

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO
Denver City & County Building
1437 Bannock Street, Room 256
Denver, Colorado 80202

Plaintiffs:

COLORADO COFFEE BEAN, LLC, a Colorado
limited liability company, et al.

Defendants:

PEABERRY COFFEE, INC., a Colorado corporation,
et al.

Counterclaim Plaintiff:

PEABERRY COFFEE FRANCHISE, INC., a Colorado
corporation.

Counterclaim Defendants:

COLORADO COFFEE BEAN, LLC, a Colorado
limited liability company, et al.

▲ COURT USE ONLY ▲

Case Number: 2006CV4514

Div.: Ctrm: 7

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

THIS MATTER CAME BEFORE THE COURT FOR TRIAL ON June 30, 2008. The case was tried to the Court, commencing June 30, 2008 and continuing through July 18, 2008. Trial then recommenced on August 18, 2008 through August 20, 2008. Trial recommenced again on September 15, 2008, through September 19, 2008. The claims tried during the above dates were between Plaintiffs and Defendants William I. Tointon (Tointon), James T. Orr (Orr), Peaberry Coffee, Inc. (PCI) and Peaberry Coffee Franchise, Inc. (PCFI). Plaintiffs' claims against Defendant Perkins Coie were stayed. Perkins Coie, through its counsel, participated in the above-referenced trial proceedings, and the findings of fact and conclusions of law stated herein are binding upon Defendant Perkins Coie.

The Court having reviewed the testimony and evidence in this case and being fully informed in this matter:

FINDS AND CONCLUDES AS FOLLOWS:

I. FINDINGS OF FACT

A. General Findings of Fact

1. The Plaintiffs are ten Colorado corporations and limited liability companies, specifically described in Section I(B), herein.

2. The Plaintiffs in this case are the owners of the ten Peaberry Coffee franchises sold by Defendants.

3. Defendants, Peaberry Coffee, Inc. ("PCI"), and, Peaberry Coffee Franchise, Inc. ("PCFI"), are Colorado corporations. Defendants, William I. Tointon ("Tointon"), and James T. Orr ("Orr"), are natural persons and residents of the State of Colorado. Tointon is the sole owner, and CEO of PCI. PCI is the sole owner of PCFI. Orr was employed in October 2003 by PCI, as its Vice President of Franchise Development.

4. Venue is proper in the District Court for the City and County of Denver because the Defendants are either located within Denver or conduct business there, and the acts and conduct that form the subject matter of the Complaint occurred in the City and County of Denver.

5. Tointon founded PCI in 1990, and opened 9 Peaberry Coffee stores between 1990 and 1997.

6. PCI lost money every year of its existence, and had losses of \$2,681,727, by the end of 1997. (Exhibit 1218 and 1000.)

7. Despite losing money each and every year, Tointon significantly expanded PCI between 1999 and 2002. (p. 2569, lns. 6-9.)

8. PCI opened 7 stores and a coffee cart in 1999 (p. 2567, lns. 10-12), 3 stores and a kiosk in 2000 (p. 2567, lns. 15-19), 2 stores in 2001 (p. 2568, lns. 13-14), 2 stores in 2002 (p. 2568, lns. 18-19), and one store in mid-2003. (p. 2572, lns. 21-24.)

9. PCI continued to sustain considerable operating losses. PCI lost 1.3 Million dollars in 1998 (p. 2557, ln. 16-p. 2558, ln. 3); 1.5 Million Dollars in 1999 (p. 2558, lns. 4-9); 2 Million

Dollars in 2000 (p. 2558, lns. 13-17); and 1.8 Million Dollars in 2001. (p. 2558, lns. 21-24.) (Exh. 1218-1219; 901-906, and 909-910.)

10. By 2002, PCI had operated for 12 years without ever experiencing a profitable year (p. 2556, lns. 19-23) (Exh. 1218-1219), and had sustained aggregate losses of over 10 Million Dollars. (Exh. 1219, p. 2560, lns. 9-17). During this time, Tointon never paid himself a salary. Peaberry's yearly losses were paid by cash contributions from Tointon and from his father, Robert Tointon. (p. 2605, lns. 17-20; p. 2563, lns. 8-13.)

11. In late 2000, Peaberry hired consultant Robert Beale, to assist it in attaining profitability. (p. 2593, lns. 4-23; p. 2123, lns. 5-8.) In 2001, Beale recommended that Peaberry hire a president to run the company, and conducted the search to locate a president. (p. 2124, ln. 24-p. 2125, ln. 6.)

12. The search for a President ended in February of 2002, when Peaberry hired Fred Nielsen ("Nielsen") to serve as its president. Nielsen was brought in to "turn around" Peaberry and help it achieve profitability. (Exh. 734 and 735.)

13. Tointon testified that Nielsen recommended that Peaberry franchise (p. 2846, ln. 21-p. 2847, ln. 6), and determined that franchise stores could perform at the level of Peaberry's top tier stores. (p. 2589, ln. 12-p. 2591, ln. 1.)

14. Nielsen, however, testified that he did not recommend franchising, and did not recall making any determination that franchise stores would perform at the level of Peaberry's top tier stores.

15. Tointon decided to sell Peaberry franchises in 2002 or 2003, despite the fact that Peaberry was not profitable.

16. Tointon testified that he developed a new theory of site selection in 2002 or 2003, and he believed the franchise stores would be profitable.

17. Peaberry's site selection for its corporate stores was a component in their lack of success.

18. Peaberry's site selection did not improve over time.

19. Of the 16 stores Peaberry had opened in the five years before franchising (between 1997 and 2002), 11 of these stores had either closed or never had a profitable year. (p. 2632, lns. 2-7.)

20. The last 8 stores Peaberry had opened before franchising (between 2000 and 2003), performed even worse. In 2003, the average annual sales of the last 8 stores Peaberry opened

was \$329,000. (p. 2586, lns. 21-25.) This was \$100,000 less than the average of all Peaberry stores, and \$225,000 less than the average sales of top tier stores. (See, sample Exhibit J, Exh. 593, p. 97) (p. 2589, lns. 7-18.)

21. Tointon disregarded his own inability to open profitable stores in the last 5 years, and the exceptionally poor performance of the last 8 stores he opened in deciding to franchise.

22. Robert Beale testified that Tointon was “under a lot of pressure” to “turn Peaberry into a successful company.” (p. 2165, lns. 3-11.)

23. Beale’s notes reflect that:

- Peaberry’s does not have a knowledgeable, seasoned and skilled senior management team in place.
- Fast growth has continued to occur although there are many unprofitable store locations.
- Peaberry’s is not using financial performance data or budgetary practices to make critical management and financial decisions.
- No defined elements critical to success for stores and store managers.
- Peaberry’s needs a **successful store formula**. (Emphasis in original.)

(See, Exh.706)

24. Beale’s notes also reflect that Tointon wanted to “do some quick return things to get out from under \$12 million in debt.” (Exh. 689, p. 6.) That Tointon’s wife was beating up on him for not being able to make a living (Exh. 693, p. 1), and that Tointon’s father had destroyed him in the last board meeting. (*Id.*)

25. Peaberry had no line of credit with a bank. (p. 2563, lns. 1-4.) It was only able to continue in business through the largess of Tointon’s father. Each year Tointon’s father wrote a check to Tointon, who in turn put the money into Peaberry. (p. 2563, lns. 8-13 and p. 2605, lns. 17-20.)

26. However, with operational losses exceeding Ten Million Dollars (\$10,000,000) and no operating profit, Tointon was under increasing pressure to make the company profitable.

27. Peaberry published its first UFOC in February 2003. (p. 2561, lns. 16-21) (*See*, sample UFOC, Exh. 4.) Between February and October of 2003, Peaberry sent out 58 UFOCs to potential franchisees. (Exhibit 1047.) The UFOCs were sent out along with a very brief cover letter which simply told prospective franchisees to review the UFOC and contact Peaberry. (Exh. 218.)

28. Using this approach, Peaberry failed to sell a single franchise.

29. In October 2003, Tointon hired Orr, a professional franchise salesman.

30. Orr designed a new sales approach. (Exh. 789, p. 2457, lns. 7-10.) Orr sent out UFOCs with a cover letter and other marketing materials (p. 2459, lns. 7-16), which included copy of a newspaper article from the Denver Business Journal. (Exh. 942.)

31. The Court finds the Denver Business Journal article contains false statements.

32. The article quotes Mr. Nielson as saying “Peaberry is profitable now.” In fact, Peaberry was not and had never been profitable.

33. At trial, Tointon asserted this quote only applied to Peaberry’s retail segment, not the company as a whole. However, the very next sentence in the article makes clear the false statement pertains to the company as a whole—not the retail segment. The full quote reads as follows:

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.

34. The article also quotes Nielsen as stating that “Funding growth through the company’s own cash flow has enabled it to add only two or three locations a year.” The Court finds this statement is also false. Peaberry never had cash flow. To open two or three locations from cash flow implies that Peaberry had up to one million dollars of annual cash flow. It did not.

35. The article quoted Nielsen as saying “our goal is 500 stores by the year 2010 . . . that’s very doable for us.”

36. The Court finds opening 500 stores by 2010 was not “very doable,” for Peaberry.

37. Peaberry knew that it had no financing and no corporate structure to support a 500 store network. Peaberry knew that it didn’t have the financial stability to embark upon a plan of explosive growth. Peaberry knew that it had no plan for explosive growth.

38. The goal to grow to 500 stores was derived from a marketing encounter group, and was referred to as a “stretch goal” or a “Big Hairy Audacious Goal” (BHAG).

39. Peaberry failed to disclose the significant obstacles that Peaberry had identified in its own strategic plan. (Exh. 836, p. 27.)

40. The Court finds that by including the Denver Business Journal article in mailings sent to franchisees with the UFOC, Peaberry adopted the false statements contained in the Denver Business Journal article.

41. The Court finds that the false statements in the Denver Business Journal article were material.

42. Peaberry intended to deceive the franchise purchasers by concealing its history of unprofitability while affirmatively representing that Peaberry was profitable, financially stable and capable of explosive growth. These representations were known to be false by the Defendants and were intentionally disseminated to prospective purchasers of Peaberry franchises to induce them to act.

43. The cover letter which was included with the UFOC and the Denver Business Journal article claimed that each Peaberry Coffee location is selected using Peaberry’s time tested demographic standards. (Exh. 1048 and 1130.)

44. There were no time tested demographic standards, only a new theory that Tointon developed by studying the demographics surrounding his corporate stores. Tointon surmised that the key to site selection was day time demographics.

45. Tointon did not test his new site selection theory on Peaberry corporate stores before offering franchises for sale to the public.

46. Instead, Tointon took over the site selection process. Plaintiff’s expert, Ed Kushell; testified extensively to the poor quality of the sites selected by the Peaberry Defendants. The Court finds the sites selected for franchise locations by Peaberry were inferior.

47. Peaberry also distributed a UFOC to each franchise purchaser. The first UFOC Peaberry produced was in February 2003. The UFOC contained federally required franchise disclosures. It also contained an earnings claim of gross sales only, as Exhibit J.

48. The 2003 UFOC, which reflected 2002 retail store performance, listed the gross sales of each of Peaberry’s stores in three ranges, “high,” “mid,” and “low.” (*See*, sample 2003 Exhibit J, Exh. 4, p. 42.) 7 stores were listed in the “high” range, 7 stores in the “mid” range and 4 stores in the “low range.”

49. 4 of the 7 stores in the “mid” range were either unprofitable or only paying expenses. (*See*, Exh. 887, 2002 retail store financials.)

50. The 2004 UFOC reflected the 2003 retail store performance. (*See*, sample 2004 Exhibit J, Exh. 593, p. 97.) Two new stores were added, for a total of 20. Average store sales had decreased by \$50,000. The two new stores performed poorly. However, the number of stores in the low range remained the same—4. Peaberry reconfigured the ranges to add an additional store to the mid and high ranges. Again, 4 of the stores in the “mid” range were unprofitable. (*See*, Exh. 888, 2003 retail store financials.) All of the 8 stores in the “mid” range would have been unprofitable as franchise stores, which would have had to pay debt service and a 6% royalty fee. (p. 3639, ln. 1-p. 3640, ln. 6.) Even 2 of the stores in the “high” income category would have been unprofitable as franchise stores.

51. If the 2004 UFOC used the ranges set by the 2003 UFOC, only 3 stores (not 8) would have been listed in the “high” range. (Exh. 4, p. 42 and Exh. 593, p. 97.)

52. Tointon testified that \$450,000 was a break-even point for profitability. Plaintiff’s expert, Robert Purvin, testified if Peaberry had used this benchmark, in 2002 8 stores should have been depicted in the “low” category. In 2003, 12 stores should have been depicted in the “low” category. (p. 3627, lns. 12-p. 3631, ln. 19.)

53. In 2004, same store sales continued to decrease. The 2005 UFOC continued to reconfigure the ranges to maintain 4 stores in the low range. (*See*, sample 2005 Exhibit J, Exh. 132, p. 136.)

54. The Court finds the earnings claims in the UFOC were deceptive.

55. The Court finds the UFOCs were used in this case as part of a sales approach designed to conceal material facts from investors.

