of intentional misrepresentation by any of the Peaberry Defendants. Based on the testimony that Mr. Nielsen believed the statements to be accurate, that Mr. Orr was a new hire who had no reason to doubt the article's accuracy, and that Mr. Tointon was not aware the article was distributed with PCFI's sales packets, I find that there is insufficient evidence to conclude that the article was used by any of the Defendants with an intent to defraud, or for any other improper purpose.

74. I also find that none of the Defendants acted with reckless indifference to the truth. Mr. Tointon was not involved in any of the day to day operations of Peaberry following Mr. Nielsen's hiring, and his failure to determine what marketing materials were being provided to franchisees does not constitute reckless indifference to the truth. Similarly, Mr. Orr's failure to question Mr. Nielsen, his new boss, regarding the accuracy of the financial information in the article is not reckless indifference – I would expect that any employee would assume information about the company provided by its President would be accurate.

75. In sum, I cannot conclude on the evidence before me that Mr. Tointon, Mr. Orr, PCI, or PCFI acted with the requisite intent to support Plaintiffs' intentional fraud claims.

⁹ Although JKF and CZ-DM testified that Mr. Orr made predictions about their store's potential future performance, these statements are clearly predictions of future events, and are not actionable. *Ballow*, 875 P.2d at 1362.

Therefore, I find in favor of the Peaberry Defendants on Plaintiffs' Second and Third Claims for Relief.

I. Plaintiffs' Fraudulent Nondisclosure/Concealment Claim (Third Claim for Relief)

76. I also find that Plaintiffs' Fraudulent Nondisclosure/Concealment claim fails because Defendants had no duty to disclose the disputed information, and because the information was not material to Plaintiffs' decision to acquire a Peaberry franchise.

1. No Duty of Disclosure

77. A claim for fraudulent concealment requires the existence of a duty of disclosure, which can arise in a variety of circumstances. In this case, Plaintiffs argue that the Defendants had a duty to disclose information regarding the profitability of PCI and its corporate-owned stores under Colorado's common law. Under Colorado's common law, there are three potential sources of duty relevant in this case: (1) disclosures customary in the trade; or (2) where a defendant knew that by his own unclear or deceptive words or conduct that he created a false impression in the plaintiff's mind; or (3) where the defendant communicated some facts but not all material facts, knowing that they would create a false impression in the plaintiff's mind. *Berger v. Security Pac. Info. Sys., Inc.*, 795 P.2d 1380, 1383 (Colo. App. 1990); Restatement (Second) of Torts § 551(2)(e); CJI-Civ. 19.5.¹⁰

a. *Customary Disclosure in the Trade*

78. A duty to disclose material information may arise under Colorado law where the disclosure of that information is customary in the trade. Restatement (Second) of Torts § 551(2)(e). The disclosures customary in the franchising trade are set forth in the Federal Trade Commission's regulations applicable to franchising. *See generally* 16 C.F.R. § 436, *et seq.* (2003).

79. Under the FTC Rule, a franchisor can disclose its parent company's financial information only where "the parent absolutely and irrevocably has agreed to guarantee all obligations of the subsidiary." 16 C.F.R. § 436.1(a)(20)(i) (2003). Thus, where a subsidiary carries out the business of franchising, the parent company's financials cannot be included in the UFOC absent the parent's guarantee.

¹⁰ Neither MLT Taylor, LLC nor JM testified that they received any representations regarding PCI's financial performance beyond what was set forth in the UFOC, and both received information regarding the actual financial performance of the stores they purchased from the owner, G.A. Bitz, Inc. I find that Peaberry had no knowledge that either of these Plaintiffs were mistaken as to their understanding of any facts material to the transaction. Therefore, I find that there is no basis in the record to support any common law duty of disclosure as to MLT Taylor, LLC and JM, Inc.

80. The FTC Rule does not require a franchisor to disclose any earnings information for its corporate-owned units. 60 Fed Reg. 17656 (April 7, 1995). Instead, an earnings claim is an optional disclosure. Peaberry included an earnings claim as Exhibit J to its UFOC. The earnings claim provided accurate gross sales information for each PCI corporate-owned store, and stated explicitly that the operating costs, expenses, and profits of any individual store would not be disclosed.

