

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

UNTITLED 3, LLC, dba Apex Energy Solutions of Pittsburgh, a Pennsylvania limited liability company,

Plaintiff,

V.

APEX ENERGY GROUP, LLC, an
Indiana limited liability company,

Defendant,

Civil Action No. _____

JURY TRIAL DEMANDED

**PLAINTIFF'S ORIGINAL
COMPLAINT**

Untitled 3, LLC (“Plaintiff” or “Franchisee”), by its undersigned counsel, Commerce Law Group, LLC, and Thomas J. Michael, Sr., Esquire, files this Complaint against Apex Energy Group, LLC (“Defendant” or “Franchisor”), states and alleges as follows:

INTRODUCTION

1. The Pennsylvania Unfair Trade Practices and Consumer Protection Law and Indiana Deceptive Consumer Sales Act bar unfair or deceptive acts or practices involving sales transactions.

2. In 2013, Defendant sold to Plaintiff a franchised window sales business in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and/or the Indiana Deceptive Consumer Sales Act.

3. Among the unfair and/or deceptive trade practices committed by Defendant in connection with the sale of the business were Defendant's conduct in: (a) representing that the

business had characteristics and benefits that the business did not, in fact, have; (b) representing that the business had particular qualities that it did not, in fact, have; (c) representing that the business relationship conferred upon Defendant rights which are, in fact, prohibited by applicable law; (d) selling the franchise in the absence of having the lawful right to sell such business; and (e) engaging in other fraudulent and/or deceptive conduct which creates a likelihood of confusion or of misunderstanding and are therefore deceptive to Plaintiff.

4. In so doing, Defendant violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the Indiana Deceptive Consumer Sales Act.

5. Notably, Defendant sold to Plaintiff a franchised business without having, first, supplied to Plaintiff proper pre-sale franchise disclosures as required by the Federal Trade Commission's ("FTC") Amended Franchise Disclosure Rule, 16 C.F.R. § 436.1, *et seq.*, and applicable common law.

6. While Defendant nominally markets its business opportunity as a "license" and represented to Plaintiff before and throughout the relationship that the relationship was that of licensor and licensee, the businesses sold by Defendant, in fact, qualify as a "franchise" as that term is defined by the FTC's Amended Franchise Disclosure Rule.

7. Upon information and belief, Defendant routinely makes sales of businesses that it refers to as "licenses" without first providing prospective licensees/franchisees with the prospectus-like Franchise Disclosure Documents, which Defendant is obligated to provide by applicable law.

8. In this case, Defendant fraudulently induced Plaintiff to make a purchase of the franchised business in question by, among other things, presenting Plaintiff with a baseless *pro forma* specifically designed to oversell Plaintiff on the merits of making a business

purchase from Defendant. See **Exhibit A**, attached hereto.

9. In order to elicit Plaintiff's agreement to make a business purchase, Defendant made unsupported financial performance representations about both: (a) the performance of existing businesses already established by licensees elsewhere in the country; and (b) the likely financial benefits to be enjoyed by Plaintiff upon the purchase of a business from Defendant.

10. Had Defendant timely provided Plaintiff with a truthful and properly-formatted Franchise Disclosure Document ("FDD"), Plaintiff would have been able to discern that the Defendant's financial performance representations were unwarranted and, otherwise, misleading.

11. This is so because Item 19 of the FDD obligates a franchisor to present any such *pro forma* representations (known as "financial performance representations" under the federally-mandated disclosure format) in a detailed format that, among other things, identifies the percentage of existing system units which have actually achieved the financial results set forth in the franchisor's *pro forma*. See 16 C.F.R. § 436.5(s).

12. Because Defendant failed to provide Plaintiff with the prospectus-like FDD disclosures, Plaintiff relied on the financial performance representations made by Defendant and moved forward with a business purchase in 2013.

13. Plaintiff executed the "License Agreement," attached hereto as **Exhibit B**, in February of 2013, in material and reasonable reliance on the content of the **Exhibit A**, *pro forma*.

14. The franchised business purchased by Plaintiff from Defendant has not performed anywhere near as well as projected by Defendant, and Plaintiff has reasonable grounds on which to question whether the *pro forma* presented to Plaintiff by Defendant was based on the actual results of any meaningful percentage of existing "Apex" franchised

businesses.

15. Plaintiff is entitled to rescission of the License Agreement executed in 2013 and to recover from Defendant money damages, including exemplary damages, as well as costs, disbursements and attorneys' fees.

16. Plaintiff is entitled to relief not only under the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the Indiana Deceptive Consumer Sales Act, but also Plaintiff's common law counts for constructive fraud, fraudulent concealment and breach of contract.

17. Plaintiff is also entitled to a declaratory judgment that Defendant has breached its warranties, representations, and commitments under the License Agreement in a fashion that justifies rescission of the License Agreement and reimbursement of Plaintiff's restitution damages.

PARTIES

18. Plaintiff is a limited liability company, organized under the laws of the State of Pennsylvania, which operates a window sales business at 27 Woodruff Drive, Carnegie, Pennsylvania, 15106.

19. Defendant is a limited liability company, organized under the laws of the State of Indiana.

20. Defendant operates and/or franchises a window sales business based in Indiana at 11644 North Michigan Road, Zionsville, Indiana 46077.

JURISDICTION AND VENUE

21. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(a) because the dispute is between citizens of different states, and the amount in controversy exceeds \$75,000,

exclusive of interests and costs.

22. Venue is proper pursuant to 28 U.S.C. § 1391 because a substantial part of the events and omissions giving rise to this action occurred in this district.

FACTUAL BACKGROUND

23. Andrew Chittock, a member manager of Plaintiff's business, was initially contacted by Defendant's national developer, Matt Duncan, on or about November 13, 2012 regarding Chittock's interest in purchasing a window sales business.