56. The Court further finds that PCI and Tointon failed to disclose material facts to the Plaintiffs. These facts include that Peaberry had never had a profitable year, that Peaberry had aggregate losses in its first thirteen years of operation of over \$11,300,000, that most Peaberry retail stores could not be operated profitably as franchise stores, and that recently opened Peaberry stores had performed very poorly.

57. Tointon could have fully and honestly disclosed Peaberry’s financial history and the performance of its retail stores. Peaberry’s misrepresentations and fraudulent omissions prevented investors from making informed decisions. Instead, the court finds Tointon decided to secretly gamble with the Plaintiffs’ money.

58. The Federal Trade Commission Rules require that every franchisor must provide prospective franchisees with a UFOC which requires the disclosure of three years of financial statements.

59. PCI created PCFI to act as the franchisor. PCFI was wholly owned by PCI, which was wholly owned by Tointon. (p. 2555, ln. 22 - p. 2556, ln. 3.)

60. The Court finds that PCFI was used to circumvent the requirement that PCI disclose its financial history.

61. The Court finds that Tointon's testimony that he formed PCFI to avoid the cost of an audit is not credible. In fact, Tointon never even determined what the cost of an audit would be, but Tointon spent millions of dollars over the course of ten years opening new stores which continued to lose money. (p. 2629, ln. 5 - p. 2630, ln. 19, and Exh. 1154, p. 476, lns. 7-22.)

62. The Court finds Tointon's testimony that he formed PCFI to enable employee ownership is not credible.

63. Peaberry's accountant, John Stapleton testified that PCFI didn't do anything other than simply collect money from franchisees and transfer that money into PCI. (p. 2434, lns. 8-13).

64. PCFI had no employees—they were all employed and paid by PCI. (p. 2433, ln. 19-p. 2424, ln. 7; p. 2436, ln. 19 - p. 2437, ln. 8.) There were no employees to own PCFI, and there was nothing for employees to own.

65. The Court further finds PCFI was not operated as an independent company. PCFI had no separate officers or employees. It did not keep separate books. Its revenue for franchise operations were accounted for on PCI's books. (p. 2436, lns. 7-18.) It had no separate financing. (p. 2431, lns. 7-15.) It had no existence independent of PCI and Tointon. Defendants made no effort to keep PCI and PCFI separate entities.

66. The Court finds Tointon formed PCFI to avoid UFOC disclosure requirements and conceal PCI's financials from franchise purchasers.

67. The Court further finds that Tointon was well aware of the sales procedures employed by Orr, the use of the Denver Business Journal article in the sales process, and the false representations of fact made at sales meetings.

68. PCI was a small, closely held company. Tointon managed PCI and was involved on a daily basis. Tointon admits he made the decision to franchise. Tointon had control over Peaberry's efforts to sell franchises.

69. Tointon approved the false representation of time tested demographic standards in Peaberry's promotional materials, and in meetings in which he was present.

70. Orr testified he didn't focus on any statement in the Denver Business Journal Article beyond the statement that Peaberry's retail stores averaged \$500,000 per year in sales. (p. 2470, ln. 6-p. 2471, ln. 7.) He also claimed that he had no knowledge of Peaberry's financial condition at the time he included the Denver Business Journal article in the sales packets. (*Id.*, and p. 2541, ln. 18-p. 2542, ln. 2.)

71. The Court does not find Orr's testimony credible. Orr testified at trial he would never use the word "profitable" in a sales meetings, because that would be an impermissible earnings claim, forbidden by the FTC Rules. The court finds that Orr could not be so aware of the impermissible use of the word "profit" in the sales process, and fail to realize this precise statement was made in an article he intentionally distributed to prospective purchasers.

72. Orr also testified that he took no steps to determine if Peaberry was profitable, or if it had cash flow. (p. 2471, lns. 16-19, and p. 2472, ln. 21 - p. 2473, ln. 8.)

73. Orr designed sales procedures which made representations and earnings claims without knowledge of Peaberry's profitability.

74. The Court finds that Peaberry also imposed site locations on its franchisees.

75. Tointon selected a number of sites for his new franchise stores. The franchisees had no input in the selection of these sites. The franchisees were required to accept one of the pre-selected locations.

76. Peaberry induced Plaintiffs to acquiesce in the sites by misrepresenting their expertise in site selection through using time-tested demographic standards.

77. Peaberry attempted to justify the decision to franchise because store sales increased through 2002.

78. However, a positive sales trend does not justify making false statements of profitability, cash flow, and the ability to grow, nor justify concealing years of adverse, material financial information.

79. Further, store sales declined significantly in 2003, before the first franchise store was sold.

80. The first franchise store was opened by Double R Coffee in July, 2004. In September of 2004, based upon poor sales of this store, Peaberry decided to halt the sale of franchises.

81. In September, 2004, Tointon could have stopped the franchise program completely. Many of the franchisees could have avoided a costly build-out. Many could have avoided liability on their lease.

82. Tointon chose not to advise the franchisees of the decision to stop selling franchises. Tointon allowed the franchisees to invest \$350,000 to \$400,000 in building out and opening the franchise stores.

83. Tointon also took steps to conceal the fact he was no longer selling franchises. To avoid telling franchisees that Peaberry was no longer selling franchises, Peaberry continued to show additional locations to franchisees that had signed development agreements.

84. With knowledge that the franchise program had failed, Tointon began to look for an exit strategy for himself.

85. In November of 2004, Tointon commissioned Trinity Capital to attempt to sell Peaberry Coffee.

86. The Information Memorandum created by Trinity Capital contained a number of false representations, particularly in regard to present plans to expand through franchising. (Exh. 848, Table G1.)

87. The Court finds Tointon understood the Information Memorandum contained a number of untrue, and baseless factual contentions, and that he nonetheless permitted it to be circulated to prospective purchasers. (p. 2717, ln. 8 - p. 2722, ln. 13) (Exh. 1154, Tointon Video Deposition Excerpts, p. 312, lns. 2-22 and p. 314, lns. 2-16.)

88. Tointon's admission that he used false statements in the Information Memorandum further demonstrates his indifference to truth in his transactions.

89. Peaberry began negotiating with Starbucks in April of 2005, and signed a letter of intent with Starbucks in July of 2005 to sell 13 of its 18 corporate stores to Starbucks. Peaberry signed an Asset Purchase Agreement with Starbucks in November of 2005.

90. Despite this, Peaberry also permitted two franchise transfers (and received a transfer fee): one in May 2005 to Plaintiff JM, Inc., and a second in September 2005 and January 2006 to Plaintiff MLT Taylor, LLC. Again Peaberry failed to inform either franchisee of its poor financial performance, continuing declining store sales, that Peaberry had discontinued franchising, or that it was looking for an exit strategy.

91. Both of the franchise transferees received a copy of Peaberry's 2005 UFOC. This UFOC indicated that as of January 2, 2005, Peaberry projected 8 new franchise stores in the year

2005. (Exh. 132, p. 32.) This was an admittedly false statement as the sale of franchise stores had been halted. Peaberry took no effort to correct this false statement.

92. Tointon also failed to inform the two franchise transferees that he was pursuing the sale of most of Peaberry's corporate stores to Starbucks. In fact, Orr provided MLT Taylor with its UFOC the day after the Asset Purchase Agreement with Starbucks was signed.

93. The Court finds that with full knowledge that his fledgling franchise network was struggling, Tointon raised coffee bean prices to franchisees by approximately 25%, in February 2005.

94. In 2005 Tointon's mark up on the sale of coffee beans to the franchisees was in excess of 50%. (Exh 1204.)

95. The Court finds, in February 2005, Tointon took steps, with his father, to protect his assets. In February, 2005, Tointon executed a UCC financing statement granting his father a security interest in his personal property. (Exh. 1158.)

96. Peaberry argued at trial that the concealed financial information was not important because its retail stores were profitable.

97. Peaberry presented testimony that Peaberry's retail stores showed a profit of \$366,000 in 2002, despite the fact the company as a whole lost over \$870,000 in the same year.

98. The reported profit of \$366,000 for 18 stores would average just over \$20,000 of profit per store, well below any reasonable profit margin necessary to justify franchising. As Plaintiff's expert, Ed Kushell, testified a franchisee could not expect to receive a fair return on investment. (p. 3038, ln. 2-p. 3044, ln. 25; p. 3051, lns. 5-18.)

99. The Court finds, however, that the reported profit also omitted a number of expenses incurred by the company that were integral to the operation of the stores.

100. The testimony at trial from Peaberry's accountant, John Stapleton, and from Tointon, established that approximately 90% of Peaberry's revenue was derived from retail store sales. Yet, millions of dollars of annual expenses which supported the retail sales operation were not allocated by Peaberry to the retail stores.

101. Peaberry omitted expenses for (1) executive compensation, (2) information systems and accounting, (3) training, and (4) interest expenses from the retail stores income statements. (p. 2415, lns. 17-24; p. 2421, lns. 3-7; p. 2425, lns. 1-7; p. 2427, lns. 6-11, p. 2424, lns. 10-13.)

102. In the year 2002, the expenses for these four "cost centers" was \$1,237,339. (Exh. 907.)

103. Had 90% of this amount been allocated to the retail stores, Peaberry's retail stores would have recorded an aggregate loss of \$507,707. Even had only 70% of this amount been allocated to the retail stores, Peaberry's retail stores would have recorded an aggregate loss of approximately \$311,853. *Id.*

104. In the year 2003, the expenses for these four cost centers was \$1,058,932. (Exh. 910). Had 90% of this amount been allocated to the retail stores, Peaberry's retail stores would have recorded an aggregate loss of \$609,700 in 2003. Had 70% been allocated, Peaberry's retail stores would have recorded a \$397,914 loss.

105. Peaberry was not a financially stable company and neither were its retail stores.

B. Findings Relative to the Individual Plaintiffs¹

a. Peak Mountain Coffee Inc.

1. Peak Mountain Coffee, Inc., is a Colorado corporation.
2. The officers and owners of Peak Mountain Coffee are Jeff and Amelia Klemann.
3. The Klemanns learned Peaberry Coffee was selling franchise stores while conducting an internet search, when they came across Peaberry's website. (Exh. 778.)
4. The Klemanns were interested in a franchise opportunity, because they wanted to buy into an established business concept. (p. 116, ln. 22 - p. 117, ln. 13.)
5. After the Klemanns contacted Orr, they were sent a sales packet, containing a cover letter, and confidentiality agreement. (p. 123, ln. 11 - p. 124, ln. 6.)
6. During their first meeting with Peaberry representatives, Mr. and Mrs. Klemann were provided an article from the Arapahoe Observer (Exh. 930), an article from the Rocky Mountain News, (Exh. 934), and the Denver Business Journal article. (Exh. 942.) The Klemanns produced the copy of Denver Business Journal article they received during this meeting as Trial Exhibit 929. (p. 393, lns. 12-24.)
7. This meeting was attended by Mr. and Mrs. Klemann, Orr, and Nielsen. (p. 128, lns. 9-13.)

¹ Findings of materiality and reliance common to the individual Plaintiffs follow in Section I(C) below.

8. Subsequently, Mr. and Mrs. Klemann met with Orr, Nielsen, and Tointon. (p. 128, lns. 14-p. 129, ln. 7.) The Court finds that Tointon actively participated in this second meeting. (p. 130, lns. 1-4.)

9. Mr. and Mrs. Klemann were not provided with any site location guidelines by Peaberry. Instead, they were given one store location, at County Line and Yosemite, on a take it or leave it basis. (p. 139, lns. 6 - 17.)

10. Peaberry had already undertaken to execute a lease agreement for this particular site, and Peak Mountain Coffee was in fact required to reimburse Peaberry approximately \$5,000 for the attorneys' fees Peaberry had expended in executing the lease for the site. (p. 139, ln. 20-p. 140, ln. 6.)

11. In accepting the site, Peak Mountain Coffee relied on Peaberry's representations of expertise and site selection, including the representation that Peaberry had time tested demographic standards, which were contained both in its internet advertising, and in the cover letter sent to them. (p. 141, ln. 18 - p. 142, ln. 7.)

12. Peak Mountain Coffee, Inc. executed a Franchise Agreement in reliance on the Defendants' representations as well as the concealed information.

13. In October 2004, after Peaberry decided to halt the sale of franchises, it entered into a development agreement with the Kleemans and accepted a \$10,000 fee. Peaberry failed to disclose to the Kleemans that it had halted the sale of franchises.

14. The franchise store of Peak Mountain Coffee performed very poorly.

15. The Court finds that as a result of Peak Mountain Coffee's reasonable reliance, it sustained the damages described more fully herein.

16. The Court further finds that both Mr. and Ms. Klemann have worked in their store for substantial hours, with no compensation. The Court finds that had the cost of this labor been accurately reflected on Peak Mountain Coffee's financial statements, its operating losses would have been substantially greater.

b. CZ-DM, Inc.

1. CZ-DM, Inc., is a Colorado corporation.

2. Its officers and owners are Catherine and Dennis Miller.

3. The Court finds that CZ-DM learned Peaberry was offering franchise stores for sale through an advertisement in the Rocky Mountain News classifieds. (p. 563, lns. 16-22.) (p. 421, lns. 14-23.)

