

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

Mama Mia, Inc., d/b/a MODE,

Plaintiff,

v.

MODE MP, LLC and Tracy MacKellar,

Defendants.

Civil No. 3:16-CV-00433

DEFENDANTS' ANSWER AND
COUNTERCLAIM

[¶1] Defendants MODE MP, LLC ("MODE MP") and Tracy MacKellar ("MacKellar") for their Answer to Plaintiff Mama Mia, Inc., d/b/a MODE's ("MODE") Complaint, state and allege as follows:

[¶2] Defendants deny each and every material allegation in Plaintiff's Complaint except as hereinafter admitted, qualified or otherwise explained.

[¶3] Upon information and belief, Defendants admit the allegations in Paragraph 1.

[¶4] As to the allegations in Paragraphs 2 and 3, Defendants admit the same, save and except for the allegation that Defendant MacKellar is the sole member of Defendant MODE MP, which is denied.

[¶5] As to Paragraphs 4, 5 and 6 regarding venue and jurisdiction of this action, Defendants place Plaintiff to its strictest proof.

[¶6] The statements made in Paragraphs 7, 8, 9, 10, 11 and 12 do not require a response of pleading, however to the extent they do Defendants place Plaintiff to its strictest proof.

[¶7] As to Paragraphs 14, 15, 16, 17, 18, and 19, Defendants admit the existence of a Franchise Agreement and Personal Guaranty, the terms of which speak for themselves.

Defendants specifically deny any allegations contrary to or at variance with those express terms, and further place Plaintiff to its strict proof as to the validity of those Agreements in light of the facts asserted below.

[¶8] Defendants deny the allegations in Paragraph 20.

[¶9] As to Paragraph 21, Defendants admit they received a written notice of default dated December 20, 2016 but deny they were in default of the Franchise Agreement.

[¶10] As to Paragraph 22, the terms of the Franchise Agreement speak for themselves and Defendants specifically deny any allegations contrary to or at variance with those express terms. Defendants affirmatively assert they were not in default of the Franchise Agreement, and were thus not required to cure any alleged defaults within 48 hours of delivery of the notice of default.

[¶11] Defendants admit they received a notice of termination dated December 27, 2016 as alleged in Paragraph 23, but deny they were in default and/or failed to cure any alleged defaults.

[¶12] As to Paragraphs 24 and 25, the terms of the Franchise Agreement speak for themselves and Defendants specifically deny any allegations contrary to or at variance with those express terms. Defendants affirmatively assert that any provisions of the Franchise Agreement purporting to limit competition are unlawful and void.

[¶13] Defendants deny the allegations in Paragraphs 26 and 27. Defendants specifically deny they are using MODE's marks in any way. Defendants affirmatively assert they are now operating a store using the name "Moda Boutique Fashions" which is neither related to or associated with MODE, nor likely to cause any confusion with MODE's purported marks.

[¶14] Defendants deny the allegations in Paragraphs 28 and 29. Defendants specifically

deny they are infringing upon MODE's marks as they are not using any of MODE's marks in the operation of Moda Boutique Fashions. Defendants further deny that the use of the name "Moda Boutique Fashions" is likely to cause consumer confusion or mistake and/or deceive the public in any way.

[¶15] Defendants deny the allegations in Paragraphs 30, 31, 32 and 33.

[¶16] Defendants deny the allegations in Paragraphs 34, 35, 36, 37, 38 and 39. Defendants specifically deny they have engaged in "unfair competition", and further deny Plaintiff is entitled to injunctive relief.

[¶17] Defendants deny the allegations in Paragraphs 40, 41, 42, 43 and 44. Defendants specifically deny any breach of the Franchise Agreement, further deny Plaintiff is entitled to injunctive relief and/or specific performance, and affirmatively assert Plaintiff's claim is barred by its own material breaches of said Agreement and fraudulent conduct as hereinafter set forth.

[¶18] Defendants deny the allegations in Paragraphs 45, 46, 47, 48 and 49. As to the validity of any Guaranty Defendants place Plaintiff to its strict proof. Defendants specifically deny any breach of any Guaranty, and further deny Plaintiff is entitled to injunctive relief and/or specific performance.