24. Duncan was attempting to generate interest on behalf of Defendant in the window sales opportunity that was nominally being marketed by Defendant as a mere licensing arrangement.

25. On or about November 14, 2012, Duncan, on behalf of Defendant, circulated the **Exhibit A** pro forma to Chittock and Plaintiff's other member manager, Bruce Stinson.

26. After numerous telephone calls discussing the Pittsburgh market, Chittock and Stinson traveled to Indianapolis, Indiana on or about December 2, 2012 to meet with Defendant's president and founder Michael Foit, chief financial officer Paul Lewis, and national developer Duncan.

27. Plaintiff's member managers believed what was represented by Defendant's agents in the telephone calls and meetings during November and December of 2012 and the *pro forma*.

28. At no time was Plaintiff (or any of Plaintiff's members) presented with an FDD by Defendant or any of its agents.

29. On February 6, 2013, Plaintiff and Defendant entered into a franchisee/franchisor relationship (titled the License Agreement); whereas, the Franchisee was given the right to

implement the Apex System in an exclusive territory “within 75 miles from the center of Pittsburgh.” See **Exhibit B** at Paragraphs 1.2 and 1.3.

30. The License Agreement reflects, at page 1, that Defendant has “developed a system for door-to-door marketing of windows and other home improvement products (the ‘Apex System’).”

31. Paragraph 1.1 of the License Agreement defines the Apex System:

The Apex System consists of a marketing plan to sell home improvement products through the use of specific marketing and canvassing strategies and specific in-home materials including the Apex Media Presentation III© which demonstrates the benefits associated with purchasing various products. The Apex System includes information regarding marketing, promotions, pricing, installation and services, and also includes use of the Flipside™ marketing strategy. The term “Apex System” does not include electronic software applications for iPad or iPhone, which may be sold separately. Use of the Apex System in the Territory shall be referred to herein as the “Business.”

32. Paragraph 1.5 of the License Agreement defines responsibilities and that “[i]t shall be the responsibility of the [Plaintiff] to: (1) Implement the Apex System; . . . and (iv) Follow all directions given by [Defendant] pursuant to Section 1.2.”

33. Paragraph 2.1 of the License Agreement provides that Plaintiff shall pay Defendant \$70,000 with a “market reservation payment of \$5,000.”

34. Paragraph 2.2 of the License Agreement provides that Plaintiff shall pay Defendant seven percent (7%) of Plaintiff’s gross sales.

35. As set forth in the License Agreement, Plaintiff was required to obtain prior approval from Defendant’s agents of the use of the “Apex” term or logo on materials to be used outside of Plaintiff’s office. See **Exhibit B** at Paragraph 3.2(C).

36. As more fully explained below, the License Agreement executed by Plaintiff and

Defendant was, in fact, a franchise agreement (even though not titled as such and presented to Plaintiff as a mere license agreement).

37. On December 15, 2014, Defendant's CFO, Lewis, sent a "courtesy letter" to Plaintiff noting a sales deficit of \$942,370.50 that constitutes a debt of \$65,965.94 owed to Defendant. See Exhibit C.

38. On December 26, 2014, Plaintiff, by its counsel, Thomas J. Michael, Jr., sent a termination letter noting certain "contractual and regulatory issues" with the License Agreement. See Exhibit D. The Termination Letter states the Plaintiff will not pay the \$65,965.94 referenced in the "courtesy letter" from Lewis.

THE "LICENSE AGREEMENT" IS, IN FACT, A FRANCHISE AGREEMENT

39. Whether a business relationship is properly defined as being a mere "licensing" relationship or, instead, a "franchise" relationship is the subject of the FTC's Amended Franchise Rule, 16 C.F.R. § 436.1, *et seq.*

40. As reflected in 16 C.F.R. § 436.1(h), a "franchise" is defined as "***any continuing commercial relationship or arrangement whatever it may be called***, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that: (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark; (2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and (3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate." See *id.* (emphasis added).

41. The License Agreement, **Exhibit B**, executed by Plaintiff in 2013 reflects that Defendant's window sales business format qualifies as a "franchise" within the meaning of the FTC's Amended Franchise Rule.

42. By the terms of the License Agreement, Plaintiff has the right and obligation to sell windows associated with Defendant's trademark under the "Apex System" proscribed in the agreement. This system included marketing, promotions, and pricing. Further, use of the Apex name and logo were subject to prior approval, as noted above, thereby satisfying the definitional requirement in 16 C.F.R. § 436.1(h)(1). See **Exhibit B** at Paragraphs 1.1 and 3.2(C).

43. By the terms of the License Agreement, Defendant has authority to control Plaintiff's methods of operation. See **Exhibit B** at Paragraphs 1.5(B) and 3.2.

44. Finally, Paragraph 2.1 of the License Agreement obligated Plaintiff to make a payment to Defendant of \$75,000 as a condition of obtaining and commencing operation of this business. See **Exhibit B** at Paragraph 2.1.

45. Accordingly, the window sales business sold by Defendant to Plaintiff is a "franchise" within the meaning of the FTC's Amended Franchise Rule.

THE BACKDROP FOR THE FEDERAL TRADE COMMISSION'S FRANCHISE DISCLOSURE REQUIREMENTS

46. In the United States, the sale of a "franchise" is regulated in much the same fashion as the sale of a secured investment. Franchisors are prohibited from making unfounded projections of financial performance to prospective franchisees by highly-detailed disclosure requirements (intended to provide prospective franchisees with all of the material information needed to make an informed purchase decision).

47. By way of background, in the 1950s and 1960s, modern franchising took off as a method of doing business, but sales of franchises were unregulated and subject to

widespread abuse. *See* Bus. Franchise Guide (CCH) ¶ 6302.

48. Thousands of people lost their substantial franchise investments as a result of having been "misled as to the true risks involved in the franchise investment by the franchisor's failure to disclose material facts" concerning franchise offerings. *See id.* at ¶¶ 6305, 6309.

