

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

SWEET FROG STONY BROOK INC. and
SWEET FROG BABYLON INC.,

Plaintiffs,

- against -

SWEETFROG ENTERPRISES, LLC F/K/A
IMAGINATION ENTERPRISES, INC., SFF, LLC,
and KI YOUNG CHA A/K/A DEREK CHA,

Defendants.

Case No.: 2:14-cv-02356

COMPLAINT

Plaintiffs, by and through their undersigned counsel, allege as follows:

THE PARTIES

1. Plaintiff Sweet Frog Stony Brook Inc. is a corporation organized pursuant to the laws of the state of New York, with its principal place of business at 1015 Route 25 A, Stony Brook, New York 11790. Sweet Frog of Stony Brook, Inc. is a citizen of New York.

2. Plaintiff Sweet Frog Babylon Inc. is a corporation organized pursuant to the laws of the state of New York, with its principal place of business at 80 A Main Street, Babylon, New York 11702. Sweet Frog Babylon, Inc. is a citizen of New York.

3. Upon information and belief, defendant SweetFrog Enterprises, LLC f/k/a Imagination Enterprises, Inc. is a limited liability company organized pursuant to the laws of the state of Virginia, with its principal place of business at 10800 Midlothian Turnpike, Suite 300, Richmond, Virginia 23235. Upon information and belief, all of the members of SweetFrog Enterprises, LLC are citizens of Virginia.

4. Upon information and belief, defendant SFF, LLC is a limited liability company organized pursuant to the laws of the state of Virginia, with its principal place of business at 10800 Midlothian Turnpike, Suite 300, Richmond, Virginia 23235. Upon information and belief, all of the members of SFF, LLC are citizens of Virginia.

5. Upon information and belief, defendant Ki Young Cha a/k/a Derek Cha is an individual and at all times relevant to this action maintains his principal place of business at 10800 Midlothian Turnpike, Suite 300, Richmond, Virginia 23235. Upon information and belief, Cha is a citizen of Virginia.

JURISDICTION AND VENUE

6. This court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) based on the diversity of the parties. The amount in controversy exceeds \$75,000, exclusive of interest and costs.

7. Personal jurisdiction over the defendants is premised upon New York's long-arm statute with respect to acts of non-domiciliaries, as codified in New York Civil Procedure Law and Rules §§ 301 and 302.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

NATURE OF ACTION

9. Plaintiffs Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. seek damages, attorneys' fees and rescission of certain franchise agreements arising out of defendant SFF, LLC's sale of franchises in violation of New York General Business Law § 680, *et seq.*, commonly referred to as the Franchise Sales Act ("FSA"), particularly § 683 and § 687. Defendants SweetFrog Enterprises, LLC and Cha directed and took part in some or all of the transactions which are the subject of this action and, pursuant to New York General Business

Law § 691, are jointly and severally liable with and to the same extent as SFF, LLC for its violations of New York General Business Law § 683 and § 687.

FACTS COMMON TO ALL COUNTS

A. Defendants and Their Business

10. Upon information and belief, SweetFrog Enterprises, LLC was previously known as Imagination Enterprises, Inc.; Imagination Enterprises, Inc. changed its name to SweetFrog Enterprises, LLC in early 2012.

11. Upon information and belief, SweetFrog Enterprises, LLC is the parent company and predecessor to SFF, LLC.

12. Upon information and belief, SweetFrog Enterprises, LLC owns the SweetFrog trademarks and other intellectual property.

13. Upon information and belief, between April 2010 and May 2012, SweetFrog Enterprises, LLC was engaged in the business of operating SweetFrog trademarked stores. It was also engaged in the business of franchising the right to open and operate SweetFrog trademarked stores to sell SweetFrog products utilizing the SweetFrog trademarks.

14. Upon information and belief, neither SweetFrog Enterprises, LLC nor Imagination Enterprises, Inc. has ever registered with the New York State Department of Law, Office of the Attorney General to offer or sell franchises in New York.

15. Upon information and belief, on or about July 3, 2012, SFF, LLC was registered with the New York State Department of Law, Office of the Attorney General to offer or sell franchises in New York. Upon information and belief, since at least that date, SFF, LLC has been engaged in the business of franchising the right to open and operate SweetFrog trademarked stores to sell SweetFrog products utilizing the SweetFrog trademarks.