4. Dennis Miller initially contacted Orr by phone, and shortly thereafter received Confidentiality Agreements. (p. 563, ln. 16 - p. 564, ln. 4.)

5. Dennis and Catherine Miller then had an initial meeting with Tointon, Orr, and Nielsen. The Court finds that multiple newspaper articles, including the Denver Business Journal article (Exhibit 942), were given to the Millers during this initial meeting. (p. 423, ln. 10- p. 424, ln. 4.)

6. The Court finds that Tointon was an active participant in this initial meeting. (p. 425, lns. 14 - 19.)

7. The Court further finds that CZ-DM was offered the site of their store location in the Denver Tech Center, on a take it or leave it basis.

8. Dennis Miller testified that he and his wife initially considered a Peaberry location at the intersection of 6th and Corona in Denver. This was sometime in January or February, 2004. Dennis Miller testified that Peaberry eventually rejected this site.

9. CZ-DM executed a Franchise Agreement with PCFI in reliance on the Defendants' representations as well as the concealed information.

10. The franchise store of CZ-DM performed very poorly.

11. The Court finds that as a result of CZ-DM's reasonable reliance, it sustained the damages described more fully herein.

12. Dennis and Catherine Miller worked considerable hours in their franchise store, with only very minimal compensation. The testimony at trial established that in the approximate 4 year time frame the Millers operated their store, they drew only about \$50,000 in officer compensation. Mr. and Ms. Miller never received any other compensation from the store.

c. ABC Sales, Inc.

1. ABC Sales, Inc., is a Colorado corporation.

2. Stan Johns and Annie Johns are the owners and officers of the ABC Sales, Inc.

3. ABC Sales learned Peaberry was selling franchises when Ms. Johns saw an advertisement in the Denver Post Business Opportunities Classified section. (p. 660, lns. 5-14.)

4. ABC Sales received Peaberry's sales packet in the mail. (p. 660, lns. 15 - p. 661, ln. 12.) The sales packet contained a cover letter about Peaberry which represented its site selection expertise and time-tested demographic standards, a copy of the UFOC, and newspaper articles, including the Denver Business Journal article. (p. 661, ln. 3 - p. 664, ln. 19.)

5. Stan and Annie Johns had an initial meeting with Tointon, Orr, and Nielsen. The Court finds that Tointon was an active participant in this meeting.

6. During this meeting, Peaberry's success and its plans for growth were stressed, as was Tointon's wealth. There were copies of articles, including the Denver Business Journal article, on the desk during the meeting. (p. 669, ln. 3 - p. 671, ln. 8.)

7. Stan and Annie Johns attended more than one sales meetings with Peaberry. At one of the meetings, Orr reviewed the contents of the UFOC with Stan Johns. Orr referred to the chart of gross revenues in Exhibit J in the UFOC. Orr stated that the "high" range stores were Peaberry's established stores, the "mid" range stores were rising, and that of the 4 "low" tier stores, 2 were kiosks, and the other 2 were stores that were slightly under achieving. Orr stated all the stores were making money. (p. 720, ln. 3 - p. 721, ln. 2.) Tointon was present during Orr's explanation, and he nodded affirmatively indicating his agreement with Orr's representations. (p. 721, lns. 3 - 10.) Stan Johns' testimony is supported by his contemporaneous notes recorded in his UFOC. (Exh. 349, p. 130.)

8. During this meeting, Stan Johns also referred to PCFI's financial statements contained in the UFOC. He asked about the financial condition of the parent company, PCI. Orr replied that it was a very strong company and had no significant liabilities. Again, Tointon affirmed this statement. (p. 721, ln. 11 - p. 722, ln. 25.) Again, Stan Johns' testimony is supported by his contemporaneous notes in his UFOC. (Exh. 349, p. 117.) The Court finds Mr. Johns' testimony credible in this regard.

9. During franchise negotiations, Orr stated to Stan Johns that if he wanted the south side of Denver, his store would have to be the site located at I-25 and Arapahoe. Orr further stated that this site was going to be a Peaberry corporate location if it was not taken by a franchisee. (p. 705, ln. 19 - p. 707, ln. 5.)

10. The Court finds that ABC Sales also placed complete reliance on Peaberry's representations of real estate expertise and time-tested demographic standards in accepting their site located at I-25 and Arapahoe Road. (p. 708, lns. 10-21.)

11. ABC Sales executed a Franchise Agreement in reliance on the Defendants' representations as well as the concealed information.

12. The franchise store of ABC Sales performed very poorly.

13. The Court finds that as a result of ABC Sales' reasonable reliance, it sustained the damages described more fully herein.

14. ABC Sales obtained free labor from Stan Johns, Annie Johns, and their daughter, Ashley Johns. (p. 776, ln. 16 - p. 778, ln. 22.)

15. Both Stan and Annie Johns essentially worked full time hours in ABC Sales franchise store, never taking a salary. (*Id.*)

16. Ashley Johns also worked a large number of hours while in high school, and at home during breaks from college, without drawing any compensation from the store.

17. ABC Sales' damages are discussed in more detail herein.

d. JKF, LLC

1. JKF, LLC, is a Colorado limited liability company.

2. The owners and officers of JKF, LLC, are Jerry and Kathleen Frohlich.

3. The Frohlichs learned Peaberry was selling franchises through friends, during a casual conversation. (p. 952, ln. 25 - p. 953, ln. 7.)

4. Upon learning Peaberry was selling franchises, the Frohlichs reviewed Peaberry's website materials, reviewed the history of the company, and Peaberry's representations of site selection expertise and use of time tested demographic standards. (p. 960, lns. 23-p. 961, ln. 10.)

5. Mr. Frohlich then completed a Confidentiality Agreement, which he mailed to Orr, and shortly after that received the Peaberry franchise sales packet. (p. 960, lns. 16-23.)

6. Included in JKF, LLC's franchise sales packet was a copy of the UFOC, a cover letter, and newspaper articles, including the Denver Business Journal article. (p. 961, ln. 11-p. 962, ln. 19.)

7. After receiving the sales packet, the Frohlichs had a meeting with Orr and Nielsen which took place at Peaberry's corporate offices. (p. 964, lns. 2-14.) Nielsen asked the Frohlichs if they had a chance to review the Denver Business Journal article.

8. During the sales process, Peaberry informed the Frohlichs that if they wanted to open a store on the north side of Denver, there were only two sites available. One site was located in Longmont, but Peaberry informed the Frohlichs that they did not have a high enough

net worth to open that site. (p. 1089, ln. 4 - p. 1090, ln. 8.) Peaberry encouraged the Frohlichs to accept the store location at 58th & Washington Street in Denver.

9. Peaberry representatives indicated to the Frohlichs that they had a very high level of confidence in the site and that they were already negotiating a lease with the landlord. If the Frohlich's did not take this site, Peaberry would open a corporate store there. (p. 968, ln. 6 - p. 969, ln. 10.)

10. The Court further finds that during sales negotiations, Jerry Frohlich and his attorney, Dennis Tharp, had a phone conversation with Orr. Orr stated that he was so confident JKF would generate \$500,000 per year in sales at the 58th & Washington site, that he was willing to offer JKF a reduced royalty rate, from 6% to 3%, if they agreed to accept this site, until they reached \$500,000 in sales.

11. The Frohlichs were never provided with written site selection guidelines. They did, however, propose several sites to Peaberry, all of which were rejected out of hand.

12. JKF, LLC executed a Franchise Agreement in reliance on the Defendants' representations as well as the concealed information.

13. The franchise store of JKF, LLC performed very poorly.

14. JKF, LLC prepared a pro forma which was submitted with its SBA materials. (Exh. 448.)

15. The Court finds that as a result of JKF, LLC's reasonable reliance, it sustained the damages described more fully herein.

16. Jerry Frohlich worked between 50 and 60 hours per week, in JKF, LLC's franchise store, without taking a salary.

17. The Court finds JKF, LLC is entitled to recover damages, as reflected below.

e. Double R Coffee, LLC

1. Plaintiff Double R Coffee, LLC, is a Colorado limited liability company.

2. It is composed of a number of different members. The two members who participated in franchise negotiations were Robert Gilmore and Richard Mauro.

3. Robert Gilmore learned Peaberry Coffee was selling franchises through an advertisement in the Denver Post. (p. 1173, ln. 25 - p. 1174, ln. 3.)

4. Orr sent a franchise sales packet to Robert Gilmore. The franchise sales packet contained a UFOC, along with numerous other materials. (p. 1179, ln. 10 - p. 1180, ln. 20.)

5. Although Robert Gilmore was unable to recall whether the Denver Business Journal article was contained within the sales packet, he did recall that he reviewed the Denver Business Journal article in advance of his initial meeting with representatives of Peaberry. Richard Mauro testified that he recalled receiving the Peaberry packet from Robert Gilmore, and believed the packet contained the Denver Business Journal article.

6. The Court finds that Double R Coffee was given a copy of the Denver Business Journal article in the sales packet sent by Orr.

7. During the sales process, Orr informed Double R Coffee that Peaberry preselected a handful of sites, and that Double R Coffee would need to select one of these sites. (p. 1206, ln. 10-p. 1207, ln. 1.) Double R Coffee was not provided with written site selection guidelines.

8. The Court further finds that site selection was one of Double R Coffee's primary considerations, and that Double R Coffee placed its reliance on Peaberry's expertise in site selection in accepting the store location at 2nd & St. Paul, in the Cherry Creek area. (p. 1210, lns. 15-p. 1211, ln. 20.) The Court finds that if Double R Coffee had not reasonably placed its confidence in Peaberry's expertise in site selection and time-tested demographic standards, it would not have accepted the site at 2nd & St. Paul.

9. Double R Coffee executed a Franchise Agreement in reliance on the Defendants' representations as well as the concealed information.

10. Immediately upon opening its stores, Double R Coffee began losing substantial amounts of money. The financial losses for Double R Coffee were so severe, that Tointon decided to halt Peaberry's franchise program.

11. Double R Coffee was owned by a group of investors. It, therefore, hired a manager to run its store. Accordingly, Double R Coffee recorded much greater operational losses than the remaining franchise stores.

12. The Court considers this fact instructive in determining the value of labor to the remaining franchise stores. The Court finds that had the remaining franchise stores been forced to hire managers, as Double R Coffee was, their operational losses would be much more substantial.

13. The Court finds that as a result of Double R Coffee's reasonable reliance, it sustained the damages described more fully herein.

f. JKKR, LLC

1. JKKR, LLC, is a Colorado limited liability company.
2. Its owners and officers are Linda Gould and Susan Feeney.
3. Ms. Gould learned Peaberry Coffee was selling franchise stores through a newspaper article (Exh. 934), and also through advertisements on the radio regarding Peaberry. (p. 1349, ln. 22 - p. 1350, ln. 3.)
4. Orr sent Ms. Gould the Peaberry franchise sales packet. (p. 1353, ln. 12 - 1354, ln. 21.)
5. The sales packet included Peaberry's cover letter in which Peaberry represented its use of time tested demographic standards. The packet also contained a number of newspaper articles, including the Denver Business Journal article. Ms. Gould, in fact, produced a copy of the Denver Business Journal article she received from Orr as Exhibit 626.
6. The Court finds that after receiving these materials, Ms. Feeney and Ms. Gould had an initial meeting with Orr and Nielsen. During this meeting they discussed that Peaberry was doing well and was profitable. (p. 1358, ln. 16 - p. 1359, ln. 11.)
7. The Court further finds that during these meetings the topic of the performance of Peaberry's was discussed. Orr stated that all of Peaberry's stores were profitable with the exception of one or two that were soon going to be closed. (p. 1363, ln. 13 - p. 1364, ln. 11.)
8. The Court finds Nielsen was present when Orr made these statements of profitability. (p. 1365, lns. 5-24.)
9. The Court finds that Orr stated to JKKR that Peaberry had already signed the lease for its one location in Longmont, and informed JKKR that if they were not willing to take the site, several other people were interested and Peaberry would offer it to them. (p. 1367, ln. 6 - p. 1368, ln. 23.)
10. The Court further finds that during the sales process, Orr emphasized Peaberry's site selection, stating that Peaberry had experts looking at all their sites, and that Peaberry had experts involved in selecting the exact sites for Peaberry locations. (p. 1371, lns. 5-14.) JKKR was not provided written site selection guidelines.
11. The Court finds JKKR executed a Franchise Agreement in reliance on the Defendants' representations as well as the concealed information.
12. The franchise store of JKKR performed very poorly.

