

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

MOXIE VENTURE L.L.C., a Minnesota
corporation; Melinda Vincent, an
individual; and Anton Vincent, an
individual,

Plaintiffs,

v.

THE UPS STORE, INC., a Delaware
corporation,

Defendant.

Court File No. _____

**COMPLAINT
(JURY TRIAL DEMANDED)**

Plaintiffs Moxie Venture L.L.C. (“Moxie”), Melinda Vincent, and Anton Vincent (collectively “Plaintiffs”), for their Complaint against Defendant The UPS Store (“TUPSS” or “Defendant”), state and allege as follows:

INTRODUCTION

1. Defendant TUPSS induced Plaintiffs into entering into a Franchise Agreement and Personal Guarantees based on misrepresentations related to the revenue and cash flow that Plaintiffs would experience in the operation of a TUPSS store and that Plaintiffs would be able to successfully operate a TUPSS store in Bloomington when two TUPSS stores in the same vicinity had previously closed. Further, TUPSS failed to state facts regarding these misrepresentations that would have caused Plaintiffs not to enter into the agreements, had Plaintiffs known all the material facts related thereto, such as that one of the previously closed TUPSS stores, which was approximately one block from Plaintiffs’ eventual location, had not generated the revenue in the fourth year of operations that TUPSS represented Plaintiffs could generate in the first year of

operations. TUPSS took these actions in violation of the Minnesota Franchise Act and its common law duties.

2. Additionally, TUPSS breached the Franchise Agreement and the implied covenant of good faith and fair dealing by (1) failing to provide a functioning software system; (2) requiring Moxie to participate in UPS' Access Point drop off program, which transfers a substantial portion of UPS' package delivery costs to Moxie without Moxie receiving adequate compensation for providing the service; (3) requiring Moxie to act as a customer drop point for packages while TUPSS' parent, UPS, negotiates service contracts with an ever increasing number of online retailers, reducing Moxie's potential to generate revenue and a positive cash flow; and (4) test marketing the Bill My Account program in Moxie's territory, with Moxie participating in the test marketing and the likelihood that all TUPSS franchisees will soon be required to participate in the Bill My Account program, when the Bill My Account program diverts revenue from Moxie to TUPSS' parent company, UPS.

3. Based on TUPSS' violation of the Minnesota Franchise Act, common law fraud and negligent misrepresentations, and breaches of the Franchise Agreement and the implied covenant of good faith and fair dealing, Plaintiffs bring this action seeking (1) rescission of the Franchise Agreement; (2) rescission of the Personal Guarantees; and (3) restitution damages to put Plaintiffs in the position they occupied before entering into the agreements. Alternatively, Plaintiffs seek damages resulting from TUPSS' breaches of the Franchise Agreement and the implied covenant of good faith and fair dealing.

THE PARTIES

4. Moxie Ventures L.L.C. is a limited liability company organized under the laws of Minnesota, and has its principal place of business at 10504 France Avenue South, Bloomington, Minnesota. All members of Moxie Ventures L.L.C. are residents of the State of Minnesota.

5. Melinda Vincent is an individual and a resident of Minnesota. Ms. Vincent is a member of Moxie Ventures L.L.C., and executed a Personal Guarantee in relation to the Franchise Agreement.

6. Anton Vincent is an individual and a resident of Minnesota. Mr. Vincent is a member of Moxie Ventures L.L.C. and executed a Personal Guarantee in relation to the Franchise Agreement.

7. Upon information and belief, The UPS Store, Inc. is a corporation organized under the laws of Delaware, and has its principal place of business at 6060 Cornerstone Court West, San Diego, California.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) because there is complete diversity between Plaintiffs and Defendant, and the amount in controversy is reasonably believed to be in excess \$75,000, exclusive of interest and costs.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial portion of the events and omissions giving rise to the claim occurred in this district.

10. This Court has personal jurisdiction over Defendant because Defendant has purposefully availed itself of the privilege of doing business in Minnesota, has intentionally done business in Minnesota, has enjoyed the privileges and benefits of Minnesota's laws and regulations, and has purposefully directed its actions toward Minnesota.