16. The SweetFrog trademarked stores feature, *inter alia*, soft-serve yogurt and other products and services and a self-service format where customers create individualized yogurt-based desserts. These stores do business under the trademark SweetFrog.

17. Upon information and belief, SweetFrog Enterprises, LLC and SFF, LLC have many of the same officers, directors, and administrative personnel.

18. Upon information and belief, Cha is the Vice President and a director of SweetFrog Enterprises, LLC and the Chief Executive Officer of SFF, LLC and directed and took part in some or all of the transactions which are the subject of this action.

B. The Financial Representations

19. Upon information and belief, Cha had a substantial amount of knowledge about the SweetFrog trademarked stores and a purported expertise in the industry. Cha had years of experience opening and operating SweetFrog trademarked stores, and access to a well of financial data from SweetFrog Enterprises, LLC's franchisees and corporate stores. By contrast, the plaintiffs had none of this industry experience or access. Cha cultivated an image of expertise, selling himself as an owner and operator of the SweetFrog trademarked stores to plaintiffs, and provided plaintiffs with written and oral representations about the SweetFrog trademarked stores, as detailed below.

20. In or about the spring/summer of 2011, Patrick Biase (who is a principal of the plaintiffs herein), James Maloney (who is a principal of the plaintiffs herein) and Don Grivetti (who is a principal of the plaintiffs herein) were prospective investors in a SweetFrog franchise in Virginia, and ultimately acquired several SweetFrog franchises in Virginia, which are not the subject of this action.

21. In or about the spring/summer of 2011, Cha, on behalf of SweetFrog Enterprises, LLC (then known as Imagination Enterprises, Inc.), provided Maloney with detailed written financial information concerning the SweetFrog trademarked stores. Upon information and belief, SweetFrog Enterprises, LLC was fully aware and endorsed the fact that Maloney would share this information with investors, including Biase. The written information contained the following:

- The initial investment costs of opening up a SweetFrog trademarked store were \$195,800;
- A SweetFrog trademarked store operated by SweetFrog Enterprises, LLC in Lynchburg, Virginia projected annual sales in 2010-2011 of \$940,000; operating profits of \$403,791; and food costs equal to 24% of projected sales. The actual sales and operating profits of this store surpassed its projections; and
- The SweetFrog trademarked stores in Carytown and in Short Pump (both located in the Richmond, Virginia area) had actual monthly sales that surpassed the monthly projections of the SweetFrog trademarked store in Lynchburg, Virginia.

22. In or about the spring/summer of 2011, Cha, on behalf of SweetFrog Enterprises, LLC, made oral representations to Grivetti concerning financial information of the SweetFrog trademarked stores. Upon information and belief, SweetFrog Enterprises, LLC was fully aware and endorsed the fact that Grivetti would share this information with investors, including Biase. Among other things, Cha told Grivetti that the SweetFrog trademarked store operated by

SweetFrog Enterprises, LLC in Lynchburg, Virginia had sales of \$123,000 in February 2011; \$142,000 in March 2011, \$146,000 in April 2011; and \$125,000 for a portion of May 2011.

23. In or about the spring/summer of 2011, Cha, on behalf of SweetFrog Enterprises, LLC, made oral representations to Biase concerning financial information of the SweetFrog trademarked stores. Upon information and belief, SweetFrog Enterprises, LLC was fully aware and endorsed the fact that Biase would share this information with investors. Among other things, Cha told Biase that the SweetFrog trademarked store in Carytown (in the Richmond, Virginia area) had sales of over a \$1,000,000 per year, and that the SweetFrog trademarked store in Chester, Virginia had sales of over \$170,000 per month.

24. Biase discussed with Cha the possibility of opening up SweetFrog trademarked stores in the New York metro area. Cha was excited about the possibility of expanding and opening SweetFrog trademarked stores in New York – indicating that Cha (and SweetFrog Enterprises, LLC) was committed to ensuring plaintiffs' success. Cha generally informed Biase that the New York metro area was more densely populated than Virginia and that a SweetFrog trademarked store would have substantially higher sales there as a result. He further indicated that he would be knowledgeable and in a position to advise on specific geographic areas in the New York metro area, and would also be in a position to provide plaintiffs with information about how SweetFrog trademarked stores would perform in the New York metro area. Accordingly, plaintiffs believed Cha's projections, representations, and statements concerning financial information regarding the SweetFrog trademarked stores, believed that the representations were truthfully made, and believed that the representations were based on reliable data, for the purpose of benefitting both parties. As a result, Biase began looking for locations in the New York metro area.