13. The Court finds that as a result of JKKR's reasonable reliance, it sustained the damages described more fully herein.

g. Colorado Coffee Bean, LLC

1. Colorado Coffee Bean, LLC, is a Colorado limited liability company.
2. Colorado Coffee Bean currently has three members. Colorado Coffee Bean negotiated its Franchise Agreement primarily through Dr. Colin Brones.
3. Dr. Brones learned Peaberry Coffee was launching a franchise program through one of his colleagues in the dental profession. (p. 1483, ln. 10 - p. 1484, ln. 3.)
4. Upon learning of this, Dr. Brones went to Peaberry's website (Exh. 778) and reviewed its contents. Dr. Brones specifically went to the franchise web page, and viewed Peaberry's representations of site selection expertise and time tested demographic standards. (p. 1485, ln. 1 - p. 1486, ln. 18.)
5. Dr. Brones met with Orr at a location in Colorado Springs, adjacent to the proposed Peaberry site location. Orr stated that there was currently a potential franchisee in California that was looking at opening 40 stores in southern California. (p. 1499, ln. 14 - p. 1500, ln. 4.)
6. Dr. Brones received a packet of material in the mail, and one during his meeting with Orr. These packets contained the UFOC, other materials and copies of newspaper articles, including the Denver Business Journal article. (p. 1501, ln. 4 - p. 1504, ln. 10.)
7. Orr also stated to Dr. Brones that if Colorado Coffee Bean did not take the site Peaberry had selected in Colorado Springs, they were going to put a corporate store there. (p. 1519, ln. 21- p. 1520, ln. 13.)
8. Neither Dr. Brones nor other members of Colorado Coffee Bean, LLC had expertise in site selection. In selecting their site, they placed all of their trust in Peaberry's representations of expertise in site selection and time tested demographics standards. (p. 1519, ln. 15 - p. 1520, ln. 13.) Colorado Coffee Bean was not provided with site selection guidelines.
9. Colorado Coffee Bean executed a Franchise Agreement in reliance on the Defendants' representations as well as the concealed information.
10. The franchise store of Colorado Coffee Bean performed very poorly.
11. The Court finds that as a result of Colorado Coffee Bean's reasonable reliance, it sustained the damages described more fully herein.

12. Colorado Coffee Bean was run by a group of investors and hired a store manager to run its store.

13. Like Double R Coffee, Colorado Coffee Bean sustained operational losses far in excess of the remaining franchisees, because it hired and compensated a manager. This supports the conclusion that the remaining franchisees' losses would have been significantly greater but for the free labor provided by the franchise owners.

14. At the time Peaberry decided to stop selling franchise stores in September of 2004, Colorado Coffee Bean had not yet begun build-out of its store. Colorado Coffee Bean was not aware of Peaberry's decision to halt the sale of franchise stores in September of 2004. The Court finds that had Colorado Coffee Bean been made aware of this fact, they would have stopped the build-out of their franchise store.

15. The Court finds that had Peaberry made Colorado Coffee Bean aware of the fact that Peaberry had halted the sale of franchise stores, Colorado Coffee Bean would not have expended approximately \$295,000 on leasehold improvements and build-out of its franchise store. (p. 1536, ln. 17 - p. 1539, ln. 6.)

h. MLT Taylor, LLC

1. MLT Taylor, LLC, is a Colorado limited liability company.
2. The owners and operators of MLT Taylor are Michael and Lori Noricks.
3. In June of 2005, Michael Noricks saw an advertisement in the Denver Post classifieds indicating a Peaberry franchisee was seeking a partner. (p. 1624, ln. 9 - p. 1625, ln. 3.)
4. The advertisement was placed by a person, who at that time, was a current Peaberry franchisee, Greg Bitz. (p. 1625, lns. 4-14.)
5. Before contacting Peaberry, Michael Noricks conducted an internet web search, reviewed Peaberry's website, and discovered numerous press releases on Peaberry in online articles.
6. Orr hand-delivered on July 19, 2005, the 2005 UFOC to Michael Noricks. (Exh.131.) The Court finds this is particularly significant as Peaberry had signed its letter of intent to sell 13 of its 18 stores to Starbucks the day before on July 18, 2005. (Exh. 997.)
7. Despite this, Orr made no statement to Noricks that Peaberry had just agreed to sell the majority of its retail stores only the day before.

8. In September of 2005, Noricks purchased a 49% interest in G.A. Bitz, Inc., the entity that owned the Peaberry franchise store located in the Colorado Mills Mall. Noricks continued operations with Bitz for a three-month time period, at which time, Noricks purchased the remaining 51% interest in Bitz's franchise store.

9. By the time Noricks agreed to purchase the remaining 51% interest in G.A. Bitz, Inc., Peaberry Coffee had signed the Asset Purchase Agreement with Starbucks, pursuant to which Starbucks would purchase 13 of Peaberry's 18 retail stores. Again, this fact was not disclosed to Noricks at any point by Orr or any other representative of Peaberry.

10. The Court finds that had Noricks been made aware of either Peaberry's July 18, 2005, Letter of Intent with Starbucks, or of Peaberry's November of 2005, Asset Purchase Agreement with Starbucks, Noricks would not have agreed to purchase any interest in G.A. Bitz, Inc., or his franchise store.

11. The Court further finds that Noricks was reasonable in relying on the assumption that these facts did not exist.

12. Peaberry publicly announced its sale to Starbucks on January 16, 2006 - only ten days after Mr. Noricks had purchased the remaining 51% interest from G.A. Bitz, Inc.

13. Neither Orr nor any other representative of Peaberry informed Noricks of the fact that as of September of 2004, Peaberry had stopped selling franchise stores. The Court finds that had MLT Taylor been aware of this fact, it would not have purchased any percent interest in G.A. Bitz, Inc., nor purchased its Peaberry franchise store. (p. 1642, lns. 6-20.)

14. MLT Taylor executed a Franchise Agreement in reliance on the concealed information.

15. The franchise store of MLT Taylor performed very poorly.

16. The Court finds that as a result of MLT Taylor's reasonable reliance, it sustained the damages described more fully herein.

i. JM, Inc.

1. JM, Inc., is a Colorado corporation.

2. The officers and owners of JM, Inc., are Heejin Suh, John Suh and Youngha Suh.

3. JM, Inc., also purchased its franchise store from Greg Bitz, Inc.

4. Ms Heejin Suh learned that a Peaberry Coffee franchise store was for sale from her mother, who is friends with Annie Johns of Plaintiff, ABC Sales, Inc.

5. Ms. Suh received a packet in the mail from Orr. Ms. Suh received a copy of the Peaberry cover letter, the UFOC and a number of other materials including an April 2004, article published in the Rocky Mountain News (Exh. 1130, page 7) that touted Peaberry's plans to grow to 500 stores. (p. 1786, ln. 4 - p. 1787, ln. 3.) This packet was admitted into evidence as Exhibit 1130.

6. Although this packet did not contain the Denver Business Journal article, Ms. Suh testified at trial that she had received a copy of the Denver Business Journal article from Stan Johns during the sales process with Peaberry. (p. 1848, lns. 8-16, and p. 1865, ln. 22 - p. 1866, ln. 14.)

7. Ms. Suh and her husband John, then attended a meeting with Peaberry representatives at Peaberry's corporate offices at 58th and Washington. The people in attendance at this meeting were Heejin and Jon Suh, Orr, Tointon, and Nielsen. (p. 1793, lns. 5-24.)

8. During this meeting, Peaberry was presented as a successful company that had been in existence for more than 10 years. It was also represented that Peaberry had plans to grow to 500 stores. (p. 1795, ln. 6 - p. 1798, ln. 14.)

9. At the time Peaberry made these representations of expansion, Peaberry had halted the sale of franchise stores.

10. Peaberry failed to inform JM, Inc. that Peaberry had retained a company to market the sale of the company stores, and that Peaberry had entered into negotiations with Starbucks to sell the majority of Peaberry corporate stores.

11. The Court finds that had JM, Inc., been aware of these facts, it would not have purchased its franchise store from Greg Bitz.

12. Although JM, Inc.'s franchise store performed very poorly, it consistently reflected a net income on its tax returns at the end of each year.

13. The Court finds that these tax returns do not accurately reflect the financial condition of JM, Inc.'s franchise store. During trial, the Court heard testimony from Ms. Suh that many of her family members worked for multiple hours in the store without pay. Specifically, Ms. Suh testified that her three sisters work for her in her franchise store, two of whom had worked full-time without compensation since 2006. (p. 1812, ln. 4- p. 1815, ln. 21 and p. 1820, ln. 24 - p. 1822, ln. 4.) Also, Ms Suh's mother would buy goods for store operations which were not reflected on the tax returns. (p. 1819, ln. 8 - p. 1820, ln. 13.)

14. J.M. Inc.'s tax returns reflect an incredibly low labor cost. For instance, on JM, Inc.'s 2006 tax return, it reflects a total payment for wages of only \$18,587. (Exh. 92.) JM, Inc.'s 2007 tax return reflects a total payment of wages of only \$11,504. (Exh.93.) The Court finds, based on this evidence, that JM, Inc., effectively lost substantial money yearly, and it only managed to show an operating profit due to the extreme generosity of Ms. Suh's family members, who chose to work in the store for free and to provision the store in order to allow Ms. Suh to support her family.

15. JM, Inc., executed a Franchise Agreement in reliance on the Defendants' representations and the concealed information.

16. The Court finds that as a result of JM, Inc's reasonable reliance, it sustained the damages described more fully herein.

j. Peak Java Company

1. Peak Java Company is a Colorado corporation.

2. Its owners and officers are David and Michele Harris.

3. The Harrises are both attorneys. They began looking for a business opportunity because Michele Harris was ready to leave the legal world and wanted to run a business. They were specifically looking for a franchise opportunity because they wanted to buy into an established system. (p. 1870, lns. 7-19.)

4. David Harris had previously practiced law with Jeff Cowman, an attorney at Perkins Coie, who is also married to Kim McCullough. David Harris knew that Cowman had experience in the franchise realm, and accordingly asked him if he had any recommendations of quality franchisors. (p. 1870, ln. 20 - p. 1871, ln. 14.)

5. Cowman then referred Ms. Harris to Ms. McCullough. Ms. McCullough recommended two potential franchisors to Mr. Harris, Spicy Pickle and Peaberry. *Id.*

6. The Harrises ultimately decided to pursue a franchise opportunity with Peaberry Coffee. The Harrises received a UFOC along with a brief cover letter authored by Jim Twifford. (p. 1882, ln. 18 - p. 1883, ln. 2; p. 1885, ln. 1-9.) The letter was dated September 16, 2003.

7. Mr. Twifford did not enclose any promotional materials or newspaper articles along with his letter—only the UFOC. This was the only contact the Harrises had with Mr. Twifford. Shortly after receiving this packet they were contacted by Orr, who set up a lunch meeting with the Harrises and Nielsen.

8. The Court finds that during this meeting the Harrises were told by Orr that Peaberry was profitable, and that its stores were profitable, with a couple of exceptions. (p. 1886, ln. 21 - p. 1887, ln. 4.) When discussing the financial viability of Peaberry, Orr also told the Harrises that Tointon was one of the wealthiest landowners in Boulder County, and that they had nothing to worry about in regard to how stable the enterprise was. (p. 1887, ln. 25 - p. 1889, ln. 19.)

9. The Harrises also had a second meeting at Peaberry's corporate offices, that was attended by Orr, Nielsen and Tointon. (p. 1889, ln. 24 - p. 1890, ln. 12.) The court finds that Tointon was an active participant in this meeting. (p. 1892, lns. 5-12.) The Harrises were provided a copy of the Denver Business Journal article at one of the two meetings. (p. 1887, lns. 13-20.)

10. The Denver Business Journal article was discussed during the second meeting, which was attended by Tointon. (p. 1892, ln. 25 - p. 1893, ln. 25.) Nielsen and Orr also stated that all of Peaberry's retail stores were profitable with a couple of exceptions, and that they were hoping to reach 500 stores by 2010. (p. 1893, lns. 4-25.)

11. Peak Java Company executed a Franchise Agreement in reliance on the Defendants' representations as well as the concealed information.

12. The franchise store of Peak Java Company performed very poorly.

13. The Court finds that as a result of Peak Java Company's reasonable reliance, it sustained the damages described more fully herein.

C. Common Findings of Reliance and Materiality.

a. Reliance and Materiality of the Franchisees.²

1. The Court finds that the franchisees each reasonably relied on the representations of Peaberry's profitability, cash flow, and ability to grow contained in the Denver Business Journal article.

2. The Court finds the Peaberry Defendants concealed the fact of its staggering annual losses, that it had never been profitable, that the stores it had opened recently had performed poorly, and that most of its retail stores could not be operated profitably as franchise stores.

3. The Court finds that the franchisees were not aware of Peaberry's adverse financial condition, the poor performance of its retail stores, or the poor performance of Peaberry's recently opened stores.

² Findings of reliance and reliability of Plaintiff MLT Taylor are set forth below in Section I(c)(b), below.

4. The Court finds that had the franchisees been aware of the true financial condition of Peaberry and its retail stores, the franchisees would not have purchased their franchise stores.

5. The Court finds that the franchisees reasonably relied on the assumption that Peaberry's adverse financial information did not exist.

6. The Court also finds that the franchisees reasonably relied on Peaberry's stated expertise in site selection, and Peaberry's representation that it possessed time-tested demographic standards.

7. The Court finds that the facts misrepresented and concealed by Peaberry were material.

8. The Court finds that the misrepresentations were made, and the withheld information was concealed to induce the franchisees to sign their franchise agreements.

b. MLT Taylor's Reliance and Materiality

1. The Court finds that Peaberry concealed the fact of its staggering annual losses, that it had never been profitable, that the stores it had opened recently had performed very poorly, and that most of its retail stores could not be operated profitably as franchise stores.