81. Peaberry's duty to disclose financial information was controlled in the first instance by the FTC regulations applicable to franchise offerings. No Plaintiff obtained a guarantee of PCFI's obligations from PCI. Under these circumstances, the FTC Rule limited Peaberry's duty of disclosure to PCFI's financial statements. 16 C.F.R. § 436.1(a)(20)(i) (2003). In fact, any additional duty to disclose PCI's financial history would be pre-empted as inconsistent with the FTC Rule. 16 C.F.R. § 436.10(b) (2003). Similarly, Peaberry complied with the FTC's requirements applicable to the earnings claim it included in Exhibit J to its UFOC. Finally, all of the experts who testified agreed that it is not standard practice in the industry to disclose the profitability of the franchisor's existing stores, and that it is improper to disclose the financial information about the franchisor's parent unless the parent guarantees the franchisor's obligations, which was not the case here. Accordingly, Peaberry met the duty of disclosure customary in the trade pursuant to the Restatement (Second) of Torts § 551(2)(e).

b. *False Impression of the Facts*

82. Although Plaintiffs placed substantial emphasis on the fact that PCI was highly unprofitable and that many of the Peaberry company stores would not have been profitable if burdened by a franchise royalty, these facts do not create a duty of disclosure. Rather, a duty of disclosure could have been created if Peaberry knew that its words or conduct created false impressions of the facts in Plaintiffs' minds, or if there were other objective circumstances that would lead Plaintiffs to reasonably expect certain disclosures. *Berger*, 795 P.2d at 1383. Having evaluated the evidence presented in this regard, I find that these circumstances did not occur here, and that that no additional duty of disclosure arose with respect to the profitability of PCI or its stores.

83. Peaberry's UFOC was explicit that it did not disclose any information regarding the profitability of PCI or its corporate-owned stores, and the Plaintiffs uniformly acknowledged that they understood Peaberry did not provide this information. Further, the UFOC expressly advised Plaintiffs that they should not rely on information outside the UFOC and Franchise Agreement. Several Plaintiffs testified that they asked Peaberry for additional financial information regarding PCI and its stores and were told that it would not be disclosed. Finally, it is undisputed that each Plaintiff executed a Closing Acknowledgment statement and Franchise Agreement that contained numerous disclaimers, statements of non-reliance, and integration provisions, all of which communicated to the Peaberry Defendants that none of the Plaintiffs were relying on information outside the UFOC and Franchise Agreement, or that any such information, communicated in any form, would be binding. *See* Tr. Ex. 68.0142-43; 68.0080; 68.0082.

84. I conclude that based on this evidence, the Peaberry Defendants had no reason to believe that Plaintiffs had a mistaken understanding about any facts material to the transaction. Plaintiffs' acknowledgments and statements of non-reliance ensured the Peaberry Defendants that Plaintiffs had relied only on the verified and accurate information set forth in the UFOC and Franchise Agreement. Moreover, given the express language of the UFOC and the disclaimers and acknowledgements signed by each Plaintiff, they had no reasonable expectation that additional facts should have been disclosed by the Peaberry Defendants.¹¹

85. Accordingly, I conclude that no additional *Berger* duty of disclosure was created here beyond those disclosures customary in the franchising trade, and that Peaberry had no duty to disclose PCI's financial information, or information regarding the profitability of its retail stores. The failure to disclose this information to prospective franchisees did not constitute fraudulent concealment or non-disclosure, and Plaintiffs did not plead or otherwise argue for relief under a theory of negligent non-disclosure.

c. *PCI's Corporate Restructuring*

86. Plaintiffs also contend that the Peaberry Defendants had a duty to disclose PCI's intent to sell-off corporate assets to Starbucks and its decision to put continued franchise sales on hold to MLT Taylor and JM.