LAWS REGULATING THE SALE OF FRANCHISES

11. In the 1950s and 1960s, modern franchising took off as a method of doing business, but was unregulated and subject to widespread abuse. State and federal regulators began to study the situation in the late 1960s and concluded that the sale of franchises was similar to the unregulated sale of securities in the 1920s. Accordingly, in 1979, the Federal Trade Commission (“FTC”) adopted a trade regulation rule governing the sale of franchises that is roughly modeled on the SEC Act. 16 CFR Part 436.

12. On January 22, 2007, the FTC amended its requirements related to disclosure (the “Amended FTC Franchise Rule”). While the Amended FTC Franchise Rule does not, itself, provide franchisees with a private right of action, certain states, including Minnesota, have parallel legislation and provide franchisees with the right to rescind the franchise agreement and the right to civil remedies if a franchisor, or its statutory control persons, fail to make the required disclosures, or make misleading statements or omissions in connection with a franchise sale.

13. The Amended FTC Franchise Rule requires a franchisor to make disclosure with respect to 23 different “Items” of information, including the nature of the franchise, the principals who own and run it, the costs of obtaining or operating the franchise, the existence of litigation in which the franchisor has been involved, the material terms of the contract, the existence of other franchisees and their locations, and, if the franchisor chooses to provide information on the financial performance of its outlets or projections of the franchisee’s performance, a fair presentation of those figures and the factual bases therefor.

14. A franchisor’s Item 19 disclosure, which relates to financial performance representations, “is one of the most important sections [of the FDD] to franchisees” because it

deals with the question most frequently posed by prospective franchisees—*i.e.*, “How much money can I make?” Dave Thomas & Michael Seid, *Franchising For Dummies* 90 (2000). Because this question is so important, the way in which a franchisor can lawfully answer the question is the most heavily regulated part of the franchise sales process. The Amended FTC Franchise Rule broadly defines “financial performance representation” as:

“Financial performance representation” means any representation, including any oral, written, or visual representation, to a prospective franchisee, including a representation in the general media, that states, expressly or by implication, a specific level or range of actual or potential sales, income, gross profits, or net profits. The term includes a chart, table, or mathematical calculation that shows possible results based on a combination of variables.

16 CFR 436.1(e).

15. Financial performance representations include both “formal” representations of revenues or profits in dollar figures, such as pro-formas, and indirect representations, such as a hotel’s occupancy rate, and informal statements, such as “You’ll make enough to buy a Porsche.” *Commercial Prop. Invs. v. Quality Inns Int’l, Inc.*, 938 F.2d 870, 872 (8th Cir. 1991); Promulgation of Final Interpretive Guidelines, 44 Fed. Reg. 49,982 (August 24, 1979).

16. As an initial matter, a franchisor is under no obligation to make a “financial performance representation” for purposes of its FDD. 16 C.F.R. § 436.5(s)(1). Because TUPSS affirmatively elected to make a financial performance representation, TUPSS was obligated to prepare the Item 19 financial performance representation according to the precise requirements of the Amended FTC Franchise Rule, and make any financial performance representation in Item 19 of the TUPSS FDD.

17. The Amended FTC Franchise Rule for Item 19 requires that: “If the franchisor makes any financial performance representation to prospective franchisees, the franchisor must have a reasonable basis and written substantiation for the representation at the time the representation is

made and must state the representation in the Item 19 disclosure.” 16 CFR 436.1(s)(3). As reflected in the FTC’s “Interpretive Guides” for Item 19, in order to conclude that a franchisor has a “reasonable basis” for its financial performance representation:

The data must reasonably support the claim as it is likely to be understood by a reasonable prospective franchisee. For example, a representation that franchisees earn a net profit of \$30,000 per year implies that such figure is representative of the usual experience of the system’s franchisees. The claim would not have a reasonable basis if, in fact, only a small minority of the franchisees earn such amount or if profits were due to nonrecurring conditions or if the franchisees used inconsistent systems for reporting profit. Moreover, the franchisor would not have a reasonable basis for the claim if the only facts to support it were the income statements of a disproportionately small percentage of the system’s franchisees.

See Bus. Franchise Guide (CCH) ¶ 6255.

18. The Amended FTC Franchise Rule provides that, if a franchisor makes a financial performance representation, it must make certain disclosures. The representation must state whether historical performance data or projections are utilized for the representation and differing disclosures must be made depending on this basis.