2. The Court finds that MLT Taylor was not aware of Peaberry's adverse financial condition, the poor performance of its retail stores, or the poor performance of Peaberry's recently opened stores.

3. The Court finds that MLT Taylor was not aware of either Peaberry's July 18, 2005, Letter of Intent with Starbucks, or of Peaberry's November of 2005, Asset Purchase Agreement with Starbucks.

4. The Court finds that had MLT Taylor been aware the true financial condition of Peaberry and its retail stores, or the sale of company stores to Starbucks, MLT Taylor would not have purchased its franchise store. (p. 138, lns. 19-25.)

5. The Court finds that MLT Taylor reasonably relied on the assumption that Peaberry's adverse financial information did not exist.

6. The Court finds that the withheld information was material and was withheld to induce MLT Taylor to sign franchise agreement.

II. CONCLUSIONS OF LAW

A. FRAUDULENT MISREPRESENTATIONS.

1. The elements of fraud by misrepresentation or omission are often stated in Colorado law, and generally go back to the formulation in *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937), as quoted in *Trimble v. City and County of Denver*, 697 P.2d 716,724 (Colo. 1985):

The elements of fraud are: (1) A false representation of a material existing fact, or a representation as to a material existing fact made with a reckless disregard of its truth or falsity; or a concealment of material existing fact, that in equity and good conscience should be disclosed. (2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose. (3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, [of] the falsity of the representation or of the existence of the fact concealed. (4) The representation or concealment made or practiced with the intention that it shall be acted upon. (5) Action on the representation or concealment resulting in damage.

2. Peaberry made false representations to each of the Plaintiffs by giving them copies of the Denver Business Journal newspaper article which quoted the President of Peaberry as stating that Peaberry was profitable, that it was financing growth of its stores at the rate of 2-3 each year out of cash flow, and expansion to 500 stores by the year 2010, was “very doable.”

3. Peaberry made false representations to each of the Plaintiffs by representing in each UFOC that all but 4 stores had “mid” or “high” gross income.

4. Peaberry made false representations to most of the Plaintiffs that it had an expertise in site selection based upon time tested demographic standards.

5. Peaberry made additional oral representations to the franchisees, including: Peaberry retail stores all are profitable now, except for one or two, Peaberry had perfected its retail store model, and that Peaberry would not be franchising had it not perfected its retail store model.

6. All of these representations were false, and created a distinctly false impression in the minds of the franchise purchasers. *See, Corder v. Laws*, 366 P.2d 369, 372 (Colo. 1961) (“The gist of a fraudulent misrepresentation is the producing of a false impression upon the mind of the other party * * * the means of accomplishing it are immaterial.”)

7. Peaberry knew that these representations were false. The misrepresentations in the Denver Business Journal newspaper article were known to be false by Peaberry. Peaberry knew that it had cumulative operating losses of more than 10 Million Dollars after 2002. Peaberry knew that it wasn't profitable.

8. Peaberry knew that it could not and did not open any new stores out of cash flow. Peaberry had lost money every year in its existence. Peaberry had no cash flow to open any stores. Peaberry knew that it could not open even one additional store out of cash flow.

9. Peaberry knew that it had no financing and no corporate structure to support a 500 store network. Peaberry knew that it didn't have the financial stability to embark upon a plan of explosive growth. Peaberry knew that it had no plan for explosive growth.

10. Peaberry knew that it did not have 14-16 stores with "mid" and "high" gross earnings. Peaberry knew that approximately half the stores in the "mid" range were not profitable.

11. Peaberry knew that it did not have a time tested and successful approach to site selection. Peaberry knew it did not have time tested demographic standards. Peaberry knew that its most recently-opened stores performed much more poorly than its older stores.

12. None of the Plaintiffs knew that the representations made by Peaberry were false.

13. The misrepresentations were material. None of the Plaintiffs would have purchased their franchises if they had known the truth.

14. The misrepresentations were made to induce the potential purchasers to buy the franchises.

15. Peaberry and Tointon argue at length that they are not liable for their fraud because they didn't intend to defraud. They claim they had an honest belief that the franchises would succeed. They argue that this honest belief precludes liability for their fraud.

16. This argument has been expressly rejected by the Colorado Supreme Court in *Morrison v. Goodspeed*, 68 P.2d 458, 464 (Colo. 1937) as follows:

. . . No more can failure to reveal such facts be excused by defendants' faith that they could save their admittedly insolvent company because of better business prospects incident to the "New Deal" or to any other hoped for favorable conditions. Equity does not permit one man to gamble *secretly* with another man's money, no matter how honest his motives or sanguine his expectation of success. [Emphasis in original]

17. “Fraudulent intent” as defined in Colorado does not require a premeditated purpose to defraud. “Fraudulent intent” only requires that the fraud feasor intend that the false representation or omission induce the other party to enter into the transaction. A false representation which the maker knew to be false, or which was made with a reckless indifference to the truth, was intended to induce the other party to act, and was reasonably relied upon by the other party to his damage constitutes actionable fraud. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). *See, also, Bemel Associates, Inc. v. Brown*, 164 Colo. 414, 418-419 (1967).

18. The Plaintiffs purchased their franchises in reliance upon the misrepresentations made by Peaberry.

19. Plaintiffs suffered damages as a result of their reliance upon the fraud of Defendants. The Court concludes that Defendants PCI and PCFI are liable to the Plaintiffs upon their claims in fraudulent misrepresentation.

20. For the reasons discussed below in Section II(E), Orr and Tointon are individually liable for the fraudulent misrepresentations.

B. FRAUDULENT OMISSION AND CONCEALMENT.

1. Fraudulent omission consists of the knowing concealment of a material fact that in equity and good conscience should be disclosed.

2. The requirement that the concealed fact in equity be disclosed has been interpreted by subsequent case law and codified into several recognized situations requiring disclosure. CJI-Civ. 19:5 provides omitted facts must be disclosed in the following circumstances:

(2) The defendant stated some facts, but not all material facts, knowing that they would create a false impression in the mind of the plaintiff; or

(3) the defendant knew that by his or her own unclear or deceptive words or conduct that he or she created a false impression of the actual facts in the mind of the plaintiff; or

(4) the defendant knew that the plaintiff was not in a position to discover the facts for himself; or

(6) the defendant promised to or stated an intention to perform an act knowing that undisclosed facts made her performance unlikely.

3. Subsection 3 imposes a duty to disclose where a party has made an unclear or deceptive statement which has created a false impression.

4. Peaberry's publication of deceptive claims concerning its profitability, its cash flow, its ability to support expansion, and its site selection expertise all required that Peaberry disclose the facts which would have dispelled the false impressions created by its deceptive representations.

5. All of the material facts about Peaberry's failure to achieve profitability, lack of cash flow, inability to open even one additional store, inability to support explosive growth and lack of time tested demographic standards were therefore required to be disclosed.

6. Subsection 6 imposes a duty to disclose where a party has stated an intention to perform an act knowing that undisclosed facts made that performance unlikely.

7. Peaberry published a statement in the Denver Business Journal article that growth to 500 stores by 2010 was "very doable."

8. All of the material facts about Peaberry's losses, financial instability and lack of cash flow were therefore required to be disclosed.

9. Peaberry argues that this statement cannot support a fraud claim because its subject is growth in the future. However, Peaberry's statement about its ability to expand created a duty to disclose the concealed facts relating to Peaberry's financial circumstances.

10. Peaberry argues that Restatement 2d Torts § 551(e) limits required disclosures to disclosures customary in the trade.

11. Restatement 2d Torts § 551(e) requires disclosures of "facts basic to the transaction," of which the customs of the trade is only one of several sources. Subsection (e) is only one of five subsections which require disclosure. These five subsections are similar to Colorado Jury Instructions 19:5, and in fact include § 551(2)(b) "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading." Restatement 2d Torts § 551 does not limit disclosures to those required by custom.

12. The Court further concludes that Peaberry actively concealed material financial facts from the Plaintiffs.

13. Peaberry formed a new corporation to act as the franchisor and seller of the franchises.

14. The new corporation had no existence independent of Peaberry. It had no separate employees, officers or board of directors. It had no capitalization and its revenues were merely passed through to Peaberry. All accounting concerning the franchises was done on Peaberry's books.

15. The only purpose for the new corporate entity was to avoid the disclosure of Peaberry's annual losses which aggregated more than ten million dollars by 2002. Although Defendant Tointon testified that the purposes of the new corporation were to enable employee ownership, create a new entity for a new business venture, and to avoid audit expense, the new corporation was never established as an independent entity. There was nothing for the employees to own.

16. Rather, by forming a new corporation to act as franchisor, Peaberry intentionally avoided FTC requirements of disclosure of past financial results.

17. Although the act of forming a new corporation was not in itself wrongful, the use of this entity by Peaberry was to avoid disclosure of financial information which it had a duty to disclose. That was wrongful.

18. The Court also concludes that the UFOC cannot be used to shield Peaberry from liability for its fraudulent omissions and concealment.

19. There is no private right of action under the UFOC. There is no federal preemption. Redress for fraudulent conduct is left to the states. The UFOC does not provide a safe harbor against a common law fraud claim.

20. The issue of whether a material fact was concealed must be resolved under Colorado's law of fraudulent omission and concealment.

21. The Court concludes the concealed facts in this case were material, and Plaintiffs had no knowledge of the true facts about Peaberry's financial history and the performance of its stores.

22. The concealed facts were also withheld with the intent that the Plaintiffs purchase their franchises ignorant of the true facts.

23. Plaintiffs suffered damages as a result of the fraudulent omission and concealment of Defendants. The Court concludes that Defendants PCI and PCFI are liable to the Plaintiffs upon their claims in fraudulent omission and concealment.

24. For the reasons set forth below, Orr and Tointon are individually liable for the fraudulent omissions and concealment.

C. NEGLIGENT MISREPRESENTATION.

1. The Supreme Court of Colorado adopted Restatement 2d of Torts, § 552(1) as the elements of the tort of negligent misrepresentation in *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 71-72 (Colo. 1991):

§ 552. Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

2. Peaberry supplied false information for the guidance of Plaintiffs in purchasing their franchises.

3. Peaberry did not exercise reasonable care in providing information about its profitability, its financial stability, its cash flow, its capability to support explosive growth, the lack of success of its company stores, or its time tested demographic standards.

4. The false information provided by Peaberry was reasonably relied upon by Plaintiffs and was a cause of the losses of Plaintiffs.

5. Plaintiffs suffered damages as a result of the negligent misrepresentation of Defendants. The Court concludes that Defendants PCI and PCFI are liable to the Plaintiffs upon their claims in negligent misrepresentation.

6. For the reasons discussed below, Defendants Tointon and Orr are individually liable for the negligent misrepresentations.

D. BREACH OF CONTRACT/BAD FAITH BREACH OF CONTRACT.

1. To recover for a breach of contract, there must be a contract and a breach of its provisions by one of the parties.

2. Plaintiffs allege a breach of the Franchise Agreement. The Franchise Agreement incorporates the UFOC as an exhibit. The UFOC obligates Peaberry to use reasonable efforts to assist franchise purchasers in locating a site for their stores by providing them with written criteria for site selection. (Item 11(1) of the UFOC.)

3. Section 5.1 of the Franchise Agreement provides, “the franchisor will not unreasonably withhold approval of a proposed site that meets all of the franchisor’s site selection criteria.”

4. Peaberry failed to provide any franchisee with written criteria for site selection. In fact Peaberry did not have written guidelines to provide to franchise purchasers.

5. Peaberry identified sites without input from any franchisee. Peaberry entered into lease negotiations for all sites before franchisees chose the site, and signed leases for many of the sites before the franchisees had any input.

6. Peaberry refused to approve, or even consider, each and every site proposed by a franchisee.

7. By taking over the site selection process, by failing to provide written guidelines, and by failing to consider or approve sites proposed by franchisees, Peaberry breached the Franchise Agreement.

8. Plaintiffs also allege a breach of the covenant of good faith and fair dealing.

9. As a matter of law, in Colorado, the covenant of good faith and fair dealing exists in every contract to enforce the reasonable expectations of the parties. *Amoco Oil Co. v. Erin*, 908 P.2d 493, 499 (Colo. 1996). A contracting party is required to refrain from acting in a manner that defeats the other party’s reasonable expectations. *Id.* at 498. Good faith performance of a contract requires “faithfulness to an agreed upon common purpose and consistency with the justified expectations of the other parties.” *Id.* A breach of the covenant of good faith and fair dealing is a breach of contract. *Denny Constr., Inc. v. City & County of Denver*, 170 P.3d 733, 737 (Colo. App. 2007).

10. The franchisees were required by the terms of the Franchise Agreement to purchase and stock franchise stores with inventory, including coffee beans, in a mix and quantity, dictated by Peaberry. (Franchise Agreement, Sections 10.1 and 11.1.) The prices set by Peaberry were solely within Peaberry’s discretion. The franchisees had no control over the prices that Peaberry would charge.

11. In February 2005, just months after the franchisees began business, and with knowledge that franchise stores were performing poorly, when franchise sales had been halted, while Tointon was pursuing an exit strategy for himself and taking steps to protect his assets, he arbitrarily increased the price of coffee beans by approximately 25%.