25. In or about February 2012, Cha visited New York to review prospective SweetFrog trademarked store locations in the New York metro area with Biase, including a prospective store in Stony Brook, New York (where the Stony Brook Store, defined below, was ultimately located). When they visited the Stony Brook location, Cha approved the location of the Stony Brook Store and reiterated that it was a “million dollar location.” Cha was so enthusiastic about the Stony Brook location that he told Biase that if he did not sign a lease for the Stony Brook location, then he would sign a lease himself on behalf of SweetFrog Enterprises, LLC. Cha told Biase that he would make his investment back in his first year of operation.

26. In or about February 2012, during Cha’s visit to New York, Cha also told Biase that the SweetFrog trademarked store in Carytown (located in the Richmond, Virginia area) had weekend sales that exceeded \$5,000 per day. Further, Cha told Biase that the SweetFrog trademarked store in Chester, Virginia had sales per month in excess of \$100,000. Cha also told Biase that a SweetFrog trademarked store in the New York metro area would do even better than these stores due to the significantly higher population density in the New York metro area.

27. Among further prospective locations for SweetFrog trademarked stores in the New York metro area, Biase later identified a location for a SweetFrog trademarked store in Babylon, New York (where the Babylon Store, defined below, was ultimately located). Biase sent Cha information about demographics for Babylon, New York. Upon review of that demographic information for the Babylon area, and in particular, the prospective Babylon location, Cha approved the location of the Babylon Store. Based on the fact that Cha had, on previous occasions, told Biase that, if he chose the right store location, his SweetFrog trademarked store would have a million dollars in sales, and based on Cha’s approval of the

location of the Babylon Store, Biase believed that the Babylon Store would have a million dollars in sales.

28. The forgoing written and oral representations contained in paragraphs 21 – 27 will hereinafter be described as the “Earnings Claims.”

29. A Franchise Disclosure Document (“FDD”) was not provided to any of the plaintiffs by any of the defendants prior to any of the plaintiffs entering into their respective agreements, discussed below.

C. The Stony Brook Franchise Agreement

30. The Stony Brook Store (defined below) opened for business on or about June 29, 2012.

31. On or about January 15, 2013, Sweet Frog Stony Brook Inc. and SFF, LLC entered into a franchise agreement (the “Stony Brook Franchise Agreement”) pursuant to which Sweet Frog Stony Brook Inc. was granted the right to open and operate a SweetFrog trademarked store to sell SweetFrog products utilizing the SweetFrog trademarks at 1015 Route 25 A, Stony Brook, New York 11790 (the “Stony Brook Store”).

32. Pursuant to the Stony Brook Franchise Agreement, Sweet Frog Stony Brook Inc. agreed and was required to pay to SweetFrog Enterprises, LLC an initial franchise fee and royalties equal to a percentage of gross sales of the SweetFrog products sold at the Stony Brook Store on a monthly basis.

33. Sweet Frog Stony Brook Inc. paid an initial franchise fee in the sum of \$30,000 for the Stony Brook Store.

34. For the period of June 29, 2012 to December 31, 2012, the Stony Brook Store had approximately \$232,053 in gross sales. For the period of January 1, 2013 to December 31, 2013,

the Stony Brook Store had approximately \$325,330 in gross sales. The Stony Brook Store did not perform as Cha had represented.

35. To date, the Stony Brook Store had not made any net income whatsoever.

36. Sweet Frog Stony Brook Inc. expended and lost over \$310,000 in start up costs, including but not limited to initial fees and investment expenses, and operating losses in connection with its investment in the Stony Brook Store.

D. The Babylon Franchise Agreement

37. On or about April 17, 2013, Sweet Frog Babylon Inc. and SFF, LLC entered into a franchise agreement (the “Babylon Franchise Agreement”) pursuant to which Sweet Frog Babylon Inc. was granted the right to open and operate a SweetFrog trademarked store to sell SweetFrog products utilizing the SweetFrog trademarks at 80 A Main Street, Babylon, New York 11702 (the “Babylon Store”).

38. Pursuant to the Babylon Franchise Agreement, Sweet Frog Babylon Inc. agreed and was required to pay to SweetFrog Enterprises, LLC an initial franchise fee of \$30,000 and royalties equal to a percentage of net sales of the SweetFrog products sold at the Babylon Store on a monthly basis.