19. If historical performance data is the basis, the representation must include: (1) whether all existing outlets or a subset of outlets are utilized for the representation; (2) if a subset is used, information on these outlets (*i.e.*, type of location, length of operation, franchise or company store, etc.); (3) the reporting dates of the achieved levels; (4) total number of outlets and the number of outlets with the described characteristics; (5) the number of outlets used for representation; (6) the number and percent of reported outlets that achieved or surpassed the represented results; and (7) the characteristics of the included outlets that may differ from the outlet that may be offered to the prospective franchisee. If the representation is a forecast, the representation must include the material bases and assumptions underlying the projection upon which the forecast is expected to depend, including, but not limited to, economic and market

conditions basic to the franchisee's operation and matters affecting the franchisee's sales, cost of goods or services sold, and operating expenses. All representations must include a "clear and conspicuous" admonition that the franchisee's results may differ and that written substantiation of the representation is available upon reasonable request. 16 CFR 436(s).

20. A franchisor has a duty to notify the prospective franchisee of any material changes that the franchisor knows or should have known occurred in the information contained in a financial performance representation. 16 C.F.R. § 436.7(d).

BACKGROUND FACTS

21. Ms. Vincent first began looking at opportunities to purchase a franchise in late 2011. Initially, Ms. Vincent became interested in purchasing a Mathnasium franchise, and even visited Mathnasium's headquarters. However, Ms. Vincent decided not to pursue the Mathnasium opportunity because she was unwilling to accept a franchise territory that she did not believe would provide enough revenue to support the business. Additionally, Ms. Vincent wanted to purchase a franchise in an established franchise system, which Mathnasium was not.

22. After deciding not to purchase a Mathnasium franchise, Ms. Vincent continued to investigate various franchise opportunities. After this further investigation, Ms. Vincent decided to focus on The UPS Store.

23. In furtherance of this, Ms. Vincent emailed TUPSS expressing interest in becoming a franchisee in the Twin Cities area.

24. Shortly thereafter, Jocelyn Prue, TUPSS' then Area Development Manager for the Twin Cities, contacted Ms. Vincent to set up a dinner meeting in October 2012. At this dinner, which was attended by Ms. Vincent, Ms. Prue, and Leigh Kennedy, TUPSS' Franchise

Consultant, the parties discussed Ms. Vincent's background and whether Ms. Vincent would be a good candidate to be a franchisee in the TUPSS system.

25. After some discussion, Ms. Prue told Ms. Vincent that individuals with Ms. Vincent's background are successful within the TUPSS system. During this conversation, Ms. Vincent also informed Ms. Prue that her goal was to generate enough cash flow in the first year of operation to pay for school tuition for one of her children, approximately \$25,000. Ms. Prue assured Ms. Vincent that this was a reasonable goal.

26. Several days after this dinner, Ms. Vincent was informed that she had been approved to become a TUPSS franchisee.

27. After this approval, Ms. Vincent had weekly phone conversations with Ms. Prue. During these conversations, Ms. Prue repeatedly stated that Ms. Vincent could expect \$220,000 in revenue in her first year of operations of a TUPSS store.

28. Further, during these conversations, Ms. Prue stated that Ms. Vincent could expect cash flow of \$75,000 to \$125,000 in the first year, and that Ms. Prue knew one stay at home mother, like Ms. Vincent, who balanced operating her store and caring for her children, and had cash flow of \$50,000 to \$60,000 per year.

29. In addition to the financial performance misrepresentations made by Ms. Prue, TUPSS also misrepresented the viability of establishing a store in Bloomington.

30. Early in Ms. Vincent's weekly conversations with Ms. Prue, Ms. Prue and Ms. Vincent began discussing potential locations for Ms. Vincent's store. Ms. Vincent told Ms. Prue that her preferred territory was Plymouth or Minnetonka, Minnesota. Because of this, Ms. Prue put Ms. Vincent in contact with Paul Engelman, a successful Twin Cities TUPSS franchisee, who wanted to sell his Brooklyn Center, Minnesota TUPSS store.

31. Ms. Vincent had several conversations with Mr. Engelman regarding the Brooklyn Center store before Mr. Engelman informed Ms. Vincent, in December 2012, that Mr. Engelman and his wife were not comfortable selling Ms. Vincent the Brooklyn Center store because of a distant professional relationship between Mr. Engelman's wife and Mr. Vincent.

