

W. Michael Garner, Esq. ([wmgarner@franchisedealerlaw.com](mailto:wmgarner@franchisedealerlaw.com))  
W. MICHAEL GARNER, P.A.  
222 South 9<sup>th</sup> Street  
Suite 2930  
Minneapolis, MN 55402  
Phone: 612-259-4801  
Fax: 612-259-4810  
Attorney for Plaintiff

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

GORDON CUNNINGHAM;  
CHRISTINE MASON;  
and NYB (KENNETT) LLC

Plaintiffs,

v.

N.Y. BAGEL ENTERPRISES, INC.;  
JOSEPH SMITH;  
and DENNIS MASON,

Defendants.

CIVIL NO: \_\_\_\_\_

**(JURY TRIAL DEMANDED)**

**COMPLAINT**

Plaintiffs, Gordon Cunningham ("Cunningham"), his wife Christine Mason ("Christine"), and NYB (KENNETT) LLC (collectively, "Plaintiffs") bring this Complaint against N.Y. Bagel Enterprises, Inc. ("NY Bagel"); Joe Smith ("Smith"); and Dennis Mason ("Mason") (collectively, "Defendants") and state and allege as follows:

**Nature of Action**

1. This lawsuit arises from Defendants' unlawful sale of a franchise to Plaintiffs. In brief, Defendants sold to Plaintiffs a franchise based on unlawful and fraudulent representations and a misleading, fraudulent, and incomplete Franchise Disclosure Document ("FDD"). Defendants made oral and written communications and

provided documents to Plaintiffs that Plaintiffs relied upon in deciding to purchase an NY Bagel franchise. After opening, Plaintiffs learned that many of the oral and written communications and documents upon which they relied were false and deceptive. As a result of Plaintiffs' reliance on information that Defendants provided, Plaintiffs have lost a substantial amount of money and are now potentially liable for a substantial amount of money with respect to certain lease obligations. Plaintiffs now seek declaratory relief that Plaintiffs' notice of rescission is effective and that Defendants cannot enforce any covenants not to compete, and Plaintiffs seek treble damages, as well as attorneys' fees and costs.

### **Jurisdiction and Venue**

2. This Court has jurisdiction of this case under 28 U.S.C. § 1332 because complete diversity of citizenship exists between Plaintiffs and Defendants, and the amount of damages sought is in excess of \$75,000, excluding interest and costs.

3. Venue is proper because 28 U.S.C. § 1391(a)(2) provides, "A civil action wherein jurisdiction is founded only on diversity of citizenship . . . may be brought only in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred," and the events underlying this Complaint, including Defendants' misrepresentations, occurred in New Jersey.

### **Parties**

4. NYB (Kennett) LLC is a Pennsylvania limited liability company, with its principal place of business located in Pennsylvania. NYB (Kennett) LLC's members Cunningham and Christine are citizens and residents of Pennsylvania.

5. Defendant N.Y. Bagel Enterprises, Inc. is a New Jersey corporation, with its principal place of business located at 301 Route 17 North, Suite 800, Rutherford, New Jersey 07070.

6. Upon information and belief, Defendants Joseph Smith and Dennis Mason are citizens and residents of New Jersey.

### **Facts**

7. Cunningham and Christine became interested in franchising in roughly 2008 or 2009. They learned about NY Bagel through the Internet and Cunningham contacted NY Bagel in the Summer of 2009.

8. When Cunningham inquired about purchasing an NY Bagel franchise in the Summer of 2009, Defendant Mason told him that NY Bagel franchised stores were earning \$10,000 to \$15,000 per week in revenue.

9. When Cunningham visited franchised locations in September 2009 with Mason and Smith, Mason repeated the representation that franchised locations were earning \$10,000 to \$15,000 per week.

10. After visiting a location in Parsippany, New Jersey, Cunningham asked Mason about the income of the store compared to the \$10,000 to \$15,000 per week representations that Mason made previously. On September 11, 2009, Mason emailed Cunningham stating that the franchisee in Parsippany, NJ, an area near which Cunningham was considering opening a franchise, was projecting revenues of \$1,300 to \$1,500 per day and that Mason thought these projections were "low."