[¶19] Defendants deny the allegations in Paragraphs 50, 51, 52 and 53. Defendants place Plaintiff to its strict proof as to the validity of the Franchise Agreement, deny any breach thereof, and further deny they proximately caused Plaintiff any damages. Defendants affirmatively assert that to the extent any damages exist, they were not proximately caused by Defendants, but rather were due to circumstances outside Defendants' control, and/or the actions/inactions of others, including but not limited to Plaintiffs' own unlawful conduct as

hereinafter set forth.

[¶20] Defendants deny the allegations in Paragraphs 54, 55, 56 and 57. Defendants place Plaintiff to its strict proof as to the validity of the purported Guaranty, deny any breach thereof, and further deny they proximately caused Plaintiff any damages. Defendants affirmatively assert that to the extent any damages exist, they were not proximately caused by Defendants, but rather were due to circumstances outside Defendants' control, and/or the actions/inactions of others, including but not limited to Plaintiffs' own unlawful conduct as hereinafter set forth.

[¶21] Defendants deny the allegations in Plaintiff's Prayer for Relief, including all subparts. Defendants specifically deny Plaintiff is entitled to Judgment in its favor, or any other relief whatsoever.

[¶22] Plaintiff's Complaint is barred by its own material breaches of the Franchise Agreement, thereby excusing Defendants from any obligations thereunder.

[¶23] Plaintiff's Complaint is barred by its own fraudulent conduct, as hereinafter set forth.

[¶24] Pending further discovery, all or part of the Franchise Agreement and Guaranty are void pursuant to North Dakota and/or South Carolina law.

[¶25] Pending additional discovery, Defendants specifically invoke any and all applicable affirmative defenses or avoidances available under the applicable Rules of Civil Procedure, Evidence, and/or any other regulation, rule, statute, or case law, including but not limited to duress; estoppel; failure of consideration; fraud; and illegality.

[¶26] Pending additional discovery, Plaintiff lacks capacity due to its failure to comply with North Dakota and/or South Carolina law

[¶27] **WHEREFORE**, Defendants request Plaintiff's Complaint be dismissed, with

prejudice, and that Defendants have their costs incurred in defending the same, together with any other and further relief the Court deems equitable and just.

JURY DEMAND

[¶28] Defendants demand a Trial by the maximum amount of Jurors allowed by law on all issues so triable, and object to the return of a less than unanimous verdict.

COUNTERCLAIM

[¶29] Defendants, for their Counterclaim against Plaintiff, state and allege as follows:

[¶30] Defendants incorporate the foregoing paragraphs by reference.

[¶31] In or around November 2014, Defendant MacKellar contacted MODE president Ciara Stockeland (“Stockeland”) to inquire about entering into a Franchise Agreement and opening a MODE store in South Carolina. Stockeland told MacKellar that MODE bought designer fashions and overstock directly from the designers themselves. MacKellar relied on this representation when she decided to continue to pursue a MODE franchise in South Carolina. As set forth more fully below, this representation proved to be false.

[¶32] In or around December 2014 MacKellar flew to Fargo to meet with MODE’s team, including Stockeland, to learn more about MODE and discuss entering into a Franchise Agreement. Stockeland again told MacKellar that MODE works directly with designers to buy overstock so MODE is able to pass designer fashions at a low cost to MODE store owners. MacKellar relied on this representation when she decided to continue to pursue a MODE franchise in South Carolina. As set forth more fully below, this representation proved to be false.

[¶33] MacKellar was also told at this December meeting that MODE would accommodate and facilitate her ability to buy product suitable for a store located in a warmer climate, as

MODE had no stores anywhere near South Carolina. As set forth below, this representation proved to be false.

[¶34] In or around January 2015, MacKellar began searching for retail space and registered MODE MP, LLC with the South Carolina Secretary of State.

[¶35] On or around March 17, 2015, Mama Mia, Inc. d/b/a MODE and MODE MP, LLC entered into the above-referenced Franchise Agreement for the operation of a MODE Store to be located at 976 Houston Northcutt, Suite M, Mount Pleasant, South Carolina 29464.

[¶36] Defendants' MODE store opened in or around July 2015. Defendants incurred significant expense in order to finance the opening of the store.