32. Because of this, Mr. Engelman and Ms. Vincent discussed other potential locations for Ms. Vincent's store, with Mr. Engelman stating that Bloomington, Minnesota was underserved and needed a store, and that it was on TUPSS' "initiative list." At this same time, Mr. Engelman also informed Ms. Vincent that there had been two previous TUPSS stores in Bloomington that had closed.

33. After it was clear Ms. Vincent was not going to be purchasing the Brooklyn Center store, Ms. Prue also began to push Ms. Vincent to establish a new store in Bloomington during their weekly conversations.

34. During a December 2012 conversation, Ms. Prue told Ms. Vincent that, if Ms. Vincent established a store in Bloomington, it would break even, and become profitable, more quickly than a store in other locations Ms. Vincent was considering.

35. In January 2013, Kimberly Hopkins, TUPSS' real estate development specialist, told Ms. Vincent, that Ms. Vincent should not be concerned that there already was a TUPSS store in Bloomington, and that TUPSS had wanted to put a second store in Bloomington for some time. Further, Ms. Hopkins stated, in January 2013, that establishing a TUPSS store in Bloomington would be the best option for Ms. Vincent.

36. Ms. Vincent, however, continued to be concerned with the fact that two previous TUPSS stores in Bloomington had been closed. Accordingly, Ms. Vincent repeatedly requested additional information on the two previously closed Bloomington stores from TUPSS.

37. Finally, Ms. Vincent was told, in a February 7, 2013, email from Ms. Hopkins, that the first store that had closed, which had been located across the street from Ms. Vincent's eventual location, was closed solely because that shopping center was going to be demolished and the owner wanted to retire. Ms. Hopkins also stated that the more recently closed store, which had been located approximately one block from Ms. Vincent's eventual location, was closed because the owner treated it as a hobby and was not putting enough effort into the operation of the store.

38. Several days later, Ms. Prue confirmed for Ms. Vincent that what Ms. Hopkins said was true, and added that many of the operational issues at the more recently closed store arose because the owner had a gambling problem.

39. Ms. Vincent was assured that, if she established her TUPSS store in Bloomington, it would be successful if she operated it properly. However, at no time before executing the Franchise Agreement was Moxie provided with financial information on the operations of either store, although it would have been highly relevant to Ms. Vincent's decisions to proceed with establishing a store in Bloomington.

40. Based on the representation of TUPSS, Ms. Vincent decided to pursue a location for the store in Bloomington.

41. Because of the time frame in which Ms. Vincent expected to open the store and the availability of training dates, Ms. Vincent attended TUPSS' new franchisee training in San Diego on May 13 and 14, 2013, before Moxie entered into the Franchise Agreement.

42. While at training, Ms. Vincent was provided with TUPSS' training manual. This training manual stated that, in the first year of operation, a TUPSS store would have \$220,000 in

revenue and an operating profit of \$12,606. During training, Ms. Vincent was repeatedly told to use the \$220,000 annual sales figure for all of the financial exercises that were completed.

43. One of the financial exercises Ms. Vincent was required to complete was the development of a Business Development Plan. This Business Development Plan included a Financial Management section, which utilized the \$220,000 of expected first year revenue to establish a first year operating budget.

44. When Ms. Vincent shared her Business Development Plan with the TUPSS trainer, Ms. Vincent was told that it looked good – *i.e.*, Ms. Vincent had assumed, as she should, that Moxie's store would generate \$220,000 in revenue in the first year of operation.

45. In reliance on TUPSS' numerous financial performance representations, including the repeated representations that first year sales revenue at Moxie's store would be \$220,000, and TUPSS' representation that Bloomington was a good location for establishing Moxie's new TUPSS store, Moxie entered into a Franchise Agreement with TUPSS and Mr. and Ms. Vincent executed Personal Guarantees on May 28, 2013. (Moxie's Franchise Agreement is attached hereto as **Exhibit 1.**)

46. Moxie opened its store in Bloomington and began operations in August 2013.

47. Although in operation for a significant period of time, Moxie has never reached the break-even point, let alone made a profit. Further, Moxie did not even come close to generating the \$220,000 in revenue during the first year of operations, as TUPSS had represented. During the first four months of operation in 2013, Moxie only generated \$50,000 in revenue. During the entire calendar year of 2014, Moxie only generated \$150,000, and Moxie is on track to generate only \$150,000 to \$160,000 in revenue in 2015.