39. Sweet Frog Babylon Inc. paid an initial franchise fee in the sum of \$30,000 for the Babylon Store.

40. The Babylon Store opened for business in or about June 2013.

41. For the period of June 2013 to December 31, 2013, the Babylon Store had approximately \$172,165 in gross sales. The Babylon Store did not perform as Cha had represented.

42. To date, the Babylon Store had not made any net income whatsoever.

43. Sweet Frog Babylon expended and lost over \$375,000 in start up costs, including but not limited to initial fees and investment expenses, and operating losses in connection with its investment in the Babylon Store.

AS AND FOR A FIRST CAUSE OF ACTION
Violation of New York General Business Law § 687 - Fraudulent Earnings Claims
(By All Plaintiffs Against All Defendants)

44. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 43 of this complaint with the same force and effect as if fully set forth herein.

45. Prior to execution of the Stony Brook Franchise Agreement and the Babylon Franchise Agreement, SFF, LLC, by itself and/or by SweetFrog Enterprises, LLC, provided the Earnings Claims referred to above to Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc.

46. Upon information and belief, the Earnings Claims were false and misleading.

47. In reasonable reliance on the aforementioned Earnings Claims, Sweet Frog Stony Brook entered into the Stony Brook Franchise Agreement and Sweet Frog Babylon Inc. entered into the Babylon Franchise Agreement, and each invested and lost substantial sums of money in the establishment and operation of their respective Sweet Frog trademarked stores.

48. The foregoing Earnings Claims were material to Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc.'s investment decisions and were made willfully in that, *inter alia*, a) they were made to induce Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. to enter into their respective franchise agreements; and b) SFF, LLC, by itself and/or by SweetFrog Enterprises, LLC, utterly disregarded the clear and unambiguous law and regulations of the FSA and knew or should have known of the regulations of the FSA.

49. Cha directly or indirectly controlled SFF, LLC and SweetFrog Enterprises, LLC and materially aided in the violation of the FSA.

50. By reason of the foregoing, Sweet Frog Stony Brook Inc. is entitled to rescission of the Stony Brook Franchise Agreement and any/all related agreements, and Sweet Frog Babylon Inc. is entitled to rescission of the Babylon Franchise Agreement and any/all related agreements, and Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. have been damaged in a sum to be determined by the court, but believed to be in excess of \$685,000, together with interest.

AS AND FOR A SECOND CAUSE OF ACTION

**Violation of New York General Business Law § 683 and § 687 – Disclosure Violations
(By All Plaintiffs Against All Defendants)**

51. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 50 of this complaint with the same force and effect as if fully set forth herein.

52. The Stony Brook Franchise Agreement and the Babylon Franchise Agreement each constituted the sale of a franchise as defined under New York law.

53. Prior to SFF, LLC offering the SweetFrog franchise for sale to Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc., and prior to Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. entering into the Stony Brook Franchise Agreement and/or the Babylon Franchise Agreement for the sale of a franchise, SFF, LLC was required to register to offer and sell franchises with the New York State Department of Law, Office of the Attorney General, and was required to provide both Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. with a FDD.

54. In utter disregard of the clear and unambiguous law and regulations of the FSA, SFF, LLC willfully offered and sold a franchise to Sweet Frog Stony Brook Inc. even though it was not registered with the New York State Department of Law, Office of the Attorney General to sell franchises at the time of the offer or sale of the franchise.

55. SFF, LLC willfully offered and sold franchises to Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. before providing them each with a FDD that was required to contain information concerning the franchise opportunity being sold. This activity violates New York General Business Law §§ 683 and 687.

56. Cha directly or indirectly controlled SFF, LLC and SweetFrog Enterprises, LLC and materially aided in the violation of the FSA.

57. By reason of the foregoing, Sweet Frog Stony Brook Inc. is entitled to rescission of the Stony Brook Franchise Agreement and any/all related agreements, and Sweet Frog Babylon Inc. is entitled to rescission of the Babylon Franchise Agreement and any/all related agreements, and Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. have been damaged in a sum to be determined by the court, but believed to be in excess of \$685,000, together with interest.

AS AND FOR A THIRD CAUSE OF ACTION

**Violation of New York General Business Law § 683 – Earnings Claims
(By All Plaintiffs Against All Defendants)**

58. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 57 of this complaint with the same force and effect as if fully set forth herein.