49. 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.

50. Throughout the 1970s, the FTC also undertook to study misleading practices by franchisors in connection with franchisors' sales of franchised businesses. *See* Bus. Franchise Guide (CCH) ¶ 6301.

51. As reflected in the FTC's Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, Bus. Franchise Guide (CCH) ¶ 6300, *et seq.*, the FTC made the following material findings:

- "[M]isrepresentations and failure to disclose material facts are widespread in franchising." Bus. Franchise Guide (CCH) ¶ 6305.
- "On the basis of the record in this proceeding, the Commission concludes that franchises have been marketed through (A) misrepresentation of material facts relevant to the nature and value of the franchise; (B) unsubstantiated claims regarding the potential sales, income, gross or net profit of franchises; (C) unfair refusal by franchisors to honor refund provisions; and (D) failure to disclose material facts about the franchise offering." *Id.*
- Many franchisors have made a practice of making "get rich quick" claims in advertisements and other promotional materials, and "such 'get rich quick' claims frequently either are unsubstantiated by the franchisor, or they misrepresent material facts with regard to the 'potential earnings' of a particular franchise business." *Id.* at ¶ 6304.

- "[T]he record also discloses that many franchisors have highlighted the atypical success of a few franchisees without disclosing the non-representative nature of these claims. Such representations are an unfair and deceptive trade practice." *Id.* at ¶ 6307.
- That said, "For most prospective franchisees there is quite simply no source other than the franchisor for much of the information necessary to make an informed investment decision." *Id.* at ¶ 6304.
- "The record establishes that prospective franchisees are at an informational disadvantage with respect to the franchisor in evaluating the franchise offering because of the setting in which franchises are sold. Because of this informational imbalance prospective franchisees do not have information about material aspects of the franchise and frequently are not even aware that they lack such information. Without such information, however, prospective franchisees cannot evaluate the value of the franchise offering. The record establishes that franchisors take advantage of the informational imbalance to sell franchises without disclosure of material facts." *Id.* at ¶ 6309.
- "Without such information, prospective franchisees lack material information concerning the prices, the risks, the potential profitability, and even the nature and contents of the franchise offering." *Id.*
- "[T]he item being offered - the franchise opportunity - is complex, and the information necessary to test the accuracy of representations lies almost solely within the possession of the franchisor. Indeed, even if available, the search costs in obtaining such information would be prohibitive. Accordingly, prospective franchisees, of necessity, have to rely on the accuracy of the representation of the franchisor as to the profitability of the franchise." *Id.* at ¶ 6307 (emphasis added).
- "The failure to disclose material facts concerning the franchise offering, where the prospective franchisee is at an informational disadvantage, violates public policy encouraging informed consumer purchasing decisions." *Id.* at ¶ 6309.
- "Disclosure requirements are effective means of curbing the 'half-truth' and the failure to disclose used in marketing franchises because they provide prospective franchisees with at least the minimal information needed to make an informed decision whether to enter the franchise relationship. By specifying the type of information which should be provided, the rule prevents franchisors from selectively disclosing only the information which is favorable to them." *Id.* at ¶ 6312.

- Going forward, "If franchisors choose to make representations concerning profits, income or sales to prospective franchisees or in the media," franchisors should be required to make "certain disclosures which are intended to give the prospective franchisee information which will enable him or her to evaluate the merits of the franchisor's claim."
Id.

52. As a result, by the late 1970s, the sale of franchises came to be regulated in much the same fashion as the sale of securities under SEC Rule 10b-5. In 1979, the FTC adopted a trade regulation rule governing the sale of franchises that is roughly modeled on the SEC Act. *See* 16 C.F.R. Part 436 (the "FTC Franchise Rule").

53. The FTC's Amended Franchise Rule requires a franchisor to provide a prospective franchisee with certain disclosures, contained in a written Franchise Disclosure Document ("FDD"), prior to the purchase of the franchise. *See* 16 C.F.R. § 436.1, *et seq.*

54. Among those FDD disclosures is that required under Item 19 of the FTC's Amended Franchise Rule. Item 19 of the FDD obligates a franchisor to present any "financial performance representation" in a detailed format that, among other things, identifies the percentage of existing system units which have actually achieved the financial results set forth in the franchisor's *pro forma*. *See* 16 C.F.R. § 436.5(s).

55. Defendant failed to honor this disclosure obligation, represented to Plaintiff that this was a mere licensing arrangement, as opposed to a franchise, and, otherwise, misled Plaintiff into purchasing a "license" to use Defendant's window sales business format from Defendant.

**DEFENDANT VIOLATED ITS PRE-SALE DISCLOSURE
OBLIGATIONS BY FAILING TO PROVIDE PLAINTIFF WITH AN
FDD PRIOR TO EXECUTION OF THE LICENSE AGREEMENT**

56. Defendant violated its pre-sale disclosure obligations by failing to timely provide

Plaintiff with an accurate and properly formatted FDD prior to Plaintiff's execution of the License Agreement.

57. Indeed, Defendant represented to Plaintiff the relationship was that of licensor and licensee and failed to provide Plaintiff *with any FDD at all*, let alone one which was accurate, properly formatted and, otherwise, non-misleading.

58. Defendant's omission is a violation of 16 C.F.R. § 436.1, which provides:

In connection with the offer or sale of a franchise to be located in the United States of America or its territories, unless the transaction is exempted under Subpart E of this part, it is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act - [f]or any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document, as described in Subparts C and D of this part, at least 14 calendar-days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate in connection with the proposed franchise sale.

59. The Indiana Deceptive Consumer Sales Act bars a seller from making a sale in the absence of having a lawful right to do so.