48. Moxie's financial results should not have been a surprise to TUPSS. Although Ms. Vincent requested information on the two previously closed Bloomington TUPPS stores multiple times before entering into the Franchise Agreement, it was not until February 2014, six months after beginning operations, that TUPSS provided financial information on the more recently closed Bloomington store, which had been located merely one block from the store established by Moxie. This information disclosed that annual revenue at the more recently closed Bloomington TUPSS store had only reached \$170,000 in its fourth year of operation, dramatically less than the \$220,000 in revenue TUPSS had represented Moxie would generate in its first year of operation.

49. In addition to misrepresenting the financial performance Moxie would experience, TUPSS failed to meet its obligations under the Franchise Agreement, further hindering Moxie's ability to generate revenue and have a positive cash flow.

50. Moxie began operations shortly after TUPSS began requiring franchisees to use its new business system software, X-Store. Before Moxie entered into the Franchise Agreement, the purported capabilities of X-Store had been used by TUPSS as a selling point.

51. Moxie soon learned, however, that X-Store was plagued with technical issues. For example, data from X-Store would not properly export to Quickbooks, resulting in Moxie expending significant time and effort checking and correcting the Quickbooks data to ensure that accurate financial reports could be produced, and the financial state of Moxie's business could be assessed.

52. Additionally, it was exceedingly difficult to add information on new services and products into X-Store, and update the pricing of services and products. This was a significant issue for franchisees like Moxie that were establishing new stores and needed to enter the pricing

for all products and services. Indeed, it was such an issue that David Beach, TUPSS' Franchise Consultant, spent many hours at Moxie's store to get X-Store to the point where it was even remotely usable to Moxie.

53. Because of the significant issues with X-Store, including those listed above, Moxie was also regularly required to seek technical assistance from TUPSS. However, TUPSS was rarely able to provide the substantive assistance needed. Indeed, X-Store failed so miserably that, in or around January 2015, TUPSS rolled X-Store back, and replaced it with TUPSS' previous software, POS 7.

54. Even then, Moxie's software problems were not resolved. The transition to POS 7 did not go smoothly, and required TUPSS' consultant to visit Moxie's store to facilitate the transition before Moxie had a functioning software system for its business, leaving Moxie without a properly functioning software system well into 2015.

55. The time and effort Moxie was required to expend on X-Store, and the eventual roll back and transition to POS 7, significantly reduced Moxie's opportunity to generate revenue and a positive cash flow.

56. In addition to the issues Moxie experienced with X-Store, TUPSS has more recently placed Moxie in a situation where Moxie struggles with generating revenue because of TUPSS' active participation in schemes to divert revenue from Moxie to UPS, TUPSS' parent company, and/or shift costs from UPS to Moxie.

57. Moxie is required to participate in UPS' Access Point drop off program. Under this program, rather than delivering packages directly to the receiving customer's business or residence, UPS delivers the package to Moxie's store and the customer picks up the package at Moxie's store. This substantially reduces UPS' delivery costs. Moxie, however, incurs

substantial costs with the program, such as package storage and employee handling costs, that are not adequately compensated for by the minimal payment Moxie receives.

58. By requiring Moxie to participate in UPS' Access Point drop off, TUPSS shifts a substantial portion UPS' package delivery costs to Moxie, allowing UPS to improve its cash flow, while saddling Moxie with additional expenses that erode Moxie's potential to achieve positive cash flow.

59. Moxie is also required to act as a customer drop point and accept packages from customers who have received a free or reduced cost UPS shipping label from a retailer, such as Amazon. In return for providing this service, Moxie receives \$1.10, which is less than it costs Moxie to provide this service.

60. Under this program, UPS negotiates shipping rates for returns to these online retailers that are significantly lower than the retail price Moxie charges for shipping. For example, return shipping, for which Moxie would typically charge \$20, usually costs the customer \$5 when the customer utilizes the retailer's website to arrange for shipping. This strongly incentivizes the customer to utilize the retailer's website rather than pay retail rates at Moxie's store.