12. The court has found Peaberry’s mark up on the sale of coffee beans to franchisees in 2005 was over 50%.

13. The increase in bean prices bore no relation to Peaberry's wholesale costs.
14. The arbitrary and unreasonable increase in the cost of beans which the franchisees were required to purchase from Peaberry was a breach of the duty of good faith and fair dealing. *See, Amoco Oil Co. v. Erin*, 908 P.2d 493, 499 (Colo. 1996).
15. The Franchise Agreement had a term of 10 years. (Franchise Agreement Section 18.1.)
16. The UFOC, incorporated into the Franchise Agreement as an exhibit, emphasized Peaberry's 21 stores and the 12 years of experience of its owner and founder, Tointon. The UFOC also represented the planned growth of the franchise network. (*See*, UFOC-Item 20.)
17. In its operations, Peaberry retained sole control over advertising and its intellectual property, as well as the promotion and protection of its brand. (*See*, Franchise Agreement, Sections 13 and 15.)
18. In making a ten year commitment to their Peaberry franchise, the franchisees were totally dependant upon Peaberry to promote and protect the Peaberry brand in good faith.
19. Just as the new franchises were starting in business, Peaberry sold 13 of the company's 18 corporate stores to the recognized industry giant, Starbucks.
20. This sale damaged the Peaberry brand in stark contrast to the reasonable and justified expectation of the new franchisees of a strong, stable and expanding network of stores.
21. The sale breached Peaberry's obligation of faithfulness to an agreed upon common purpose.
22. The sale of 13 of 18 corporate stores to Starbucks, just after the creation of the franchise stores constituted a bad faith breach of the implied covenant of good faith and fair dealing.
23. The Plaintiffs contracted with Defendant PCFI. Defendant PCFI had no existence separate and apart from PCI. Defendant PCFI was not adequately capitalized. Defendant PCFI was created as an instrumentality of fraud. Defendant PCFI was completely controlled by PCI and Tointon.
24. PCI and its officers and shareholders completely disregarded the PCFI corporate entity, and made it a mere instrumentality for the transactions of PCI's affairs. To adhere to the doctrine of corporate entity would promote injustice and protect fraud. *See, The Rosebud Corp. v. Boggio*, 561 P.2d 367, 371 (Colo. App. 1977).

25. Defendant PCFI was the alter ego of PCI.

26. Defendants PCI and PCFI are liable jointly and severally to Plaintiffs on their claims of breach of contract and bad faith breach of contract.

E. CLAIMS AGAINST DEFENDANTS TOINTON AND ORR.

a. Liability of Tointon

1. Corporate officers are not personally liable solely by reason of their capacity as an officer. *Hoang v. Abbess*, 80 P.3d 863, 867 (Colo. App. 2003).

2. Corporate officers and employees are personally liable for their own torts. *Hoang v. Abbess*, 80 P.3d 863, 867 (Colo. App. 2003). *See also Galie v. RAM, Assoc. Mgmt. SVS., Inc.*, 757 P.2d 176 (Colo. App. 1988).

3. Corporate officers are also personally liable for the torts of the corporation if they approved of, sanctioned, directed, actively participated in or cooperated in such conduct. *Hoang*, 80 P.3d at 868 (*citing Snowden v. Taggart*, 17 P.2d 305, 307 (Colo. 1932)); *Klockner v. Kesser*, 488 P.2d 1135, 1137 (Colo. App. 1971); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 425 S.E.2d 144, 149 (W. Va. 1982); 3A *Fletcher Cyc. Corp.*, § 1135 (Permanent Ed. 1986).

4. Under Colorado law, “an agent of a corporation is presumed to have that knowledge of its affairs particularly under his control and management which, by the exercise of due diligence, he would have ascertained” [citations omitted]. *Overland Cotton Mill Co. v. People*, 75 P. 924, 926 (Colo. 1904). *See, also, Klockner v. Keser*, 488 P.2d 1135, 1137 (1971).

5. Tointon claims ignorance of the representations made to the public and to individual franchisees. Tointon testified that he was unaware that the fraudulent newspaper article was given to the franchise purchasers, despite his admission that he participated in a sales meeting with each franchisee, other than Colorado Coffee Bean.

6. Fraud is seldom proven by direct evidence. *See, Kopeikin v. Merchants Mortgage and Trust Corp.*, 679 P.2d 599, 602 (Colo. 1984) (“We have repeatedly held that fraud may be inferred from circumstantial evidence.”)

7. Tointon is charged with the knowledge of the company’s actions in its business under Tointon’s control and management. *Overland Cotton Mill Co. v. People*, 75 P.924, 926 (Colo. 1904).

8. Peaberry’s financial performance and the franchising process were directly under Tointon’s control and management.

9. Numerous franchisees have testified to Tointon's active participation in the sales process. Tointon also acknowledges the false statements of site selection expertise and time tested demographic standards. Tointon's denials are not credible, and in any event do not shield Tointon from liability.

10. Tointon participated in the fraudulent conduct in this case, and Tointon is liable both because he personally committed fraud, and because, as the Chief Executive Officer of Peaberry, the fraudulent actions of Peaberry were under his control and management.

b. Liability of Orr

1. Orr claims that he didn't know that the newspaper articles were false.

2. Orr provided a copy of the Denver Business Journal article to most franchise purchasers. The article was provided with franchising materials, including the UFOC.

3. The dissemination of the Denver Business Journal article was a part of the sales procedures specifically designed by Orr to sell franchises.

4. Orr made material misrepresentations without knowing whether they were true or false, and is liable for his reckless disregard of the truth or falsity.

5. Making material representations without knowing if they were true or false is just as actionable as having actual knowledge of their falsity. *Duke v. Pickett*, 451 P.2d 288, 290 (Colo. 1969); *Karan v. Post*, 521 P.2d 1276, 1277 (Colo.App. 1974).

6. Orr also made material misrepresentations of fact in regard to Peaberry's profitability, the profitability of its retail stores, and site selection expertise to many of the Plaintiffs.

7. It is not a defense that Orr was acting for PCI and PCFI when making the false representations. *See, Galie v. RAM, Assoc. Mgmt. SVS., Inc.*, 757 P.2d 176, 177 (Colo. App. 1988); *See, also, Hoang v. Abbess*, 80 P.3d 863, 867 (Colo. App. 2003).

8. Defendant Orr was a knowing and active participant in Peaberry's fraud. Defendant Orr is personally liable for his extensive role in the fraud.

9. Defendant Orr is liable for his own fraud, and as an officer of PCI, he is liable for the fraud committed under his authority.

F. PEABERRY DEFENSE: DISCLAIMERS

1. Peaberry argues that reliance upon its misrepresentations was precluded by exculpatory provisions in the Franchise Agreements, in the UFOC, and in the Closing Acknowledgments.

2. Fraudulent representation and fraudulent omissions are both intentional torts, and Defendants cannot disclaim liability for intentional conduct by contract. *Rhino Fund LLP v. Hutchins*, _____ P.3d _____, 2008 Colo.App. LEXIS 1078, 2008 WL 2522308 (Colo. App., June 26, 2008). The exculpatory provisions in this case could only apply to the negligent misrepresentation claim.

3. Peaberry argues that even if the disclaimers were unenforceable to preclude liability in fraud and concealment, they are still effective to preclude reliance upon the fraud.

4. This argument finds no support in law or logic. If the disclaimers are ineffective to shield Defendants from liability for their intentional torts, they are also ineffective to negate the elements of those intentional torts.

5. Even if a disclaimer could have made reliance upon Defendants' intentional fraud unreasonable, these disclaimers did not. Most of the disclaimers do not even mention reliance, and those few that do are not specific enough to make reliance unreasonable. *See, Keller v. A.O. Harvestore Products, Inc.*, 819 P.2d 69, 74 (Colo. 1991).

6. The Franchise Agreement contains the following disclaimers:

§ 24.2 Entire Agreement

This agreement, including all exhibits and addenda, contains the entire agreement between the parties and supersedes any and all prior agreements concerning the subject matter hereof. The Franchisee agrees and understands that the Franchisor shall not be liable or obligated for any oral representations or commitments made prior to the execution hereof or for claims of negligent or fraudulent misrepresentation and that no modifications of this Agreement shall be effective except those in writing and signed by both parties. The Franchisor does not authorize and will not be bound by any representation of any nature other than those expressed in this Agreement. The Franchisee further acknowledges and agrees that no representations have been made to it by the franchisor regarding projected sales volumes, market potential, revenues, profits of the Franchisee's PEABERRY COFFEE Store, or operational assistance

other than as stated in this Agreement or in any disclosure document provided by the Franchisor or its representatives.

§ 24.13 Acknowledgments

BEFORE SIGNING THIS AGREEMENT, THE FRANCHISEE SHOULD READ IT CAREFULLY WITH THE ASSISTANCE OF LEGAL COUNSEL. THE FRANCHISEE ACKNOWLEDGES THAT:

(A) THE SUCCESS OF THE BUSINESS VENTURE CONTEMPLATED HEREIN INVOLVES SUBSTANTIAL RISKS AND DEPENDS UPON THE FRANCHISEE'S ABILITY AS AN INDEPENDENT BUSINESS PERSON AND ITS ACTIVE PARTICIPATION IN THE DAILY AFFAIRS OF THE BUSINESS, AND

(B) NO ASSURANCE OR WARRANTY, EXPRESS OR IMPLIED, HAS BEEN GIVEN AS TO THE POTENTIAL SUCCESS OF SUCH BUSINESS VENTURE OR THE EARNINGS LIKELY TO BE ACHIEVED, AND

(C) NO STATEMENT, REPRESENTATION OR OTHER ACT, EVENT OR COMMUNICATION, EXCEPT AS SET FORTH IN THIS DOCUMENT, AND IN ANY OFFERING CIRCULAR SUPPLIED TO THE FRANCHISEE IS BINDING ON THE FRANCHISOR IN CONNECTION WITH THE SUBJECT MATTER OF THIS AGREEMENT.

7. The disclaimers in § 24.2 and § 24.13(C) which purport to negate all liability are too general to enforce. *See, Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69, 74 (Colo. 1991). Only if the disclaimer relates to the content of the misrepresentation does reliance upon the misrepresentation become unjustifiable. *Atlantic Credit v. MBNA America Bank*, 2001 U.S. Dist. LEXIS 10957 (D. Va. 2001); *Manufacturer 's Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 317 (2nd Cir. 1993).

8. The disclaimers in § 24.2 claim that no representations were made about earnings, sales or profits of the Franchisees' store. These disclaimers are statements of fact. This includes the statements made by Defendants in Exhibit J to the UFOC:

Except for the information in this item, no representations of actual, average, projected, forecasted or potential sales, costs, income or profits are made . . . by us.

We do not authorize our sales personnel to furnish . . . the actual, average, projected, forecasted or potential sales, costs, income or profits of a franchise.

9. Disclaimers which purport to state a fact are “acknowledgments.” They are not promises or representations. *Club Valencia Homeowners Association v. Valencia Associates*, 712 P.2d 1024, 1027 (Colo. App. 1985). Acknowledgments are some evidence of the facts they recite, but the facts may be proved to be true or false at trial. Acknowledgments do not foreclose evidence of the truth. *Van Zandt v. Van Zandt*, 451 S.W.2d 322, 327 (Tex. App. 1970); *Bank of America v. Haag*, 37 S.W.3d 55, 57 (Tex. App. 2000).

10. Acknowledgments which contradict the admitted truth are meaningless. Contrary to the acknowledgments in Exhibit J to the UFOC, representations admittedly have been made by Peaberry, as in the Denver Business Journal article.

11. The acknowledgment that no representations were made regarding profitability is demonstrably false.

12. Beyond Exhibit J to the UFOC, none of the acknowledgments in the Franchise Agreement relate specifically to the sales, income, profits, or performance of Peaberry or its corporate stores.

13. Exhibit J makes two other disclaimers:

We do not furnish or make, or authorize our sales personnel to furnish or make, any oral or written information concerning the actual, average, projected, forecasted or potential sales, costs, income or profits of a franchise or prospects or chances of success that any franchisee can expect or that present or past franchisees have had, other than as set forth in this item.

14. This disclaimer (which is reiterated in part in the Closing Acknowledgments) only relates to representations about the performance of franchise stores.

15. The last disclaimer states:

We disclaim and will not be bound by any unauthorized representations.

16. The Denver Business Journal newspaper article quoted the President of PCFI and PCI. It was provided to franchisees with their UFOC. It was discussed in the presence of the sole owner and CEO of the parent of the franchise seller. None of the representations were unauthorized.

17. During the closing for each franchise sale, Peaberry had each franchisee sign a “Closing Acknowledgment.” Among other things, it contained the following statements:

2. I have not received any assurances, promises or predictions of how well my PEABERRY COFFEE Store will perform financially from any officer, employee, agent or area sales representative of PCFI, except as set forth in Item 19 of PCFI’s Offering Circular.”

5. I am not relying on any promises of PCFI which are not contained in the PCFI franchise agreement.

(See, sample Closing Acknowledgments, Exh. 594.)

18. Defendants contend that the Plaintiffs could not rely on the newspaper articles as a result of these acknowledgments.