11. NY Bagel also provided documents to Cunningham indicating that food costs would be roughly 30 percent of the suggested retail price.

12. Based on these representations, Cunningham decided to investigate purchasing an NY Bagel franchise in greater detail. Thus, Defendants provided him with a Franchise Disclosure Document ("FDD") in September 2009.

13. The FDD included the following information:

- Item 2 did not disclose Mr. Mason's principal positions and employers during the past five years, as required by the FTC Franchise Rule.
- Item 3 of the FDD stated, "Currently there is no litigation."
- Item 7 listed the range of expenses to build out the location to be between \$27,500 and \$60,000.
- Item 7 also provided that the cost of equipment was roughly \$22,000 to \$38,000.
- Item 11 did not include the nature of instructional materials and the instructor's experience. It also did not include the typical length of time between the signing of the agreement or the first payment of consideration for the franchise and the opening of a franchisee's business.
- Item 13 in the FDD did not indicate whether the franchisor had a registered trademark.
- Item 19 stated, "We do not furnish or authorize our salespersons to furnish any oral or written information concerning the actual or potential sales, cost, income or profit of a NY Bagel Franchised Business." Nonetheless, as indicated above, Defendants did provide such information.
- Item 20 contained none of the required charts.
- Item 20 of the franchisor's FDD merely displays the names and addresses of franchisees.

14. Based on the financial performance representations, representations about food costs, and the information in the FDD, Cunningham and Christine decided to purchase an NY Bagel franchise.

15. Cunningham and Christine signed a franchise agreement with NY Bagel on or around September 25, 2009 on behalf of an LLC to be formed and paid a franchise fee of \$27,500. Cunningham and Christine signed a personal guaranty.

16. Cunningham and Christine then formed NYB (Kennett) LLC on November 6, 2009 to own and operate the franchise.

17. Plaintiffs made substantial investments in building out the location and properly equipping it. In total, Plaintiffs have invested and lost roughly \$230,000 in the business and Cunningham has taken on personal lease obligations of which roughly \$150,000 remain.

18. After opening the franchise, Plaintiffs learned that the financial performance representations, the representations about food costs, and representations in the FDD were false, misleading, and often incomplete.

19. After opening the franchise, Plaintiffs learned that the franchise could not earn nearly what Defendants had represented other franchisees were earning or were projected to earn. In fact, Plaintiffs' franchise earns only about \$4,200 to \$4,900 per week in revenue; significantly less than the \$10,000 to \$15,000 per week Defendants indicated it could be expected to earn.

20. Defendants knowingly overstated franchise earnings and the potential of franchise earnings to induce Plaintiffs to purchase a franchise. If Plaintiffs had been

aware that Defendants' financial performance representations were overstated, Plaintiffs would not have purchased the franchise.

21. After opening, Plaintiffs also learned that Mason was involved in a lawsuit that should have been disclosed in the FDD. On April 18, 2008, a lawsuit was filed against Java's Brewin Development, Inc. and other defendants including Mason. *Dipietro et al. v. Java's Brewin Development, Inc. et al.*, N.Y.E.D. Case No. 1:2008-cv-01620 (April 18, 2008). This lawsuit involved allegations of an illicit scheme that Mason and others employed to deceive and induce the plaintiffs into purchasing franchises. If this information had been properly disclosed in the FDD, Plaintiffs would not have purchased a franchise from NY Bagel.

22. Also, Plaintiffs learned that the franchisor understated food costs. Instead of being 30 percent of the suggested retail price, food costs were roughly 65 to 70 percent of the suggested retail price. This cut into Plaintiffs' margin significantly and Plaintiffs would not have purchased the franchise knowing food costs would be so high.

23. Furthermore, much of the disclosure in the FDD was false, misleading, and incomplete.

24. Upon information and belief, Mason had a position with Java's Brewin Development, Inc. and this should have been disclosed in Item 2 of the FDD. Had this been disclosed, Plaintiffs would have discovered the lawsuit involving Mason. Also, Plaintiffs would have been able to discover the State of Connecticut Department of Banking Notice of Intent to Fine, and Cease and Desist order issued against Java's

Brewin Development, Inc. dated May 30, 2008. If they had been aware of either the lawsuit or the state agency action, Plaintiffs would not have purchased the franchise.