61. Accordingly, rather than generating \$20 in revenue for servicing the customer, Moxie only receives \$1.10, and realizes a certain loss on the sale rather than even having the chance to make the sale at a profit. As UPS negotiates more and more of these contracts with online retailers, Moxie's revenue, and potential to generate positive cash flow, is further eroded.

62. Although it is aware of the situation, TUPSS has done nothing to prevent this diversion of revenue away from Moxie to UPS. Rather, on information and belief, TUPSS has assisted UPS in carrying out this scheme to divert revenue.

63. Additionally, Moxie is currently participating in the Bill My Account test program, which is to run until the end of September 2015. At the end of the test period, TUPSS is likely to require all TUPSS franchisees, including Moxie, to participate in the Bill My Account program.

64. Under the Bill My Account program, customers set up an account with UPS that functions like a charge account. When the customer then goes to a TUPSS store for products and services, the sale is charged to the customer's UPS account, and the franchisee provides the products and services. The customer, however, receives a discounted price, and, when Moxie is eventually reimbursed by UPS, Moxie receives significantly less revenue than if the customer had not used the Bill My Account program, and paid the retail rate.

65. To make matter worse, UPS has been conducting extensive advertising to encourage customers that would otherwise deal directly with Moxie to set up a UPS account with Bill My Account charge functionality. This results in Moxie automatically receiving less revenue from customers that would otherwise have patronized Moxie's store and paid retail prices, reducing Moxie's revenue and potential to generate a positive cash flow.

66. Plaintiffs entered into the Franchise Agreement and Personal Guarantees in reliance on the representations of TUPSS detailed above. Because of the misrepresentations of TUPSS, the failure by TUPSS to fulfill its obligations, and TUPSS' actions to assist UPS in diverting revenue away from Moxie and shifting costs from UPS to Moxie, Moxie has expended time and money in establishing a TUPSS store that Moxie has been unable to operate in a financially successful manner. Indeed, although in operation for a significant period of time, Moxie has never been able to reach the break-even point, and the prospect of Moxie reaching break-even, let alone making a profit, is dim. Because of this, it is merely a matter of time before Moxie will

no longer be able to sustain the continuing operational losses, and will be forced to close its doors.

COUNT I
VIOLATION OF THE MINNESOTA FRANCHISE ACT

67. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

68. The Minnesota Franchise Act ("MFA"), Minn. Stat. §§ 80C.01, *et seq.*, governs the sale of the franchise and the relationship between Moxie and TUPSS because Moxie's store is located in Minnesota and sale of the franchise to Moxie was made in Minnesota. Minn. Stat. § 80C.19. Furthermore, the MFA contains an anti-waiver provision, which precludes a franchisor from utilizing a choice of law clause to avoid compliance with the MFA. Minn. Stat. § 80C.21; *see also Randall v. Lady of America*, No. 04-CV-3394 (PJS/RLE), 2007 WL 2128180 (D. Minn. 2007).

69. TUPSS violated the Amended FTC Franchise Rule and, accordingly, the MFA by, including, but not limited to:

- Providing, before Moxie signed the Franchise Agreement, the TUPSS training manual containing statements that in the first year of operation a TUPSS store would generate \$220,000 in revenue and operating profit in the first year of \$12,606, which constitutes a financial performance representation outside of Item 19 of the TUPSS FDD, and is in blatant violation of the most fundamental franchise laws regarding financial performance representations;
- Making oral representations to Moxie regarding the financial performance that would be achieved, including representations (1) relating to the amount of revenue that Moxie would generate in the first year of operations; (2) relating to the cash flow that would be generated by Moxie in the first year of operation; (3) relating to the time to break-even; (4) relating to the cash flow that could be achieved by a stay at home mother like Ms. Vincent; and (5) that the use of \$220,000 for first year revenue when developing the Business Development Plan was proper, which constitute financial performance representations outside of Item 19 of the TUPSS FDD; and

- Lacking a reasonable basis for the written and oral financial performance representations TUPSS made.

70. Under the MFA:

No person may make or cause to be made any untrue statement of a material fact in any application, notice, report, or other document filed with the commissioner under sections 80C.01 to 80C.22, or omit to state in any such application, notice, report or other document any material fact which is required to be stated therein....