19. The statements in the Closing Acknowledgments refer to assurances, promises and predictions of future performance, and to “promises” in general. These statements do not refer to representations of past profitability or omissions.

20. The court finds the acknowledgments do not, by their terms, prevent reasonable reliance.

21. The Court finds that each franchisee who received a copy of the Denver Business article acted reasonably in relying on the contents of that article.

22. Orr testified that he placed great importance on the Closing Acknowledgments. Orr claims he would have stopped the closing if franchisee had said they were relying on the Denver Business Journal article, though he didn’t know what he would have done next.

23. The Court finds Orr’s testimony to be illogical. The Court has found that Orr placed Denver Business Journal articles in packets he mailed out with Peaberry’s UFOC. If it was truly of paramount importance to Orr that prospective franchisees not rely on any information outside the UFOC, he would not have sent them additional information along with the UFOC.

24. The Court finds that Orr wanted the franchisees to rely on the Denver Business Journal article. He also wanted to avoid liability for the misrepresentations which were included. That is not a proper use of disclaimers.

25. Exhibit J, the Franchise Agreement, and the Closing Acknowledgments do not disclaim the misrepresentations of the ability to expand.

26. Exhibit J, the Franchise Agreement, and the Closing Acknowledgments do not attempt to disclaim the ability to support rapid expansion as represented in the Denver Business Journal article.

27. Similarly, there is no attempt to disclaim the representations of expertise in site selection, based upon time tested demographics standards.

28. Not one of the disclaimers purport to preclude reliance upon the specific factual content of any of the misrepresentations. In fact, none of the disclaimers purport to preclude reliance at all. The primary statement concerning reliance is in the Closing Acknowledgments, and refers to “promises” made by Peaberry, not to representations or omissions, and that statement does not refer to any specific factual content.

29. The disclaimers are insufficient to preclude reliance of the Plaintiffs upon the fraud or the negligent misrepresentations of Peaberry.

G. PEABERRY DEFENSE: RELIANCE AND MATERIALITY.

1. Peaberry argues that PCI’s unprofitable history and its financial instability were not material because the FTC does not require that it be disclosed in the UFOC. Whether or not a disclosure is required in the UFOC has no bearing on Plaintiffs’ common law of fraud claims. 16 CFR 436.10.³ Rather, a fact is material if it might have altered the decision of the Plaintiffs to enter into the transaction. *Ackmann v. Merchants Mortgage*, 645 P.2d 7, 14 (Colo. 1982).

2. Peaberry argues that Plaintiffs could not have relied on the profitability of Peaberry’s stores because they purchased their franchises without the information about the stores’ profitability. Peaberry argues that the Plaintiffs knew that the financial information existed.

3. Peaberry’s argument misses the point. The Plaintiffs relied on the lack of material adverse information. *See, Kopeikin v. Merchants Mortgage*, 679 P.2d 599, 601-02 (Colo. 1984) (“In order to prevail on a claim of fraudulent concealment, a plaintiff must show that a defendant actually knew of a material fact that was not disclosed and that the defendant’s intent was to cause

³ C.F.R. 436.10 parts (a) and (b), explicitly provide that compliance with FTC Rules does not preempt state law claims requirements that additional material information, outside the disclosure document, may need to be disclosed to potential franchisees. This is explained by the FTC in its commentary regarding section 436.10, where it provides: “Accordingly, the amended Franchise Rule would not affect state laws providing greater consumer protection.”

the plaintiff to act differently than he might otherwise have done if the information had been disclosed.”)

4. The Plaintiffs all testified that they would not have purchased their franchises if they had known of the concealed facts. Thus, the Plaintiffs reasonably relied on their absence of material adverse facts in the acquisition of their franchises.

5. The fact that the Plaintiffs completed the purchase of the franchises means that the fraud was successful, not that reliance was not reasonable.

H. PEABERRY DEFENSE: WAIVER

1. Peaberry argues that the franchisees waived Peaberry’s breach of contract regarding site selection.

2. A waiver is a voluntary relinquishment of a known right. *Ewing v. Colorado Farm Mut. Casualty Co.*, 296 P.2d 1040, 1043 (Colo. 1956) (A waiver can be shown by conduct which shows an intention to relinquish a right.) However, such conduct must be unequivocal and free from ambiguity. *Western Cities Broadcasting, Inc. v. Schueller*, 830 P.2d 1074, 1079-80 (Colo. App. 1991.)

3. Peaberry argues that the acceptance by the franchisees of the sites previously selected and leased by Peaberry was a waiver of Peaberry’s contractual obligations to provide written guidelines, to consider sites proposed by franchises, and to reasonably approve such sites.

4. However, the evidence is clear that the acceptance by the franchisees of the pre-selected sites was the result of the fraudulent representations of Peaberry that it had expertise in site selection based upon time-tested demographic standards.

5. A waiver must be predicated upon a full knowledge of the material facts. *Ewing v. Colorado Farm Mut. Casualty Co.*, 296 P.2d 1040, 1043 (Colo. 1956). Acquiescence fraudulently procured cannot be a voluntary relinquishment of a known right.

6. The acceptance of the sites due to Peaberry’s fraud was not a waiver of Peaberry’s breach of contract.

I. PEABERRY DEFENSE: RESCISSION

1. Unlike the election to affirm a contract which is immediately final, the election to rescind is not a final election. As provided by RESTATEMENT OF RESTITUTION § 68:

2. A person who avoids a transaction is not entitled subsequently to affirm the transaction, unless the avoidance was induced by the fraud,

material misrepresentation or duress of the transferee. A person does not avoid a transaction until:

(a) he has regained all or a substantial part of what he gave and to which he would be entitled only upon avoidance; or

(b) he has obtained a final judgment or decree based upon the avoidance; or

(c) the other party has changed his position in reliance upon a statement of disaffirmance or has manifested his consent thereto.

2. In the instant case, three Plaintiffs have ceased operation of their franchise stores. Two of these Plaintiffs, JKRR, LLC and Colorado Coffee Bean, LLC, announced by letter an intention to rescind. (Exh. 1152 and 1153.) The announced rescission was immediately rejected by Defendants, who claimed that no right to rescind existed.

3. The Court finds Defendants have returned no restitution to any of the Plaintiffs. Plaintiffs are therefore free to affirm their contracts and sue for damages in fraud and breach of contract.

J. PEABERRY COUNTERCLAIMS

1. Defendant PCFI brought counterclaims against each Plaintiff for payment of monthly royalty fees.

2. The Court has determined that PCFI breached the Franchise Agreements by taking over the site selection process, unfair pricing, and undermining its brand.

3. A party to a contract who is the first to violate its terms cannot claim its benefits. A material breach deprives a party of the right to demand performance by the other. *Coors v. Security Life Co.*, 112 P.3d 59, 64 (Colo. 2005).

4. Further, the Court has determined that PCI and PCFI fraudulently induced the Plaintiffs to enter into the Franchise Agreements.

5. Fraud is a defense to the claims of PCFI under the contract. *See, e.g., Ackmann v. Merchants Mortgage & Trust Corp.*, 659 P.2d 697 (Colo. App. 1982), *rev'd on the grounds*, 679 P.2d 599 (Colo. 1984).

6. The counterclaims of Defendant PCFI shall be dismissed, with prejudice.

III. DAMAGES

a. Actual Out-Of-Pocket Loss

1. Plaintiffs retained Lari B. Masten to quantify their losses. Ms. Masten is a Certified Public Accountant (CPA), and holds the certification of Certified Valuation Analyst (CVA), conferred by the National Association of Certified Valuation Analysts. She is also Accredited in Business Valuation (ABV), conferred by the American Institute of Certified Public Accountants. Ms. Masten prepared a comprehensive analysis of the actual total out-of-pocket loss sustained by each Plaintiff franchisee.

2. The total actual out-of-pocket loss, as calculated by Ms. Masten, contains two components, capital investment losses and operational losses. The capital investment loss component consists of each franchisees' investment in equipment, leasehold improvements, franchise and development fees, and other miscellaneous capital investment costs. The operation loss component consists of actual losses sustained by each franchisee from operations. Losses are calculated based upon the tax returns of each franchisee entity. The loss calculated represents actual out-of-pocket cash losses through December 31, 2007.

3. Losses in these two categories were totaled and prejudgment interest at the statutory rate of 8% per annum was calculated to convert these actual out-of-pocket losses to the present value of the loss for each franchisee as of June 30, 2008, the date on which the trial commenced.

4. The Court concludes the approach employed by Ms. Masten to quantify Plaintiffs' total actual out-of-pocket losses is reasonable.

5. The Court recognizes that a component of the operational loss includes interest expense actually paid by franchisees, whether incident to a loan to build out their Peaberry store, or to fund operational losses. In both instances, this interest expense represents a reasonable expense incurred in the ordinary course of business and is an appropriate component of capturing each franchisee's actual loss. The interest paid by the franchisee for capital and operations loss funding purposes is distinguished from the statutory interest that adjusts the actual losses of each franchisee for the time value of money to express each franchisees' loss in terms of June 30, 2008 dollars.

6. The Court concludes Ms. Masten's damage model fairly represents each Plaintiff's total actual out-of-pocket loss to a reasonable degree of probability. It is true that Ms. Masten did not set off years in which tax returns of a few franchisees showed positive operational cash flow, as opposed to a cash loss in that particular year. In every instance where a franchisee's tax returns in a given year indicate positive cash flow from operations, there has been consistent credible testimony that scores or even hundreds of hours per week were devoted by franchisees and their family members to the businesses without compensation.

7. In addition, no losses sustained by any franchisee after January 1, 2008, were quantified in Ms. Masten's model.

8. The additional losses in terms of uncompensated labor, and the losses incurred after January 1, 2008 negate any set off for gain reflected by certain franchisees' tax returns.

9. Accordingly, the Court concludes that the losses calculated by Ms. Masten for each franchisee represents the reasonable actual out-of-pocket loss sustained by each franchisee.

b. Expectancy Loss

1. The Court has found and concluded that each franchisee in this case has been fraudulently induced to enter into their franchise agreement. Further, the Court, as stated above, has found that Peaberry breached the franchise agreement, in bad faith. The Court concludes that the actual out-of-pocket damage model does not adequately compensate each franchisee for the losses they sustained.

2. Each franchisee also retained Ms. Masten to calculate their total lost expected profits. Colorado law recognizes this component of damages in cases of fraud. *Forsyth v. Associated Grocers of Colorado, Inc.*, 724 P.2d 1360, 1363-65 (Colo. App. 1986) (lost profits recoverable in case of fraud).

3. In *Denny Constr., Inc. v. City & County of Denver*, 170 P.3d 733, 738-39 (Colo. App. 2007), the court discussed the proof for lost profits from breach of contract:

First, the party must prove that the lost profits were reasonably foreseeable to all parties to the contract at the time they entered into the contract. Second, the party must demonstrate that the damages sought are traceable to and are the direct result of the breaching party's conduct. Third, the party must prove that there is a reasonable basis for computing such damages.

4. Where the fact of damage is certain, uncertainty of the amount of damage is not a bar to recovery. *See, Cope v. Vermeer Sales and Service of Colorado, Inc.*, 650 P.2d 1307, 1309 (Colo. App. 1982). In *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1382 (Colo. 1993), the Supreme Court noted, "in balancing the competing interest involved in a future damages case, we have adopted a rule requiring a plaintiff to provide the trier of fact with (1) proof of the fact that damage will accrue in the future, and (2) sufficient admissible evidence which would enable the trier of fact to compute a fair approximation of the loss."

5. Ms. Masten calculated the total lost expected profits of each franchisee, based upon an expected rate of return of 10% per year. In the few instances where franchisees testified

to an expected gross revenue over the term of their franchise agreement, this expectation for gross revenue was used, as opposed to the gross revenues represented in proformas used in training for the franchisees. In all cases, however, the 10% net profits expectation rate was used.

6. Industry data indicates that the average rate of return for typical retail coffee stores is approximately 20%.

7. Ms. Masten calculated the expected lost profits over the ten-year term of the franchise agreement, and brought the expected profit to a present value as of June 30, 2008.

8. The Court finds that Ms. Masten's calculation provides a reasonable manner of calculating future lost expected profits. Ms. Masten's calculations and testimony provides sufficient evidence to permit a computation of fair approximation of each franchisees losses. The Court concludes that lost expected profits are necessary to compensate the franchisees for losses they sustained beyond their investment and operational losses.

9. The Court adopts the total lost expected profits Ms. Masten has calculated for each franchisee expressed in Table 9 of the detailed calculations that she performed for each franchisee.

c. Leasehold Damages

1. Ms. Masten has also calculated the remaining leasehold liability for each franchisee. With the exception of Colorado Coffee Bean, LLC, who negotiated a release of its leasehold obligations on behalf of both itself and Peaberry in exchange for turning over its leasehold improvements to the landlord, each franchisee remains responsible for lease payments through the remainder of their lease terms. Ms. Masten has calculated the present value of that liability as of June 30, 2008.

2. The Court concludes that Ms. Masten's calculations are reasonable and reliable. In general, Peaberry's expert, Mr. Zeeb, concurs that Peaberry should be liable for leasehold damages, but believes that some set off should have been incorporated in Ms. Masten's damage model recognizing the possibility of a sublease. The Peaberry Defendants, however, have offered no evidence as to what the probability of finding a subleasee might be, or what level of set off might be appropriate.