87. The undisputed evidence demonstrated that Bill Tointon did not begin investigating the potential to sell off any corporate assets until after all of the original franchise agreements were executed. The investigation that culminated in the sale of 13 retail store locations to Starbucks began in early 2005 and remained a contingency until February 2006, after Peaberry announced the decision to the Plaintiffs. I also find that Peaberry's decision to put franchise sales on hold in late-2004 was contingent on the resolution of the problems that the

¹¹ Neither Bill Tointon nor Jim Orr had a personal duty of disclosure because they were not parties to any of the Franchise Agreements. *See* Restatement (Second) of Torts § 551. Moreover, Mr. Tointon was not personally aware of any facts that would have led to this additional duty of disclosure. Plaintiffs' evidence supporting this contention is even less than the evidence supporting their contention that PCI or PCFI was under such a duty. Unlike the rule that the knowledge of a corporation's officers or employees is imputed to the corporation itself, there is no basis to impute Mr. Orr or Mr. Nielsen's knowledge regarding the sales process to Mr. Tointon. *Dodo v. Stocker*, 219 P. 222, 223-224 (Colo. 1923). Accordingly, I do not find that Mr. Tointon was under a personal duty to disclose any information to the Plaintiffs, and their Third Claim for Relief against him individually must fail.

Mr. Orr was not personally a party to the transaction, and Plaintiffs could not have reasonably expected any disclosures from him in his personal capacity. Further, the testimony is undisputed that Mr. Orr was not involved in the decision whether to disclose PCI's financial information, and was unaware of the decision to put franchising on hold or to enter into a transaction with Starbucks. Accordingly, he has no personal liability with respect to Plaintiffs' Third Claim for Relief.

first franchisees faced. Because these facts did not exist at the time Plaintiffs executed their franchise agreements, Peaberry was not under any duty to disclose them. *Lewis*, 365 P.2d at 898 (observing “one cannot be held liable for concealing a condition concerning which he had no knowledge.”).

88. With respect to MLT Taylor and JM, Peaberry had no relationship with these Plaintiffs. Peaberry’s only involvement with these Plaintiffs was to approve the transfer of existing franchises from G.A. Bitz, Inc. The FTC Rule did not even require a UFOC disclosure under the circumstances. 16 C.F.R. § 436.2(e) (2003); *FTC Interpretive Guidelines*, 44 Fed. Reg. 49966, 49969-70. Moreover, given the contingent nature of the potential sale to Starbucks, Peaberry had no obligation to disclose this potential, but uncertain, transaction to Plaintiffs.

89. In light of this evidence presented in Plaintiffs’ case, I conclude that the Peaberry Defendants had no duty to disclose PCI’s corporate intent regarding the Starbucks sale, or its decision to put continued franchise sales on hold. *O’Neal v. Burger Chef Sys., Inc.*, 860 F.2d 1341, 1351 (6th Cir. 1988).

90. Based upon the foregoing findings and conclusions, I ultimately conclude that none of the Peaberry Defendants were under a duty to disclose the information Plaintiffs allege was omitted or concealed. For this reason, I find in favor of each of the Peaberry Defendants on Plaintiffs’ Third Claim for Relief. I also separately conclude Plaintiffs failed to carry their burden on the elements of materiality.

2. The Undisclosed Information was Not Material

91. By not mandating the disclosure of parent company financial information or earnings claims regarding unit performance, the FTC has made an objective determination that this information is not material to prospective franchisees.

92. All Plaintiffs were free to request additional information from Peaberry regarding the financial information that was not disclosed. They were also free to walk-away from the purchase if they believed that this or any other information not being provided was material to their decisions.

93. All Plaintiffs testified that they did not obtain a guarantee of PCFI’s contractual obligations under their franchise agreements from PCI. Absent a guarantee of PCFI’s obligations, PCI’s financial information was not material to their decision to enter into the Franchise Agreements because PCI had no obligations under those agreements.

94. Several Plaintiffs testified that they requested additional financial information regarding the profitability of PCI and its corporate-owned stores, but were told that it would not be provided. Double R Coffee and Peak Mountain Coffee both obtained additional information regarding the operating expenses of coffee shops like Peaberry franchises from public sources. The remaining Plaintiffs did not. This evidence further underscores the objective immateriality of the financial information at issue. All ten Plaintiffs went forward without PCI’s financial information, and eight out of ten went forward without any additional information regarding store operating expenses or profitability.

95. Accordingly, I conclude that Plaintiffs have failed to carry their burden with respect to the element of materiality of the information they allege the Peaberry Defendants fraudulently failed to disclose during the sales process.

96. Based upon the foregoing findings and conclusions, I hereby find in favor of the Peaberry Defendants on Plaintiffs' Third Claim for relief.