[¶37] From approximately September 2015 to December 2015, and again from March 2016 to June 2016, MacKellar had numerous conference calls with MODE representatives regarding purchasing the proper inventory for the South Carolina store's demographics. MacKellar constantly battled with MODE to obtain appropriate product for MODE MP's store. Thus MODE's prior representation that it would facilitate the supply of proper product for a South Carolina store proved to be false.

[¶38] In or around November 2016, MacKellar discovered MODE had been withdrawing \$3,679.71 from MODE MP's checking account by ACH transfer and was not providing invoices to support the withdrawals. These unauthorized and unsupported withdrawals occurred from August 2016 until they were discovered in November of that year. These unauthorized withdrawals were not provided for under the Franchise Agreement and no explanation for them was provided.

[¶39] MacKellar blocked MODE from access to MODE MP's bank accounts until the matter of the withdrawals could be resolved.

[¶40] Because of the ongoing issues with MODE, and because Defendants had not been provided with documentation supporting the unauthorized ACH transfers, in or around December 2016 MacKellar refused shipment of product and instead joined a wholesale buying group called FashionGo to ensure MODE MP had enough inventory for the holiday season.

[¶41] It was at this time that Defendants discovered MODE had been buying inventory from that same wholesaler, marking up the product 100%, then selling the product to its franchisees at the mark-up price . . . all the while still collecting 6% of gross sales pursuant to the Franchise Agreement. This practice was nowhere provided for in the Franchise Agreement, was never disclosed to Defendants, was directly at odds with the representations as to MODE's business model which induced Defendants into entering into the Franchise Agreement and Guaranty, and made it nearly impossible for Defendants to operate profitably.

[¶42] Due to Plaintiff's statements that were now known to be fraudulent, and Plaintiff's breach of its own Franchise Agreement, in or around December 2016 Defendants disassociated with MODE and began to operate the store under a new name, "Moda Boutique Fashions." Defendants removed all MODE branding from the store, including hang tags, business cards, shopping bags and signage. Defendants shredded MODE's Operations Manual, painted MODE's signature red wall blue, created new social media pages for Moda Boutique Fashions, and changed the font of the store's name from MODE's Arial block letters.

COUNT ONE – ACTUAL FRAUD

[¶43] Defendants incorporate the foregoing by reference.

[¶44] Plaintiff, with the intent to deceive Defendants and induce Defendants into entering

into the Franchise Agreement, or in a manner not warranted by the information it had, made numerous misrepresentations to Defendants, including the quality and brands of product the Defendants would be able to sell, the fees routinely collected by the Plaintiff pursuant to its Franchise Agreement, and its practice of marking-up the product sold to franchisees while still collecting 6% of gross sales as hereinbefore set forth with particularity.

[¶45] Plaintiff also knowingly and intentionally concealed or suppressed the true facts about the franchise with the intent to defraud Defendants.

[¶46] But for Plaintiff's misrepresentations, Defendants would not have entered into the Franchise Agreement and Guaranty. Nor would Defendants have entered into the Franchise Agreement and Guaranty had all material facts been disclosed.

[¶47] Plaintiff's fraudulent statements and conduct proximately caused Defendants damages in an amount to be determined by the trier of fact, but in no event less than \$75,000, including but not limited to all lost profits and expenses incurred as a result of Plaintiff's fraudulent conduct, and affords Defendants the right to amend their Counterclaim to seek exemplary damages under North Dakota law.

[¶48] Plaintiff's fraudulent statements and conduct also negate Defendants' consent to the Franchise Agreement and Guaranty, and thereby entitle Defendants to rescind the Franchise Agreement pursuant to N.D. Cent. Code §§ 9-09-02 and 32-04-21, together with all rescissionary damages incurred as a result of Plaintiff's fraudulent conduct.

COUNT TWO – BREACH OF CONTRACT

[¶49] Defendants incorporate the foregoing by reference.

[¶50] Plaintiff breached its Franchise Agreement with Defendants by collecting fees not disclosed therein, refusing to provide suitable product/inventory, and selling product to

Defendants at a marked-up price, all proximately causing Defendants damages.

[¶51] As a result of Plaintiff's breach of the Franchise Agreement, the consideration therefor and for the concomitant Guaranty have failed, thereby entitling Defendants to rescission.