60. The Pennsylvania Unfair Trade Practices and Consumer Protection Law prohibits deceptive trade practices, including deceptive conduct which creates a likelihood of confusion or of misunderstanding. 73 P.S. § 201-1, *et seq.*

61. Because Defendant has violated the FTC's Amended Franchise Rule by failing to make proper, pre-sale disclosure to Plaintiff, Defendant has, likewise, violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the Indiana Deceptive Consumer Sales Act.

62. Upon information and belief, Defendant knew that it was obligated to comply with the Pennsylvania Unfair Trade Practices and Consumer Protection Law given that Defendant was selling a business to a Pennsylvania limited liability company which intended to operate in Pennsylvania.

63. Defendant clearly knew that Defendant was obligated to comply with the Indiana Deceptive Consumer Sales Act because the License Agreement crafted by Defendant calls for application of Indiana law.

**DEFENDANT FRAUDULENTLY INDUCED PLAINTIFF TO
EXECUTE THE “LICENSE” AGREEMENT BY UNLAWFULLY
MAKING FINANCIAL PERFORMANCE REPRESENTATIONS**

64. Furthermore, Defendant knew or should have known that the business sold to Plaintiff by Defendant was a franchise -- the prospective sale of which required Defendant to have satisfied certain pre-sale disclosure obligations.

65. Defendant’s aforementioned conduct, accordingly, satisfies the elements for Plaintiff’s claims against Defendant for constructive fraud and/or fraudulent concealment.

66. Defendant fraudulently induced Plaintiff to execute the License Agreement by presenting Plaintiff with a *pro forma* – the contents of which could be presented only according to the requirements of 16 C.F.R. § 436.5(s) (relating to a franchisor’s dissemination of “financial performance representations”).

67. As explained above, a franchisor’s use of financial performance representations is among the most tightly-controlled aspects of pre-sale franchise disclosure because the franchisor alone has accurate information regarding the percentage of existing system units which have actually achieved the financial performance reflected in the *pro forma* shared by Defendant with Plaintiff.

68. Among the topics of disclosure that a franchisor must make to a prospective franchisee is that required by Item 19 (*i.e.*, 16 C.F.R. § 436.5(s)).

69. 16 C.F.R. § 436.5(s) provides that the following disclosure requirements need to be met if a franchisor, like Defendant, elects to make any financial performance representation

like that included in the *pro forma* presented to Plaintiff.

70. Defendant was obligated to make the following disclosures relating to financial performance representations, in writing, prior to Plaintiff's execution of the License Agreement:

Item 19: Financial Performance, Representations:

- (1) Begin by stating the following:

The FTC's Franchise Rule permits a franchisor to provide information about the actual or potential financial performance of its franchised and/or franchisor-owned outlets, if there is a reasonable basis for the information, and if the information is included in the disclosure document. Financial performance information that differs from that included in Item 19 may be given only if (1) a franchisor provides the actual records of an existing outlet you are considering buying; or (2) a franchisor supplements the information provided in this Item 19, for example, by providing information about possible performance at a particular location or under particular circumstances.

- (2) If a franchisor does not provide any financial performance representation in Item 19, also state:

We do not make any representations about a franchisee's future financial performance or the past financial performance of company-owned or franchised outlets. We also do not authorize our employees or representatives to make any such representations either orally or in writing. If you are purchasing an existing outlet, however, we may provide you with the actual records of that outlet. If you receive any other financial performance information or projections of your future income, you should report it to the franchisor's management by contacting [name address, and telephone number], the Federal Trade Commission, and the appropriate state regulatory agencies.

- (3) 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. The franchisor must also disclose the following:

(i) Whether the representation is an historic financial performance representation about the franchise system's existing outlets, or a subset of those outlets, or is a forecast of the prospective franchisee's future financial performance.

(ii) If the representation relates to past performance of the franchise system's existing outlets, the material bases for the representation, including:

(A) Whether the representation relates to the performance of all of the

franchise system's existing outlets or only to a subset of outlets that share a particular set of characteristics (for example, geographic location, type of location (such as free standing vs. shopping center), degree of competition, length of time the outlets have operated, services or goods sold, services supplied by the franchisor, and whether the outlets are franchised or franchisor-owned or operated).

(B) The dates when the reported level of financial performance was achieved.

(C) The total number of outlets that existed in the relevant period and, if different, the number of outlets that had the described characteristics.

(D) The number of outlets with the described characteristics whose actual financial performance data were used in arriving at the representation.

(E) Of those outlets whose data were used in arriving at the representation, the number and percent that actually attained or surpassed the stated results.

(F) Characteristics of the included outlets, such as those characteristics noted in paragraph (3)(ii)(A) of this section, that may differ materially from those of the outlet that may be offered to a prospective franchisee.

(iii) If the representation is a forecast of future financial performance, state the material bases and assumptions on which the projection is based. The material assumptions underlying a forecast include significant factors upon which a franchisee's future results are expected to depend. These factors include, for example, economic or market conditions that are basic to a franchisee's operation, and encompass matters affecting, among other things, a franchisee's sales, the cost of goods or services sold, and operating expenses.

(iv) A clear and conspicuous admonition that a new franchisee's individual financial results may differ from the result stated in the financial performance representation.

(v) A statement that written substantiation for the financial performance representation will be made available to the prospective franchisee upon reasonable request.

- (4) If a franchisor wishes to disclose only the actual operating results for a specific outlet being offered for sale, it need not comply with this section, provided the information is given only to potential purchasers of that outlet.
- (5) If a franchisor furnishes financial performance information according to this section, the franchisor may deliver to a prospective franchisee a supplemental

financial performance representation about a particular location or variation, apart from the disclosure document. The supplemental representation must:

- (i) Be in writing.
- (ii) Explain the departure from the financial performance representation in the disclosure document
- (iii) Be prepared in accordance with the requirements of paragraph (s)(3)(i)-(iv) of this section.
- (iv) Be furnished to the prospective franchisee.

See id.