J. Plaintiffs' Breach of Contract Claims (Fifth and Sixth Claims for Relief).

97. Plaintiffs generally allege that PCFI breached their franchise agreements by not providing the required level of operational and marketing assistance, and by not providing competent site-selection assistance. However, Plaintiffs have failed to identify any provisions of their franchise agreements that Peaberry has breached in order to prevail. *Interbank Investments, LLC v. Vail Valley Consolidated Water Dist.*, 12 P.3d 1224, 1228 (Colo. App. 2000).

98. Plaintiffs argue that PCFI's failure to provide written guidelines regarding the selection of the sites by Plaintiffs constituted a breach of the franchise agreement. These guidelines were to be used by Plaintiffs in the site selection process after the franchise agreements were signed, in order to allow them to identify sites that would be acceptable to Peaberry. Here, however, all Plaintiffs except Peak Java had selected their sites prior to the signing of their franchise agreements, and there was no reason that these Plaintiffs would need written site selection criteria. No Plaintiff ever requested the criteria, and I conclude that the Plaintiffs waived their right to receive written site selection criteria by agreeing to a specific site in their franchise agreements. *Burman v. Richmond Homes Ltd.*, 821 P.2d 913, 919-20 (Colo. App. 1991) (finding implied waiver where objective evidence shows no intention to exercise contractual right within the time for performance).¹²

99. Additionally, Plaintiffs also allege that the Peaberry Defendants breached the implied covenant of good faith and fair dealing by raising prices on the coffee and espresso beans and other goods PCI distributes for sale in Plaintiffs' stores, and by selling 13 of 18 PCI corporate-owned stores to Starbucks. However, the implied covenant of good faith "does not inject substantive terms into the parties' contract" but instead "requires only that the parties perform in good faith the obligations imposed by their agreement." *Wells Fargo Realty Advisors Funding, Inc. v. Uioli*, 872 P.2d 1359, 1362 (Colo. 1994). The Franchise Agreement does not restrict PCI from selling any of its corporate assets, or otherwise guarantee that PCI would

¹² Peak Java was the only franchisee whose site was not identified in its franchise agreement and, after both Peaberry and Peak Java reviewed a variety of potential sites, the parties agreed to sell an existing Peaberry store to Peak Java. Accordingly, even if these facts would support a breach of contract claim, Peak Java's damages would be the additional cost it incurred in the site selection process that might have been avoided if Peaberry had provided written site selection criteria. Peak Java never requested the criteria, and there was no evidence that it incurred additional costs in the site selection process because it did not have **this** written criteria. Accordingly, Peak Java's breach of contract claim also fails.

maintain a certain number of corporate-owned retail outlets, and it does not restrict Peaberry's right to set the price of goods it sells to them; the covenant merely requires that Peaberry set those prices reasonably. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1996).

100. Plaintiffs have not offered any evidence to suggest that either Peaberry's price increase or the sale of its company stores to Starbucks was done for any improper purpose or wrongful motive. Moreover, the evidence submitted by the Peaberry Defendants' expert witnesses that the price increase was reasonable given market conditions was uncontroverted. Accordingly, because the evidence establishes that Peaberry exercised its discretion under the Franchise Agreement reasonably, I find that there was no breach of the covenant of good faith and fair dealing.

101. The only damages evidence presented related to the amount of money that would be needed to put Plaintiffs in the position they would have been in but for the Defendants' alleged misrepresentations prior to the signing of the Franchise Agreements (rescission), or the amount of money that would meet the expectations they had at the time they signed those agreements (lost expectations). Plaintiffs offered no evidence of damages they incurred in connection with any of the alleged breaches of contract by PCFI.

102. Accordingly, I find in favor of the Peaberry Defendants on Plaintiffs' Fifth and Sixth Claims for Relief.

K. Plaintiffs' Alter Ego Claim (Ninth Claim for Relief)

103. Plaintiffs' alter ego theory seeks to pierce the corporate veil so that any liability incurred by PCI or PCFI will be borne by Bill Tointon personally. The alter ego doctrine permits a court to disregard the corporate entity and consider the actions taken by the corporation to be those of its shareholders. *Gude v. City of Lakewood*, 636 P.2d 691, 697 (Colo. 1981). The veil may be pierced where the evidence establishes that a shareholder's disregard for the corporate form made it a mere instrumentality for the perpetration of a fraud. *Id.* The essential question is whether the corporate entity is used for the purpose of protecting fraud. *Id.*

104. Plaintiffs at all times dealt with PCFI. Plaintiffs offered no testimony that Mr. Orr, Mr. Tointon, or Mr. Nielsen represented or otherwise implied that they were conducting any sales meetings on behalf of PCI, or on behalf of themselves in their personal capacities.