No person may offer or sell a franchise in this state by means of any written or oral communication which includes an untrue statement of a material fact or which omits to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading.

Minn. Stat. § 80C.13, subds. 1 & 2.

71. TUPSS made oral and written untrue statements of material fact, both inside and outside of the TUPSS FDD, as well as material omissions, including, but not limited to:

- Misrepresentations regarding the revenue that Moxie would to generate in the operation of the TUPSS franchise;
- Misrepresentations regarding the cash flow that would be generated by Moxie's TUPSS franchise;
- Misrepresentations regarding the suitability of Bloomington as a location for Moxie's store;
- Failing to provide complete information to Plaintiffs on the performance of the previously closed Bloomington TUPSS stores, and full information on why those stores were closed; and
- Misrepresentations regarding the properties and capabilities of X-Store.

72. Had TUPSS not made these misrepresentations and omissions of material fact, Moxie would not have entered into the Franchise Agreement, nor expended the significant amount of time and effort in establishing and operating its store.

73. As established above, TUPSS' conduct violates the MFA. The MFA provides that:

A person who violates any provision of this chapter [Minn. Stat. §§ 80C.01 to 80C.22] or any rule or order thereunder shall be liable to the franchisee or subfranchisor who may sue for damages caused thereby, for rescission, or other relief as the court may deem appropriate.

Minn. Stat. § 80C.17, subd. 1.

74. Furthermore, Minn. Stat. § 80C.17, subdivision 3, provides for the recovery of actual damages together with costs, disbursements and reasonable attorneys' fees.

75. As a result of TUPSS' violations of the MFA, Plaintiffs are entitled to: (1) rescind the Franchise Agreement and Personal Guarantees; and (2) receive restitution (also known as rescission damages) in order to put the Moxie back in the positions it occupied prior to entering into the Franchise Agreement. Pursuant to the MFA, Moxie is entitled to recover these damages, as well as its costs, disbursements and reasonable attorneys' fees.

76. As a direct and proximate result of TUPSS' violation of the MFA, Moxie has been damaged in an amount to be determined at trial that is reasonably believed to be in excess of \$75,000, exclusive of interest and costs.

COUNT II

FRAUD

77. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

78. The aforementioned misrepresentations also constitute fraud. TUPSS falsely represented material facts (*e.g.*, the revenue and cash flow that would be generated by Moxie's store, and that Moxie's store would be successful in Bloomington) and omitted material facts that were necessary in order to make the representations not misleading (*e.g.*, the financial performance

of the previously closed Bloomington TUPSS stores, and the reasons they closed), with the intent to induce Moxie to act upon the information in purchasing the franchise.

79. TUPSS made these misrepresentations and omissions of material fact with knowledge of their falsity, and the intent that Moxie rely on the misrepresentations and omissions of material fact when Moxie purchased its franchise.

80. TUPSS' conduct of inducing Moxie to make substantial investments of time and money in reliance upon TUPSS' unjustified representations to Moxie constitutes fraud.

81. Plaintiffs were damaged by their reliance on TUPSS' misrepresentations and omissions of material fact, and are entitled to rescission of the Franchise Agreement and Personal Guarantees, and restitution, to put Moxie in the position it occupied before entering into the Franchise Agreement.

82. As a direct and proximate result of TUPSS' fraudulent conduct, Moxie has been damaged in an amount to be determined at trial that is reasonably believed to be in excess of \$75,000, exclusive of interest and costs.

COUNT III
NEGLIGENT MISREPRESENTATION

83. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

84. TUPSS owed Moxie a duty to use reasonable care in making representations that it knew Moxie was relying upon. TUPSS owed this duty of care because it was supplying information to Moxie for use in a transaction in which TUPSS had a pecuniary interest and in the course of TUPSS' business.

85. TUPSS breached its duty of reasonable care by negligently supplying false and misleading information (or omitting facts), which were reasonably relied upon by Moxie — *e.g.*,

misrepresenting the revenue and cash flow that Moxie's Bloomington TUPSS store would generate, and that Moxie's store would be successful in Bloomington.

86. Due to TUPSS' unlawful conduct, Plaintiffs have been damaged and now seek rescission of the Franchise Agreement and Personal Guarantees, and restitution.