25. Item 3 merely provided that “currently” the franchisor was not involved in litigation. Item 3, however, requires disclosure about prior litigation as well. Mason’s prior litigation with respect to Java’s Brewin Development, Inc. should have been disclosed here. Had it been disclosed, Plaintiffs would not have purchased the franchise.

26. It cost Plaintiffs roughly \$108,000 to build out the store. If these build out costs had been properly disclosed in Item 7, Plaintiffs would not have purchased the franchise. The Item 7 disclosure understated these costs by around 50 percent.

27. Plaintiffs, using the franchisor’s list of required equipment and authorized vendors spent \$55,000 on equipment. Item 7 understated these costs by around 50 percent. If these costs had been accurately disclosed, Plaintiffs would not have purchased the franchise.

28. If a franchisor does not have a registered trademark the FTC Franchise Rule requires the franchisor to include specific language in Item 13 of the FDD: “We do not have a federal registration for our principal trademark. Therefore, our trademark does not have many legal benefits and rights as a federally registered trademark. If our right to use the trademark is challenged, you may have to change to an alternative trademark, which may increase your expenses.” The franchisor failed to include this information despite the fact that “N.Y. Bagel,” the franchise’s principal trademark, is not listed on the United States Patent and Trademark Office website as a registered

trademark. Thus, the failure to disclose that the franchisor had not registered “N.Y. Bagel” was a material omission from the FDD upon which Plaintiffs relied.

29. Not only were the financial performance representations unlawful in substance, but they were also unlawful in the manner in which they were provided. The FTC Franchise Rule requires that if financial performance representations are to be made at all, they must be included in Item 19 of the FDD, along with certain information about the representations (*e.g.*, whether the financial performance representation is historic or forward looking; whether the representation relates to all existing outlets or only a subset of outlets; etc.). Defendants failed to include the financial performance representations and other required information in Item 19.

30. The FTC Franchise Rule also requires that a franchisor include specific language in Item 19: “The FTC Franchise Rule permits a franchisor to provide information about the actual or potential financial performance of its franchise and/or franchisor owned outlets, if there is a reasonable basis for the information, and if the information is included in the Disclosure Document . . . .” This statement was not included in NY Bagel’s FDD. If NY Bagel had included this required language it would have put Plaintiffs on notice that the franchisor was not complying with FTC Regulations and it would have raised serious concerns for Plaintiffs.

31. Moreover, Defendants failed to include language in the FDD in Item 19 that is required by the FTC Franchise Rule: “If you receive any other financial performance information of projections of your future income, you should report it to the

franchisor's management . . . ." If this language had been included, it would have raised serious concerns for Plaintiffs.

32. The charts left out of Item 20 are intended to indicate how franchisees have performed in the past and the franchisor's prospects for growth in the future. By not including this information in Item 20, Plaintiffs were not able to take into account information that the FTC requires franchisors to disclose.

33. Item 20 of the FDD also must include the names of all current franchisees, their addresses, and the telephone numbers of each of their outlets. If any outlets were terminated, cancelled, not renewed, or closed for other reasons, the franchisor must disclose the name, city, state, and phone numbers of these former franchisees. The franchisor only included names and addresses of current franchisees and this falls woefully short of the required disclosures. The required information is important because had it been included, Plaintiffs could have discussed the business with independent sources, rather than sales persons or franchisor-selected franchisees.

34. The franchisor was also obligated to "fully assist" Plaintiffs "at no cost" to Plaintiffs in all opening and pre-opening procedures, including, but not limited to, lease negotiations, grand opening assistance, and on-going support. Defendants failed to provide this contractually required support and assistance.

35. Plaintiffs sent to NY Bagel a notice of rescission ("Notice of Rescission").

36. Defendants have not yet accepted Plaintiffs' Notice of Rescission.

**COUNT I  
(Fraud)**

37. Plaintiffs repeat and reallege all of the allegations set forth in the preceding paragraphs as though fully set forth herein.