59. Pursuant to New York General Business Law § 683, franchisors must make all claims concerning historical or potential earnings, revenues and profitability in writing to prospective franchisees in a FDD provided to the prospective franchisee prior to the sale of the franchise, together with a statement setting forth the data, methods and computations on which the claims concerning historical or potential earnings, revenues and profitability were based.

60. Prior to execution of the Stony Brook Franchise Agreement and Babylon Franchise Agreement, SFF, LLC, by itself and/or by SweetFrog Enterprises, LLC, provided the Earnings Claims to Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc.

61. The aforementioned Earnings Claims were not included in a FDD, and SFF, LLC, by itself and/or by SweetFrog Enterprises, LLC, failed to provide Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. with a statement setting forth the data, methods and computations on which the Earnings Claims were based.

62. The failure to provide Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. with the aforementioned Earnings Claims in writing in a FDD, and to provide Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. with a statement setting forth the data, methods and computations on which the Earnings Claims were based, was willful and material in that, *inter alia*, SFF, LLC, by itself and/or by SweetFrog Enterprises, LLC, utterly disregarded the clear and unambiguous law and regulations of the FSA and knew or should have known of the regulations of the FSA.

63. Cha directly or indirectly controlled SFF, LLC and SweetFrog Enterprises, LLC and materially aided in the violation of the FSA.

64. By reason of the foregoing, Sweet Frog Stony Brook Inc. is entitled to rescission of the Stony Brook Franchise Agreement and any/all related agreements, and Sweet Frog Babylon Inc. is entitled to rescission of the Babylon Franchise Agreement and any/all related agreements, and Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. have been damaged in a sum to be determined by the court, but believed to be in excess of \$685,000, together with interest.

AS AND FOR A FOURTH CAUSE OF ACTION
Attorneys' Fees For Violation of New York General Business Law
(By All Plaintiffs Against All Defendants)

65. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 64 of this complaint with the same force and effect as if fully set forth herein.

66. Pursuant to New York General Business Law § 691, SFF, LLC, SweetFrog Enterprises, LLC and Cha are jointly and severally liable for reasonable attorneys' fees and court costs stemming from their violations of New York General Business Law § 683 and § 687.

67. As a result of SFF, LLC, SweetFrog Enterprises, LLC and Cha's acts, Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. have retained the services of counsel to represent them in this matter and will incur attorneys' fees and costs. These attorneys' fees and costs are reasonable and necessary in order to prosecute this matter.

68. Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. are entitled to award of attorneys' fees and costs in an amount to be proven at trial.

WHEREFORE, plaintiffs demand judgment as follows:

1. On the first cause of action, awarding Sweet Frog Stony Brook Inc. rescission of the Stony Brook Franchise Agreement and any/all related agreements, awarding Sweet Frog Babylon Inc. rescission of the Babylon Franchise Agreement and any/all related agreements, along with damages in a sum to be determined by the court, but believed to be in excess of \$685,000, together with interest, for which SFF, LLC, SweetFrog Enterprises, LLC and Cha are jointly and severally liable;

2. On the second cause of action, awarding Sweet Frog Stony Brook Inc. rescission of the Stony Brook Franchise Agreement and any/all related agreements, awarding Sweet Frog Babylon Inc. rescission of the Babylon Franchise Agreement and any/all related agreements,

along with damages in a sum to be determined by the court, but believed to be in excess of \$685,000, together with interest, for which SFF, LLC, SweetFrog Enterprises, LLC and Cha are jointly and severally liable;

3. On the third cause of action, awarding Sweet Frog Stony Brook Inc. rescission of the Stony Brook Franchise Agreement and any/all related agreements, awarding Sweet Frog Babylon Inc. rescission of the Babylon Franchise Agreement and any/all related agreements, along with damages in a sum to be determined by the court, but believed to be in excess of \$685,000, together with interest, for which SFF, LLC, SweetFrog Enterprises, LLC and Cha are jointly and severally liable;

4. On the fourth cause of action, awarding Sweet Frog Stony Brook Inc. and Sweet Frog Babylon Inc. attorneys' fees in a sum to be determined by the court, and the costs and disbursements of this action, for which SFF, LLC, SweetFrog Enterprises, LLC and Cha are jointly and severally liable; and

5. Such other and further relief as to this court may seem just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Dated: New York, New York
April 11, 2014

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