87. As a direct and proximate result of TUPSS' unlawful conduct, Moxie has been damaged in an amount to be determined at trial that is reasonably believed to be in excess of \$75,000, exclusive of interest and costs.

COUNT IV
BREACH OF CONTRACT AND
IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

88. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

89. In every contract there is an implied covenant of good faith and fair dealing under which neither party may do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Storeck & Storeck, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal. App. 4th 44, 55 (Cal. Ct. App. 2002).

90. Moxie substantially complied with the Franchise Agreement.

91. TUPSS has breached the Franchise Agreement and the implied covenant of good faith and fair dealing by its above described conduct, including, but not limited to: (1) failing to provide a functioning software system to Moxie, *see* Franchise Agreement §§ 7.1(b), (f), (g); (2) requiring Moxie to participate in UPS' Access Point drop off program, which transfers a substantial portion of UPS' package handling and delivery costs to Moxie without Moxie receiving adequate compensation, *see* Franchise Agreement §§ 7.1(a), (b), (h), Exhibit K, Addendum One § 3; (3) requiring Moxie to continue acting as a customer drop point while

TUPSS' parent negotiates more and more service contracts with online retailers, reducing Moxie's potential to generate revenue and a positive cash flow, *see* Franchise Agreement §§ 7.1(a), (b), (h), Exhibit K, Addendum One § 2; and (4) test marketing the Bill My Account program in Moxie's territory, with the likely requirement that Moxie participate in the Bill My Account program after the test period, when the Bill My Account program diverts revenue from Moxie to TUPSS' parent company, UPS, *see* Franchise Agreement §§ 7.1(a), (b), (h), 7.6.

92. Under California law, a party to a contract may rescind the contract if there is a material breach by the other party that frustrates the purpose of the undertaking. *Pennel v. Pond Union School Dist.*, 29 Cal. App. 3d 832, 838 (Cal. Ct. App. 1973); *Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse*, 132 P.2d 457, 469-70 (Cal. 1942).

93. TUPSS' above described breaches of the Franchise Agreement and implied covenant of good faith and fair dealing frustrate the purpose of the Franchise Agreement – *i.e.* that Moxie would be able to profitably operate its store and that Moxie would be assisted, not hindered, by TUPSS in achieving profitability.

94. As a result of TUPSS' breaches, Plaintiffs are entitle to rescission of the Franchise Agreement and Personal Guarantees, and restitution damages to put Plaintiffs in the position they occupied before entering into the Franchise Agreement.

95. Alternatively, Moxie has the right to damages cause by TUPSS' breaches of the Franchise Agreement and the implied covenant of good faith and fair dealing.

96. As a direct and proximate result of TUPSS' breaches, Plaintiffs have been damaged in an amount to be determined at trial that is reasonably believed to be in excess of \$75,000, exclusive of interest and costs.

JURY TRIAL DEMAND

97. Plaintiffs demand a jury trial on all claims so triable.

PRAYER

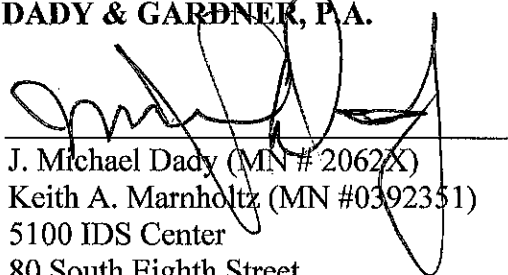
WHEREFORE, Plaintiffs respectfully requests the following relief in their favor and against Defendant:

1. Rescission of the Franchise Agreement and Personal Guarantees;
2. An award of Plaintiffs' restitution damages;
3. An award of Plaintiffs' full amount of actual damages;
4. An award of Plaintiffs' complete costs, disbursements, interest (pre- and post-judgment), and reasonable attorneys' fees incurred herein, to the extent authorized by applicable law; and
5. An award of such other and further relief as the Court may deem just and appropriate.

Dated: September 21, 2015

DADY & GARDNER, P.A.

By



J. Michael Dady (MN # 2062X)
Keith A. Marnholtz (MN #0392351)
5100 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 359-9000
jmdady@dadygardner.com
kmarnholtz@dadygardner.com

ATTORNEYS FOR PLAINTIFFS