71. Defendant failed to comply with 16 C.F.R. § 436.5(s) by:
- a. Failing to provide Plaintiff with an FDD;
 - b. Failing to provide Plaintiff with the introductory statement required by 16 C.F.R. § 436.5(s)(1);
 - c. Presenting Plaintiff with a *pro forma* that was not included in the franchisor's FDD in violation of 16 C.F.R. §§ 436.5(s)(1) and (5);
 - d. Presenting Plaintiff with a *pro forma* which had no "reasonable basis" as required by 16 C.F.R. §§ 436.5(s)(1) and (3);
 - e. Failing to admonish Plaintiff, in writing and consistent with 16 C.F.R. § 436.5(s)(2), that any *pro forma* presented to Plaintiff by Defendant, or Defendant's agents, which differed from Defendant's Item 19 FDD disclosure, was not presented with the Defendant's authorization;
 - f. Making *pro forma* representations regarding existing system units without having "written substantiation" of the financial performance claims set forth in the *pro forma* as required by 16 C.F.R. § 436.5(s)(3);
 - g. Presenting Plaintiff with a *pro forma* without identifying whether the content

of the *pro forma* “is an historic financial performance representation about the franchise system's existing outlets, or a subset of those outlets, or is a forecast of the prospective franchisee's future financial performance” as required by 16 C.F.R. § 436.5(s)(3)(i);

- h. Presenting Plaintiff with a *pro forma* without identifying the “material bases” for its content as required by 16 C.F.R. §§ 436.5(s)(3)(ii) and (iii);
- i. Presenting Plaintiff with a *pro forma* without identifying whether its content “... relates to the performance of all of the franchise system's existing outlets or only to a subset of outlets that share a particular set of characteristics (for example, geographic location, type of location (such as free standing vs. shopping center), degree of competition, length of time the outlets have operated ... and whether the outlets are franchised or franchisor-owned or operated)” as required by 16 C.F.R. § 436.5(s)(3)(ii)(A);
- j. Presenting Plaintiff with a *pro forma* without identifying the “dates when the reported level of financial performance was achieved” as required by 16 C.F.R. § 436.5(s)(3)(ii)(B);
- k. Presenting Plaintiff with a *pro forma* without identifying the “number of outlets with the described characteristics whose actual financial performance data were used in arriving at the representation” as required by 16 C.F.R. § 436.5(s)(3)(ii)(D);
- l. Presenting Plaintiff with a *pro forma* without identifying “the number and percent that actually attained or surpassed the stated results” amongst existing units as required by 16 C.F.R. § 436.5(s)(3)(ii)(E);

- m. Presenting Plaintiff with a *pro forma* without identifying the “[c]haracteristics of the included outlets ... that may differ materially from those of the outlet” offered to Plaintiff by Defendant as required by 16 C.F.R. § 436.5(s)(3)(ii)(F);
- n. Presenting Plaintiff with a *pro forma* without also providing Plaintiff, in writing, a “clear and conspicuous admonition that a new franchisee’s individual financial results may differ from the result stated in the financial performance representation” as required by 16 C.F.R. § 436.5(s)(3)(iv);
- o. Presenting Plaintiff with a *pro forma* without also providing Plaintiff, in writing, a “statement that written substantiation for the financial performance representation will be made available to the prospective franchisee upon reasonable request” as required by 16 C.F.R. § 436.5(s)(3)(v); and
- p. Presenting Plaintiff with a *pro forma* without explaining why Defendant failed to include the *pro forma* information in Defendant’s FDD as required by 16 C.F.R. § 436.5(s)(5)(ii).

72. Defendant’s failure to comply with the FTC’s Amended Franchise Rule constitutes a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the Indiana Deceptive Consumer Sales Act.

73. Apart from the aforementioned manner in which Defendant’s *pro forma* violated the FTC’s Amended Franchise Rule, the *pro forma* was also misleading and in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and the Indiana Deceptive Consumer Sales Act in that Defendant’s *pro forma*: (a) represented that the business to be purchased by Plaintiff had characteristics and benefits that the business did not, in fact, have; and (b) represented that the business had particular qualities that it did not, in

fact, have.

74. Defendant's failure to comply with the FTC's Amended Franchise Rule, likewise, constitutes constructive fraud and/or fraudulent concealment under applicable law.

THE MISLEADING NATURE OF THE *PRO FORMA*

75. Even if Defendant were not obligated to make pre-sale franchise disclosures to Plaintiff, the *pro forma* presented to Plaintiff by Defendant was, in and of itself, inherently misleading and, upon information and belief, not premised on the actual experience of existing system outlets.

76. The *pro forma* presented to Plaintiff by Defendant misleadingly conveyed to Plaintiff that the business: (a) had characteristics and benefits (*e.g.*, the likelihood of financial benefits) that the business did not, in fact, have; and (b) representing that the business had particular qualities (*e.g.*, a business format that would generate substantial financial benefits for Plaintiff) that it did not, in fact, have.

77. As a result, Defendant's presentation of the *pro forma* was a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, the Indiana Deceptive Consumer Sales Act, and applicable common law even if Defendant owed Plaintiff no franchise disclosure obligations.

PLAINTIFF'S RELIANCE ON THE *PRO FORMA* CRAFTED BY DEFENDANT

78. As more fully detailed herein, Defendant's failure to provide Plaintiff and/or its investors with an FDD was part and parcel of an effort on the part of Defendant to fraudulently elicit Plaintiff's execution of the License Agreement, attached hereto as **Exhibit B**.

79. Because Plaintiff did not receive from Defendant a pre-sale disclosure that met the requirements of the FTC's Amended Franchise Rule, Plaintiff was, instead, left to rely upon

the *pro forma* given to Plaintiff by Defendant.