105. Plaintiffs entered into franchise agreements with PCFI, not PCI or Mr. Tointon or Mr. Orr in their individual capacities. Plaintiffs did not obtain guarantees of PCFI's obligations from PCI or any of the individual defendants.

106. PCI, PCFI, and Mr. Tointon observed corporate formalities at all times. Any transfers of funds between PCFI and PCI were accounted for using Generally Accepted Accounting Principles, and PCFI's books were independently audited on an annual basis using Generally Accepted Auditing Standards. Absent evidence supporting a disregard of corporate formalities for the purpose of using the corporate form to perpetrate a fraud, there is no basis to apply the alter ego doctrine and impose personal liability on Bill Tointon.

107. Moreover, Plaintiffs claim here is that Mr. Tointon should be liable for the actions of PCI. PCI was created in 1990, and there is absolutely no evidence that its corporate form was ignored by Mr. Tointon, or that this entity was created or used as a means to escape liability for fraud. Accordingly, there is no basis to conclude that this Court should pierce the corporate veil of PCI so its liability in this case should be borne by Bill Tointon personally.

108. Based upon the foregoing findings and conclusions, I find in favor of the Peaberry Defendants on Plaintiffs' Ninth claim for relief.

L. Plaintiffs' Damages Claim

109. Plaintiffs' claims for fraud, negligent misrepresentation, and breach of contract carry inconsistent remedies. With respect to these claims, Plaintiffs "must elect to either rescind the entire contract to restore the conditions existing before the agreement was made, or to affirm the entire contract and recover the difference between the actual value of the benefits received and the value of those benefits if they had been as represented." *Trimble v. City & County of Denver*, 697 P.2d 716, 723 (Colo. 1985).

110. Three Plaintiffs unequivocally elected to rescind their franchise agreements before trial. Plaintiffs' Second Amended Complaint states that Colorado Coffee Bean, LLC, Double R Coffee, LLC, and JKKR, LLC "have elected to rescind their franchise agreements, and have tendered back to Defendants all benefits received as a result of their franchise agreements and any related agreements." (Compl. at ¶ 83). Once an election of remedies is made, it is final. *Tisdell v. Central Sav. Bank & Trust Co.*, 6 P.2d 912, 917-18 (Colo. 1931). These three Plaintiffs unequivocally elected to rescind their agreements and have ceased operations of their Peaberry franchises.

111. The Complaint further states that the remaining Plaintiffs "have not yet elected to rescind their franchise agreements." (Compl. at ¶ 83). However, a party may demonstrate an election of remedies through its actions during the course of litigation where those actions are inconsistent with an intention to affirm the agreement and continue performance. *H&K Automotive Supply Co. v. Moore & Co.*, 657 P.2d 986, 988 (Colo. App. 1982); *Rice v. Hilty*, 559 P.2d 725, 726 (Colo. App. 1976). In this case, each of the remaining Plaintiffs have discontinued their royalty payments to PCFI, and two Plaintiffs, Peak Mountain Coffee and MLT Taylor testified at trial that they did not intend to continue operating their stores after the conclusion of this litigation. Based upon this evidence, I find that all Plaintiffs have elected to rescind their franchise agreements.