38. Defendants made material misrepresentations about the financial performance of franchises and financial projections, food costs, and in the FDD.

39. Upon information and belief, Defendants made misrepresentations knowing their statements were false.

40. Defendants made misrepresentations to induce Plaintiffs to purchase a franchise.

41. Plaintiffs reasonably relied on the misrepresentations in purchasing an NY Bagel franchise.

42. Plaintiffs have suffered significant damages as a result of relying on Defendants' misrepresentations.

**COUNT II  
(Negligent Misrepresentation)**

43. Plaintiffs repeat and reallege all of the allegations set forth in the preceding paragraphs as though fully set forth herein.

44. Defendants negligently made incorrect statements.

45. Plaintiffs justifiably relied upon Defendants' incorrect statements.

46. Plaintiffs suffered damages as a result of Defendants' negligently made incorrect statements.

**COUNT III**  
**(Violation of the New Jersey Consumer Fraud Act)**

47. Plaintiffs repeat and reallege all of the allegations set forth in the preceding paragraphs as though fully set forth herein.

48. Defendants engaged in unlawful conduct by making affirmative misrepresentations, and by concealing, suppressing or omitting material information.

49. Defendants failed to provide Plaintiffs with required disclosures.

50. Plaintiffs suffered an ascertainable loss as a result of Defendants' unlawful conduct.

51. Plaintiffs are entitled to treble damages and attorneys' fees and costs pursuant to N.J. Stat. Ann. § 56:8-19.

**COUNT IV**  
**(Violation of the Pennsylvania Unfair Trade Practices and  
Consumer Protection Law)**

52. Plaintiffs repeat and reallege all of the allegations set forth in the preceding paragraphs as though fully set forth herein.

53. Defendants committed fraud and engaged in deceptive conduct.

54. Plaintiffs suffered damages in relying on Defendants' misrepresentations.

55. Plaintiffs request treble damages and attorneys' fees and costs pursuant to 73 P.S. § 201-9.2.

**COUNT V**  
**(Breach of Contract)**

56. Plaintiffs repeat and reallege all of the allegations set forth in the preceding paragraphs as though fully set forth herein.

57. Defendants were contractually obligated to “fully assist” Plaintiffs in all opening and pre-opening procedures.

58. Defendants did not assist Plaintiffs in such procedures.

59. Plaintiffs suffered damages as a result of Defendants’ failure to provide required assistance.

**COUNT VI  
(Declaratory Relief)**

60. Plaintiffs repeat and reallege all of the allegations set forth in the preceding paragraphs as though fully set forth herein.

61. There is an actual controversy as to whether the franchise agreement is rescinded and whether Defendants can enforce covenants not to compete in the franchise agreement against Plaintiffs.

62. Plaintiffs seek declaratory relief that the franchise agreement is rescinded and that Defendants not be able to enforce covenants not to compete found in the franchise agreement.

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them jointly and severally, as follows:

1. For appropriate declaratory relief and rescission of the Agreement;
2. For actual damages in the amount of \$380,000;
3. For treble damages;
4. For reasonable attorneys’ fees and costs; and
5. For such other and further relief as the court deems just and proper.

**Jury Demand**

Plaintiff demands a trial by jury.

Dated: November 1, 2011

W. MICHAEL GARNER, P.A.

s/W. Michael Garner  
W. Michael Garner, Esq. (NJ #052551994)  
222 South 9th Street  
Suite 2930  
Minneapolis, MN 55402  
Phone : (612) 259-4800  
Fax: (612) 259-4810  
Email: [wmgarner@franchisedealerlaw.com](mailto:wmgarner@franchisedealerlaw.com)

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2011, I caused the following documents:

**COMPLAINT, CIVIL COVER SHEET, SUMMONS AND DISCLOSURE DOCUMENT**

to be filed electronically with the Clerk of Court through ECF.

Dated: November 1, 2011

**s/ W. Michael Garner**  
W. Michael Garner