80. Plaintiff reasonably relied on the *pro forma*.

81. The content of the *pro forma* was misleading (though this fact was unknown to Plaintiff at the time the *pro forma* was presented to Plaintiff by Defendant). Defendant cannot credibly claim that Plaintiff unreasonably relied on the *pro forma* given Defendant's failure to meet the requirements of 16 C.F.R. § 436.1, *et seq.*

82. Against a backdrop in which Defendant failed to provide proper, pre-sale disclosure documentation, and representation that the relationship was that of licensor and licensee, there can be no credible allegation on the part of Defendant that Plaintiff was not entitled to rely on the *pro forma*.

83. Plaintiff was unaware of the misleading nature of the *pro forma* at the time it executed the **Exhibit B** License Agreement.

84. Plaintiff began operating in the Pittsburgh market immediately after completing the training process in February of 2013.

85. Plaintiff's sales and profits never approached either of the top-line gross sales figures identified in the **Exhibit A** *pro forma* crafted by Defendant.

86. Plaintiff has yet to learn of any system licensee/franchisee who has achieved the sales revenues and/or gross profits highlighted in the *pro forma* provided by Defendant to Plaintiff.

**DEFENDANT ATTEMPTS TO INDUCE WAIVER OF PLAINTIFF'S
RIGHTS OVER FRANCHISE DISCLOSURE REQUIREMENTS**

87. Before execution of the License Agreement and throughout the relationship between the parties, Defendant represented, and continued to represent, to Plaintiff and other potential licensees/franchisees that the business operated under a license and was not a

franchise.

88. On or about November 20, 2013, Defendant's agent, Duncan, emailed Plaintiff regarding new training materials available. However, these materials would only be available if a waiver was signed. See **Exhibit E**, email and attached waiver attached hereto.

89. The waiver made receipt of further training and support conditional upon the signing of the attached release, which prohibits Plaintiff from making any claims against Defendant relating to allegations that Defendant was a franchisor and from any disclosure obligations associated with the franchise designation. See **Exhibit E**. Plaintiff did not sign the release.

90. The following month, Defendant's agent once again emailed Plaintiff about signing the waiver. See **Exhibit F** attached hereto. In January of 2014, a revised release was again emailed by Duncan to Plaintiff for signature, and again, Plaintiff did not sign the release. See **Exhibit G** attached hereto.

91. Through the above-described actions, Defendant fraudulently concealed the true nature of the relationship as a franchise and Defendant's corresponding pre-sale disclosure duties.

92. Because Defendant failed to honor its legal obligations to Plaintiff in connection with the sale of the business in question, Plaintiff is entitled to rescind the License Agreement.

93. Plaintiff is also entitled to recover its restitution damages, exemplary damages, costs, disbursements and attorneys' fees.

COUNT ONE

Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.*

Plaintiff hereby incorporates by reference the preceding paragraphs of this Complaint and the Exhibits hereto.

94. The Pennsylvania Unfair Trade Practices and Consumer Protection Law defines a “person” as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entitles.” *See* 73 P.S. § 201-2(2).

95. Plaintiff is a “person” within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

96. The Pennsylvania Unfair Trade Practices and Consumer Protection Law grants a cause of action to persons who suffer ascertainable loss of money “as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act.” *See* 73 P.S. § 201-9.2(a).

97. Section 3 of the aforementioned Act, outlines numerous unlawful practices. In particular, the act declares the following as an unfair or deceptive act or practice: “Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.” *See* 73 P.S. § 201-2(4)(xxi).

98. Defendant violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law in connection with Defendant’s sale of the business in question to Plaintiff.

99. Among other things, Defendant represented that it had the lawful right to sell a franchise to Plaintiff (which Defendant did not have in the absence of having made pre-sale disclosure to Plaintiff) and, otherwise, overstated the financial returns to be had in the operation of the business in question.

100. Upon information and belief, Defendant made such misrepresentations willfully and either: (a) knowing such representations to be false; (b) recklessly, without knowing whether Defendant's representations were fully accurate and not the subject of any unlawful omission; and/or (c) having unreasonably relied upon on the opinion of an attorney who had advised Defendant that Defendant need not make pre-sale franchise disclosures to Plaintiff.

101. Plaintiff is entitled to the following relief as described in the Pennsylvania Unfair Trade Practices and Consumer Protection Law: actual damages, treble damages, costs and reasonable attorney fees. *See* 73 P.S. § 201-9.2(a).

102. Plaintiff is entitled to all such relief and reasonably believes the amount in dispute to be significantly in excess of this Court's jurisdictional threshold.

103. Through Defendant's above-described conduct, Defendant fraudulently concealed the true nature of the relationship between the parties and Defendant's corresponding pre-sale disclosure duties that arise in the context of a franchise relationship.

104. Plaintiff reasonably believes the amount in dispute to be significantly in excess of this Court's jurisdictional threshold.

COUNT TWO
Constructive Fraud

Plaintiff hereby incorporates by reference the preceding paragraphs of this Complaint and the Exhibits hereto.

105. The failure to disclose all material facts by one on whom the law imposes a duty to disclose constitutes actionable fraud.

106. A claim for constructive fraud exists where: (1) by virtue of the relationship between two parties, a duty of disclosure exists; (2) the party with the duty of disclosure makes representations and/or omissions in violation of that duty of disclosure; (3) the party who is

owed a duty of disclosure relied on such representations and/or omissions; (4) the party who is owed a duty of disclosure is injured as a proximate result of the representations and/or omissions; and (5) the party with the duty of disclosure gained an advantage at the other's expense.

107. As detailed, *supra*, Defendant had pre-sale franchise disclosure obligations to Plaintiff which Defendant failed to honor. Such actions constitute common law fraud. See *Rodopolous v. Sam Piki Enters.*, 570 So. 2d 661 (Ala. 1990).

108. Plaintiff became a franchisee/licensee of Defendant's system as a result of Defendant's failure to honor its disclosure obligations.