112. Plaintiffs' election to rescind their franchise agreements bars the recovery of exemplary damages. *Dodds v. Frontier Chevrolet Sales & Service, Inc.*, 676 P.2d 1237, 1238 (Colo. App. 1983) (reversing trial court award of exemplary damages where plaintiff elected to rescind). This election also bars Plaintiffs' recovery of attorneys' fees based upon the fee-shifting provision set forth in their franchise agreements. *Kennedy v. Gilliam Development Corp.*, 80 P.3d 927, 930-31 (Colo. App. 2003). Finally, Plaintiffs' election to rescind precludes the recovery of any lost expected future profits because rescission limits their "remedy to

restoration of the conditions existing before the agreement was made.” *Trimble*, 697 P.2d at 724.¹³

113. Accordingly, the only damages to which Plaintiffs would be entitled are those that would put them back into the position they occupied before entering into their franchise agreements. I find that Ms. Matsen’s calculations overstated Plaintiffs rescission damages in several ways, and I adopt the rescission damage calculations presented by Mr. Zeeb in Tr. Exh. 1186 as follows:

- ABC Sales - \$501,891;
- Colorado Coffee Bean - \$608,801;
- CZ-DM - \$424,121;
- Double R Coffee - \$694,317;
- JKF - \$393,536;
- JKKR - \$659,048;
- JM - \$52,898;
- MLT Taylor - \$395,861
- Peak Java - \$480,994;
- Peak Mountain - \$289,317.

114. However, based upon my findings and conclusions set forth above regarding the liability issues, I award no damages.

M. PCFI’s Counterclaims

115. PCFI presented counterclaims against Plaintiffs for breach of contract. The evidence supporting these claims was not rebutted.

116. Pursuant to Section 12.1 of PCFI’s franchise agreement, each Plaintiff agreed to pay PCFI a weekly royalty equal to a certain percentage of the total amount of gross revenue generated through the operation of their Peaberry franchises.¹⁴

¹³ Plaintiffs’ evidence of lost expected future profits is also legally insufficient to support any award. “[L]ost profits are not available if they are speculative, remote, imaginary, or impossible of ascertainment.” *W. Cities Broadcasting, Inc. v. Schueller*, 849 P.2d 44, 49-50 (Colo. 1993). Plaintiffs here put on expert testimony regarding the lost expected future profits that a hypothetical coffee shop would have generated had certain hypothetical market conditions and revenue levels been met. However, Plaintiffs’ expert admitted that these damage “models” were not based upon the actual operation of any Peaberry coffee shop. Accordingly, these hypothetical lost future profits are too speculative to support a damages award. *See, e.g., id.* at 50-51; *Astarte, Inc. v. Pacific Industrial Sys., Inc.*, 865 F. Supp. 693, 708-09 (D. Colo. 1994) (finding lost profits evidence “based upon hypothetical models” advanced by expert testimony too speculative to support damages award).

117. Plaintiffs do not dispute that they ceased royalty payments in January 2008. As set forth in Tr. Ex. 1114, Mr. Zeeb concluded that Plaintiffs owe the following amounts to PCFI through June 30, 2008:

- JM = \$5,321.23;
- MLT Taylor = \$11,778.74;
- Peak Java = \$11,020.56;
- ABC Sales = \$6,960.57;
- JKF = \$1,626.84;
- CZ-DM = \$6,370.19;
- Peak Mountain = \$9,729.67.

118. Additionally, Mr. Zeeb testified that ABC Sales and JM both underreported their 2006 sales and royalty obligations, and owe an additional \$23,224.61 and \$10,217.17 respectively.

119. Plaintiffs submitted no evidence to rebut Peaberry's Counterclaims. Accordingly, I find in favor of PCFI on its Counterclaims against Plaintiffs. I also find that PCFI, is entitled to an award of its attorneys fees pursuant to paragraph 24.7 of the Franchise Agreement.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law pursuant to Colo. R. Civ. P. 52(a), the Court hereby finds in favor of Defendants with respect to Plaintiffs' Second, Third, Fourth, Fifth, Sixth, and Ninth claims, and those claims are hereby dismissed with prejudice.

This Court also finds in favor of PCFI with respect to its Counterclaim and awards the following damages for underpaid royalties against the Plaintiffs as follows:

- JM = \$15,538.40
- MLT Taylor = \$11,778.74;
- Peak Java = \$11,020.56;
- ABC Sales = \$30,185.18
- JKF = \$1,626.84;
- CZ-DM = \$6,370.19;
- Peak Mountain = \$9,729.67.

(Footnote cont'd from previous page.)

¹⁴ The standard royalty figure was 6%, although certain Plaintiffs negotiated for lower royalty rates which are accounted for in the figures Mr. Zeeb presented.

ORDERED THIS ____ DAY OF _____, 2008

DISTRICT COURT JUDGE