COUNT THREE – UNLAWFUL SALES PRACTICES

[¶52] Defendants incorporate the foregoing by reference.

[¶53] North Dakota's Unlawful Sales or Advertising Practices Act, specifically N.D. Cent. Code § 51-15-02, prohibits the "act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise[]" Section 51-15-09 affords a "claim for relief by any person against any person who has acquired any moneys or property by means of any practice declared to be unlawful [under the Act]. If the court finds the defendant knowingly committed the conduct, the court may order that the person commencing the action recover up to three times the actual damages prove, and the court must order that the person commencing the action recover costs, disbursements, and actual reasonable attorney's fees incurred in the action."

[¶54] Plaintiff committed deceptive acts, or practices, as defined by the Act in misrepresenting the cost of product purchased from wholesalers and marking-up the price before selling the product to franchisees. To Defendants' detriment, Plaintiff reaped substantial financial gain as a result.

[¶55] Defendants are entitled to relief from Plaintiff's unlawful sales/advertising practices, including the disgorgement of any profits earned as a result of Plaintiff's misrepresentations and concealment, treble damages, costs and attorney's fees.

**COUNT FOUR – VIOLATION OF NORTH DAKOTA
FRANCHISE INVESTMENT LAW**

[¶56] Defendants incorporate the foregoing by reference.

[¶57] North Dakota’s Franchise Investment Law, specifically N.D. Cent. Code § 51-19-11, states, “[i]t is unlawful for any person in connection with the offer, sale or purchase of any franchise, directly or indirectly: (a) [t]o employ any device, scheme, or artifice to defraud; (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” Section 51-19-12 creates a civil cause of action for the franchisee or subfranchisor, stating that any person who violates the Franchise Investment Law is “liable to the franchisee or subfranchisor who may bring an action for damages, for rescission, or for such other relief as the court may deem appropriate.” Further, in any action brought under the Franchise Investment Law, a franchisee or subfranchisor, if successful, is entitled to its costs and disbursements plus reasonable attorney’s fees.

[¶58] Plaintiff violated the Franchise Investment Law by making untrue statements of material facts to Defendants and omitting to state material facts in order to make the statements not misleading.

[¶59] Defendants are entitled to relief from Plaintiff’s violation of the Franchise Investment Law, including damages in an amount to be proven at trial, but in no event less than \$75,000, recovery of their costs, disbursements, and reasonable attorney’s fees.

**COUNT FIVE – VIOLATION OF SOUTH CAROLINA
BUSINESS OPPORTUNITY SALES ACT**

[¶60] Defendants incorporate the foregoing by reference.

[¶61] South Carolina's Business Opportunity Act, specifically S.C. Code § 39-57-80, affords remedies to a business opportunity buyer if the seller uses any untrue or misleading statements in the sale of the business opportunity, or if buyer is injured by seller's breach of a contract, and/or violation of the Business Opportunity Sales Act. Remedies available include, but are not limited to, rescission, and recovery of damages, together with reasonable attorneys' fees.

[¶62] Plaintiff violated the Business Opportunity Act by making numerous untrue and/or misleading statements that induced Defendant into purchasing the business opportunity of entering into a Franchise Agreement and opening a MODE store in South Carolina.

[¶63] Pending further discovery, Defendants may be entitled to relief from Plaintiff's violation of the Business Opportunity Act, including but not limited to, rescission of the Franchise Agreement, recovery of damages, and reasonable attorneys' fees.

[¶64] **WHEREFORE**, Defendants request this Court enter Judgment in their favor of and against Plaintiff as follows:

- A. For damages in an amount to be proven at trial;
- B. For the right to amend their Complaint to assert a prayer for exemplary damages;
- C. For treble damages and Attorneys fees as provided by N.D. Cent. Code §§ 51-15;
- D. For costs, disbursements and reasonable attorney's fees as provided by N.D. Cent. Code §§ 51-19 and S.C. Code §§ 39-57;
- E. For rescission of the Franchise Agreement and Personal Guaranty;

- F. For prejudgment interest where allowed by law, and post-judgment interest at the legal rate; and
- G. For such other and further relief the Court deems equitable and just.

Dated this 31st day of January, 2017.

/s/ Michael T. Andrews

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