109. Through Defendant's above described conduct, Defendant fraudulently concealed the true nature of the relationship between the parties and Defendant's corresponding pre-sale disclosure duties that arise in the context of a franchise relationship.

110. Plaintiff has paid Defendant hundreds of thousands of dollars as a direct and proximate result of Defendant's representations and omissions in connection with pre-sale franchise disclosure.

111. Plaintiff is entitled to rescission and restitution as a result of Defendant's conduct in this regard, as well as any recoverable costs, disbursements and attorneys' fees.

112. Plaintiff reasonably believes the amount in dispute to be significantly in excess of this Court's jurisdictional threshold.

COUNT THREE **Fraudulent Concealment**

Plaintiff hereby incorporates by reference the preceding paragraphs of this Complaint and the Exhibits hereto.

113. As an alternative to Plaintiff's claim for constructive fraud, Plaintiff brings this

Count Three claim for fraudulent concealment.

114. A claim for fraudulent concealment exists where: (1) one party has a duty of disclosure to another; (2) the party with the duty of disclosure knowingly failed to honor that disclosure duty; and (3) the party who is owed the duty of disclosure justifiably relied on the other's non-disclosure to its detriment.

115. As detailed, *supra*, Defendant had pre-sale franchise disclosure obligations to Plaintiff which Defendant failed to honor. Such actions constitute common law fraud. *See Rodopolous v. Sam Piki Enters.*, 570 So. 2d 661 (Ala. 1990).

116. Upon information and belief, Defendant *knowingly* failed to honor its pre-sale disclosure obligations to Plaintiff.

117. Plaintiff became a franchisee/licensee of Defendant's system as a result of Defendant's failure to honor its disclosure obligations.

118. Through Defendant's above described conduct, Defendant fraudulently concealed the true nature of the relationship between the parties and Defendant's corresponding pre-sale disclosure duties that arise in the context of a franchise relationship.

119. Plaintiff has paid Defendant tens of thousands of dollars as a direct and proximate result of Defendant's representations and omissions in connection with pre-sale franchise disclosure.

120. Plaintiff is entitled to rescission and restitution as a result of Defendant's conduct in this regard, as well as any recoverable costs, disbursements and attorneys' fees.

121. Plaintiff reasonably believes the amount in dispute to be significantly in excess of this Court's jurisdictional threshold.

COUNT FOUR
Breach of Contract

Plaintiff hereby incorporates by reference the preceding paragraphs of this Complaint and the Exhibits hereto.

122. Paragraph 3.1 of the License Agreement, **Exhibit B**, provides that: “As a material inducement to [Plaintiff] to enter into this Agreement, [Defendant] hereby represents, warrants and covenants as follows: B. *[Defendant] has full right and power to grant the license set forth herein.*” (Emphasis added.)

123. As more fully explained above, this covenant on the part of Defendant was false at the time it was offered/made to Plaintiff (and remains false at present).

124. Defendant had no right to sell the business in question in the absence of having complied with Defendant’s pre-sale franchise disclosure obligations.

125. Defendant failed to honor its pre-sale franchise disclosure obligations.

126. Paragraph 4.2 provides that “[v]iolation of any agreement or covenant” is an “event of default.”

127. Defendant engaged in an “event of default” which is not, now, subject to cure (because providing *post-sale* franchise disclosures to Plaintiff defeats the purpose of requiring Defendant to have provided Plaintiff *pre-sale* franchise disclosures).

128. Paragraph 4.3 specifies that Plaintiff is entitled to “terminate this agreement, to seek damages, or both and any other remedies available in law or equity.”

129. Plaintiff is entitled to rescission and restitution as a result of Defendant’s conduct in this regard, as well as any recoverable costs, disbursements and attorneys’ fees.

130. Plaintiff reasonably believes the amount in dispute to be significantly in excess of

this Court's jurisdictional threshold.

COUNT FIVE
Declaratory Judgment with Additional
Relief Pursuant to 28 U.S.C. §§ 2201
and 2202

Plaintiff hereby incorporates by reference the other paragraphs of this Complaint and the Exhibits hereto.

131. Because it is a party to the License Agreement, Plaintiff is a party to a written agreement pursuant to Ind. Code § 34-14-1-2.

132. There is an actual controversy between Plaintiff and Defendant regarding whether the License Agreement is in fact a Franchise Agreement.

133. There is an actual controversy between Plaintiff and Defendant regarding whether Defendant violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law and/or the Indiana Deceptive Consumer Sales Act.

134. Pursuant to 28 U.S.C. § 2201, or, alternatively, pursuant to Ind. Code § 34-14-1-2, Plaintiff hereby demands a construction of the License Agreement and a declaration of rights, status and other legal relations thereunder.

135. Pursuant to 28 U.S.C. § 2201, or, alternatively, pursuant to Ind. Code § 34-14-1-2, Plaintiff seeks a declaration by this Court that the relationship between the parties is a "franchise," and that Defendants were, accordingly, obligated to provide Plaintiff pre-sale disclosures consistent with the FTC's Amended Franchise Disclosure Rule.

136. Pursuant to 28 U.S.C. § 2201, or, alternatively, pursuant to Ind. Code § 34-14-1-2, Plaintiff seeks a declaration by this Court that Defendant violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law and/or the Indiana Deceptive Consumer Sales Act.

137. Pursuant to 28 USC § 2202, or, alternatively, pursuant to Ind. Code § 34-14-1-8, Plaintiff seeks, as part of its declaratory judgment, the additional relief of rescission and restitution as a result of Defendant's above-described conduct, as well as any recoverable costs, disbursements, attorneys' fees and/or exemplary damages.

138. Plaintiff reasonably believes the amount in dispute to be significantly in excess of this Court's jurisdictional threshold.

COUNT SIX
Violation of the Indiana Deceptive Consumer Sales
Act, Ind. Code § 24-5-0.5-1, *et seq.*

Plaintiff hereby incorporates by reference the preceding paragraphs of this Complaint and the Exhibits hereto.