3. Accordingly, the Court concludes Ms. Masten's calculation as to the leasehold component of damage reflected in Trial Exhibit 1067 is reasonable and represents the leasehold damages sustained by each franchisee.

d. Attorney Fees

1. Paragraph 24.7 of the Franchise Agreement, entitled Attorneys' Fees provides that the prevailing party will recover the costs and expenses of litigation, including reasonable attorney fees.

2. The Court concludes that the Plaintiffs are the prevailing parties in this litigation. The Court further concludes that each of the Peaberry Defendants is a party at fault.

3. The Court, therefore, concludes that Plaintiffs are entitled to recover, in addition to their damages, all of their costs, and expenses, including reasonable attorneys' fees incurred from Plaintiffs' first submission of its claims to mediation which was on February 9, 2006. (Exh. 779.) Accordingly, Plaintiffs will be awarded their expenses, costs and attorney fees.

e. Punitive Damages

1. Pursuant to statute, in Colorado, damages may be assessed when the injury complained of is attended by circumstances of fraud, malice, or willful conduct. (C.R.S. § 13-21-102.)

2. The purpose of the exemplary damage statute is to punish the wrongdoer, and to deter similar offenses by the defendant or others in the future. *Mince v. Butters*, 616 P.2d 127, 129 (Colo. 1980); *Lexton-Ancira Real Estate Fund v. Heller*, 826 P.2d 819, 822 (Colo. 1992).

3. The Court concludes that the Defendants fraudulently induced the Plaintiffs to buy Peaberry franchises. The Defendants affirmatively misrepresented Peaberry's profitability, Peaberry's ability to expand out of its cash flow, Peaberry's ability to expand rapidly and the existence of time tested demographic standards. Defendants intentionally concealed and withheld material facts in regard to staggering losses sustained by Peaberry Coffee, Inc., its cash flow, the poor performance of its retail stores and the poor performance of its most recently opened retail stores.

4. Significant aggravating factors are that Defendants used the franchisees in this case as guinea pigs, to test a new site selection theory based upon daytime demographics. Defendants took over the site selection process and rejected sites proposed by the franchisees.

5. Tointon callously raised bean prices at a time when he was well-aware his experiment had failed, he wasn't selling franchises, he was looking for an exit strategy for himself, and he was taking steps to protect his own assets.

6. The Court concludes that the Defendants' conduct was willful and wanton.

7. The deterrent purpose of the punitive damage statute is well-served in this case. Franchisors may not conceal and withhold material facts. Franchisors may not misrepresent material facts. Franchisors may not use franchisees as guinea pigs. Franchisors may not experiment with the economic lives and livelihood of innocent people.

8. The Court finds, beyond a reasonable doubt, that the injury sustained by the Plaintiffs was attended by circumstances of fraud, malice or willful conduct.

9. The Court concludes that it is appropriate to impose punitive damages in an amount equal to the damage sustained by each Plaintiff, exclusive of pre-judgment interest.

IV. ORDER AND JUDGMENT

A. General Provisions

1. The above Findings of Fact, Conclusions of Law are incorporated by this reference and are made an Order of this Court.

2. The Court stayed proceedings against Defendant Perkins Coie, at the request of Defendant Perkins Coie, which request was joined in by the Peaberry Defendants. The purpose of the stay was to preserve the attorney-client-privilege, asserted by the Peaberry Defendants. During the course of this litigation, it has become apparent that Tointon has taken steps in conjunction with his father to protect his assets from judgment collection. Delay in entry of final judgment would provide the Peaberry Defendants with a further opportunity to secure and sequester their assets. Pursuant to Rule 54(b) of the Colorado Rules of Civil Procedure, the Court expressly finds that there is no just reason for delay of entry of final judgment, and final judgment should enter in favor of Plaintiffs and against the Peaberry Defendants forthwith.

3. The Plaintiffs will have 10 days to file their request for costs, expenses, and attorney fees pursuant to the terms of the Franchise Agreement, from the date this case was first submitted to mediation. Plaintiffs will also have 10 days to file their Bill of Costs.

4. Defendants will have 10 days from the date Plaintiffs file their request for costs and attorney fees, and Bill of Costs, to object to Plaintiffs' Bill of Costs, or request for costs, expense and attorney fees filed pursuant to the Franchise Agreement. Plaintiffs shall have 5 days to reply.

5. Judgment shall be entered *Nunc Pro Tunc* to June 30, 2008.

B. Entry of Specific Judgments

1. *Peak Mountain Coffee, Inc.*

Judgment shall enter in favor of Peak Mountain Coffee, Inc., and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$421,333 (Exhibit 1075, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by Peak Mountain Coffee, Inc.; \$662,483 (Exhibit 1075, Table 9) representing the total lost expected profits of Peak Mountain Coffee, Inc.; \$282,506 (Exhibit 1067) representing the net present value of the leasehold obligation of Peak Mountain Coffee, Inc., as of June 30, 2008, and \$1,230,000⁴ representing punitive and exemplary damage equal to the damages incurred by Peak Mountain Coffee, Inc., exclusive of prejudgment interest.

The total judgment entered in favor of Peak Mountain Coffee, Inc. and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,596,322, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the Franchise Agreement, Peak Mountain Coffee, Inc., shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, Peak Mountain Coffee, Inc., shall recover its costs.

2. *CZ-DM, Inc.*

Judgment shall enter in favor of CZ-DM, Inc., and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$509,494 (Exhibit 1073, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by CZ-DM, Inc.; \$509,925 (Exhibit 1073, Table 9) representing the total lost expected profits of CZ-DM, Inc.; \$ 411,924 representing the net present value of the leasehold obligation of CZ-DM, Inc., as of June 30, 2008, and \$1,293,000⁵ representing punitive and exemplary damages equal to the damages incurred by CZ-DM, Inc., exclusive of prejudgment interest.

The total judgment entered in favor of CZ-DM, Inc., and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,724,343, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the Franchise Agreement, CZ-DM, Inc., shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, CZ-DM, Inc., shall recover its costs.

⁴ $((421,333-107,580) + (662,483-28,613) + 282,506=1,230,129)$

⁵ $((509,925-19,733) + (509,494-118,050) + 411,924 = 1,293,560)$

3. ABC Sales, Inc.

Judgment shall enter in favor of ABC Sales, Inc., and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$641,815 (Exhibit 1076, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by ABC Sales, Inc.; \$510,872 (Exhibit 1076, Table 9) representing the total lost expected profits of ABC Sales, Inc.; \$273,670 (Exhibit 1067) representing the net present value of the leasehold obligation of ABC Sales, Inc., as of June 30, 2008, and \$1,261,000⁶ representing punitive and exemplary damage equal to the damages incurred by ABC Sales, Inc., exclusive of prejudgment interest.

The total judgment entered in favor of ABC Sales, Inc., and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,687,357, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the franchise agreement, ABC Sales, Inc., shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, ABC Sales, Inc., shall recover its costs.

4. Colorado Coffee Bean, LLC.

Judgment shall enter in favor of Colorado Coffee Bean, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$619,335 (Exhibit 1071, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by Colorado Coffee Bean, LLC; \$505,528 (Exhibit 1071, Table 9) representing the total loss expected profits of Colorado Coffee Bean, LLC; and \$1,031,000⁷ representing punitive and exemplary damage equal to the damages incurred by Colorado Coffee Bean, LLC, exclusive of prejudgment interest.

The total judgment entered in favor of Colorado Coffee Bean, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,155,863, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the franchise agreement, Colorado Coffee Bean, LLC, shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, Colorado Coffee Bean, LLC, shall recover its costs.

5. Double R Coffee, LLC.

Judgment shall enter in favor of Double R Coffee, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$681,110 (Exhibit 1068, Table 5), representing the total actual out-of-pocket loss

⁶ $((641,815-144,350) + (510,872-20,680) + 273,670 = \$1,261,327)$

⁷ $((619,335-26,767) + (505,528-66,486) - \$1,031,610)$

from investment and operations incurred by Double R Coffee, LLC; \$648, 763 (Exhibit 1068, Table 9) representing the total lost expected profits of Double R Coffee, LLC; \$245,968 (Exhibit 1067) representing the net present value of the leasehold obligation of Double R Coffee, LLC, as of June 30, 2008, and \$1,362,000⁸ representing punitive and exemplary damages equal to the damages incurred by Double R Coffee, LLC, exclusive of prejudgment interest.

The total judgment entered in favor of Double R Coffee, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,937,841, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the Franchise Agreement, Double R Coffee, LLC, shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, Double R Coffee, LLC, shall recover its costs.

6. JKKR, LLC.

Judgment shall enter in favor of JKKR, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$658,987 (Exhibit 1074, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by JKKR, LLC; \$509,437 (Exhibit 1074, Table 9) representing the total lost expected profits of JKKR, LLC; \$289,565 (Exhibit 1067) representing the net present value of the leasehold obligation of JKKR, LLC, as of June 30, 2008, and \$1,289,445⁹ representing punitive and exemplary damage equal to the damages incurred by JKKR, LLC, exclusive of prejudgment interest.

The total judgment entered in favor of JKKR, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,746,989, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the Franchise Agreement, JKKR, LLC, shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, JKKR, LLC, shall recover its costs.

7. Peak Java Company.

Judgment shall enter in favor of Peak Java Company, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$752,254 (Exhibit 1070, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by Peak Java Company; \$518,636 (Exhibit 1070, Table 9) representing the total lost expected profits of Peak Java Company; \$51,743 (Exhibit 1067) representing the net present value of the leasehold obligation of Peak Java Company as of

⁸ $((681,110-184,140) + (648,763-29,245) + 245,968 = \$1,362,456)$

⁹ $((658,987-149,299) + (509,437-19,245) + 289,565 = \$1,289,445)$

June 30, 2008, and \$1,109,000¹⁰ representing punitive and exemplary damage equal to the damages incurred by Peak Java Company, exclusive of prejudgment interest.

The total judgment entered in favor of Peak Java Company and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,431,633, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the franchise agreement, Peak Java Company shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, Peak Java Company shall recover its costs.

8. JKF, LLC

Judgment shall enter in favor of JKF, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$514,103 (Exhibit 1072, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by JKF, LLC; \$610,085 (Exhibit 1072, Table 9) representing the total lost expected profits of JKF, LLC; \$132,312 (Exhibit 1067) representing the net present value of the leasehold obligation of JKF, LLC, as of June 30, 2008, and \$1,105,000¹¹ representing punitive and exemplary damage equal to the damages incurred by JKF, LLC, exclusive of prejudgment interest.

The total judgment entered in favor of JKF, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,361,500, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the Franchise Agreement, JKF, LLC, shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, JKF, LLC, shall recover its costs.

9. MLT Taylor, LLC

Judgment shall enter in favor of MLT Taylor, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$438,757 (Exhibit 1069, Table 5), representing the total actual out-of-pocket loss from investment and operations incurred by MLT Taylor, LLC; \$503,631 (Exhibit 1069, Table 9) representing the total lost expected profits of MLT Taylor, LLC; \$431,583 (Exhibit 1067) representing the net present value of the leasehold obligation of MLT Taylor, LLC, as of June 30, 2008, and \$1,276,000¹² representing punitive and exemplary damage equal to the damages incurred by MLT Taylor, LLC, exclusive of prejudgment interest.

¹⁰ $((752,254-186,765) + (518,636-26,416) + 51,743 = \$1,109,452)$

¹¹ $((514,103-122,758) + (610,085-28,616) + 132,312 = 1,105,126)$

¹² $((438,757-84,396) + (503,631-13,439) + 431,583 = 1,276,136)$

The total judgment entered in favor of MLT Taylor, LLC, and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$2,649,971, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the Franchise Agreement, MLT Taylor, LLC, shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, MLT Taylor, LLC, shall recover its costs.

10. JM, Inc.

Judgment shall enter in favor of JM, Inc., and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, in the amount of \$246,423 (Exhibit 1077, Table 3), representing the total actual out-of-pocket loss from investment and operations incurred by JM, Inc.; \$507,310 (Exhibit 1077, Table 9) representing the total lost expected profits of JM, Inc.; \$35,360 (Exhibit 1067) representing the net present value of the leasehold obligation of JM, Inc., as of June 30, 2008, and \$718,665¹³ representing punitive and exemplary damage equal to the damages incurred by JM, Inc., exclusive of prejudgment interest.

The total judgment entered in favor of JM, Inc., and against William I. Tointon, James T. Orr, Peaberry Coffee, Inc., and Peaberry Coffee Franchise, Inc., jointly and severally, is \$1,516,093, *Nunc pro tunc* to June 30, 2008. Pursuant to the express terms of the Franchise Agreement, JM, Inc., shall be entitled to recover its costs and expenses, including reasonable attorney fees against all Defendants, jointly and severally. As the prevailing party, JM, Inc., shall recover its costs.

DONE AND SIGNED this _____ day of _____, 2008.

BY THE COURT:

WILLIAM D. ROBBINS
DISTRICT COURT JUDGE

¹³ ((246,423-53,310) + (507,310-17,118) +35,360 = \$718,665)