139. The Indiana Deceptive Consumer Sales Act defines a "person" as including an "individual, corporation, the state of Indiana or its subdivisions or agencies, business trust, estate, trust, partnership, association, nonprofit corporation or organization, or cooperative or any other legal entity." *See* Ind. Code § 24-5-0.5-2(2).

140. Plaintiff is a "person" within the meaning of the Indiana Deceptive Consumer Sales Act.

141. The Indiana Deceptive Consumer Sales Act is applicable to the relationship between Defendant and Plaintiff because Plaintiff is a "consumer" as defined in the Act.

142. The provisions of the Indiana Deceptive Consumer Sales Act are to be liberally construed to protect purchasers, like Plaintiff. *See* Ind. Code § 24-5-0.5-1.

143. The Indiana Deceptive Consumer Sales Act makes it unlawful to represent that a consumer transaction involves a right or particular characteristic if the representation is false. *See* Ind. Code § 24-5-0.5-3.

144. Defendant violated the Indiana Deceptive Consumer Sales Act by misleadingly representing:

(1) That such subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have.

(2) That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not.

*

*

*

(8) That such consumer transaction involves or does not involve a warranty, a disclaimer of warranties, or other rights, remedies, or obligations, if the representation is false and if the supplier knows or should reasonably know that the representation is false.

See Ind. Code § 24-5-0.5-3 (emphasis added).

145. Defendant violated each of the above-described subparts of the Indiana Deceptive Consumer Sales Act in connection with Defendant's sale of the business in question to Plaintiff.

146. Among other things, Defendant represented that it had the lawful right to sell a franchise to Plaintiff (which Defendant did not have in the absence of having made pre-sale disclosure to Plaintiff) and, otherwise, overstated the financial returns to be had in the operation of the business in question.

147. Upon information and belief, Defendant made such misrepresentations willfully and either: (a) knowing such representations to be false; (b) recklessly, without knowing whether Defendant's representations were fully accurate and not the subject of any unlawful omission; and/or (c) having unreasonably relied upon the opinion of an attorney who had advised Defendant that Defendant need not make pre-sale franchise disclosures to Plaintiff.

148. Defendant, likewise, violated the Indiana Deceptive Consumer Sales Act by

“solicit[ing] to engage in a consumer transaction without a permit or other license required by law ...” *See* Ind. Code § 24-5-0.5-10(a)(1)(A).

149. Irrespective of whether the FTC’s Amended Franchise Rule provides Plaintiff with a “private right of action,” the Indiana Deceptive Consumer Sales Act expressly declares that the violation of any other law, including, but not limited to, the FTC Amended Franchise Rule, is a violation of the Indiana Deceptive Consumer Sales Act.

150. Defendant lacked the lawful right or “license” under applicable federal law, to sell Plaintiff this business without Defendant’s having, first, timely provided Plaintiff with the pre- sale disclosures required under the FTC’s Amended Franchise Rule.

151. Defendant had an affirmative duty and affirmative obligation to have provided Plaintiff with pre-sale disclosures pursuant to the FTC’s Amended Franchise Rule prior to making any offer or sale of the License Agreement to Plaintiff.

152. Defendant also committed the unconscionable act of having elicited Plaintiff’s consent to an agreement (which unduly limited Plaintiff’s remedies and which required that Plaintiff pay an exorbitant fee for the purpose of becoming a licensee/franchisee) without having made pre-sale disclosures required under the FTC’s Amended Franchise Rule. *See* Ind. Code § 24-5-0.5-10(b). Defendant’s unconscionable act in this regard was yet another deceptive trade practice within the meaning of the Indiana Deceptive Consumer Sales Act.

153. Had Defendant made the pre-sale disclosures required under the FTC’s Amended Franchise Rule, Plaintiff would have had a more fulsome understanding of the terms and operation of the License Agreement presented to Plaintiff by Defendant. Defendant failed to make such disclosures and, in so doing, violated the Indiana Deceptive Consumer Sales Act.

154. Plaintiff has reasonably commenced this action upon discovering that it could

not achieve the multi-year projections of revenue and profit set forth in the *pro forma* presented to Plaintiff by Defendant.

155. For the reasons discussed, *supra*, Defendant must be characterized as having fraudulently concealed the information that should have, otherwise, been presented to Plaintiff prior to Plaintiff becoming a licensee/franchisee of this system.

156. Through Defendant's above-described conduct, Defendant fraudulently concealed the true nature of the relationship between the parties and Defendant's corresponding pre-sale disclosure duties that arise in the context of a franchise relationship.

157. The protections of the Indiana Deceptive Consumer Sales Act are not subject to waiver because the License Agreement expressly calls for the application of Indiana law.

158. Plaintiff is entitled to damages, treble damages, and attorneys' fees as a result of Defendant's violations of the Indiana Deceptive Consumer Sales Act. *See* Ind. Code § 24-5-0.5- 4.

159. Plaintiff is entitled to all such relief and reasonably believes the amount in dispute to be significantly in excess of this Court's jurisdictional threshold.

PRAYER

WHEREFORE, Plaintiff respectfully requests the following relief:

1. Award Plaintiff any and all actual damages, exemplary damages, costs, disbursements, interest and attorneys' fees as allowed by applicable law, in an amount to be determined at trial;
2. Award Plaintiff treble damages;
3. Grant Plaintiff rescission of its License Agreement and all other related agreements and grant Plaintiff restitution damages in an amount that will return it to the

status quo ante, along with exemplary damages, costs, disbursements, interest and attorneys' fees as allowed by applicable law, in an amount to be determined at trial; and

4. Such other and further relief as the Court may, otherwise, deem just and equitable.

5. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury on all issues triable of right by a jury.

Respectfully Submitted,

Dated: February 6, 2015

/s/ Thomas J. Michael, Sr.
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