South Shore D'Lites, LLC v First Class Prods. Group, LLC
2024 NY Slip Op 31726(U)
May 14, 2024
Supreme Court, New York County
Docket Number: Index No. 650827/2012
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** ***Justice*** **PART** **56M**

---X

INDEX NO. 650827/2012

SOUTH SHORE D'LITES, LLC, D'LITES OF WEST CALDWELL, LLC, and HGB D'LITES OF SMITHTOWN, LLC,

Plaintiffs,

- v -

FIRST CLASS PRODUCTS GROUP, LLC, TODD COVEN, and MAGDA ABT,

Defendants.

---X

DECISION, ORDER, AND JUDGMENT AFTER NONJURY TRIAL

I. INTRODUCTION

In this action, the plaintiffs, South Shore D'Lites, LLC (South Shore), D'Lites of West Caldwell, LLC (West Caldwell), and HGB D'Lites of Smithtown, LLC (Smithtown), seek to recover damages from the defendants First Class Products Group, LLC (First Class), Todd Coven, and Magda Abt for violation of the New York Franchise Sales Act (General Business Law §§ 680-695; hereinafter NYFSA) and common-law fraudulent inducement. Between October 17, 2023 and October 31, 2023, this court conducted a nonjury trial, at which South Shore, West Caldwell, and Smithtown's owners, Nina Schurz, Robin Garman, and Haidee Ganz-Bonhurst, respectively, testified on behalf of their businesses. Coven and Abt testified on their own behalf and on behalf of their company, First Class. The parties submitted the relevant sublicense agreements, correspondence, and other documentation concerning the operation of the plaintiffs' businesses. The court credits the testimony of the witnesses and the documentary evidence to the extent indicated in the following findings of fact.

II. FINDINGS OF FACT

D'Lites Enterprise, Inc. (DEI), is a Florida corporation, and is the nationwide distributor of the D'Lites soft-serve ice cream brand. Gerald Corsover is its principal. First Class is a New

York limited liability company owned and managed by Coven and Abt. On October 23, 2009, First Class entered into a "license agreement" with DEI, granting First Class, as a franchisee, the right to sell the D'Lites brand ice cream products in the tristate New York City metropolitan area. First Class paid DEI a licensing fee of $75,000. As a part of the agreement, First Class agreed to purchase the ice cream from DEI or a supplier designated by DEI at the price of $8.50 per gallon. Additionally, the agreement required First Class to open or sub-license twenty locations in the tri-state area within the first five years after the agreement went into effect.[1]

In May 2010, First Class opened its own D'Lites ice cream store on Long Island in Woodbury, New York (the Woodbury location). On May 4, 2010, West Caldwell, as a sub-franchisee and sub-licensee, purchased a sublicense from First Class to sell D'Lites ice cream in the tri-state area, while South Shore, as a sub-franchisee and sub-licensee, purchased a sublicense on April 21, 2011, and Smithtown, as a sub-franchisee and sub-licensee, purchased a sublicense on May 2, 2011. Each plaintiff paid a sublicense fee of $50,000 to First Class. The agreements between First Class, on the one hand, and West Caldwell and South Shore, on the other, specified that the sublicensee would purchase the ice cream from First Class at $13.50 per gallon. Although the agreement between First Class and Smithtown did not specify the cost of the ice cream, Ganz-Bonhurst testified that she, too, paid First Class $13.50 per gallon. First Class did not inform the plaintiffs that they were paying a higher price per gallon to First Class for the ice cream than First Class had paid to DEI, with the $5 per gallon difference retained by First Class. As a result, First Class earned approximately $27,000 from the plaintiffs' purchases of ice cream from it.

In expanding the D'Lites franchise, neither Coven and Abt, nor DEI itself, provided the sub-franchisees with a written prospectus. Rather, in November 2009, Coven reached out to Corsover and explained that,

[1] The court notes that this fact is not in contention amongst the parties.

> "[i]In order to sell this to others Magda and I need to set up a mock spread sheet. In order to do this we need to know how many gallons of icecream [the ice cream store in] Aventura [Florida] buys from you a year . . . or any other high volume store. Then we can backtrack and fudge numbers to show that the store makes real $. Assuming that one gallon makes 45 4 oz. cups . . . we can do the math"

Thereafter, Coven created a "Business Plan" to provide to potential sub-franchise investors. Coven and Abt made certain representations to the plaintiffs about the revenue and profitability of their own D'Lites ice cream store, and what each plaintiff could expect upon the opening of their individual stores.

DEI had been the subject of a 2008 Florida action, sounding in fraud and breach of contract, alleging that it had misrepresented the caloric content and nutritional value of its D'Lites brand ice cream, in which the plaintiff franchisees thereafter added a claim to recover for defamation after DEI allegedly posted defamatory statements about the franchisees in response to the lawsuit (*see Ball v D'Lites Enters., Inc*., 65 So 3d 637 [Fla Ct App 2011]).

a. <u>Nina Schurz/South Shore</u>

Schurz worked in the "stockbroker business" for approximately 40 to 45 years, and is currently employed in the financial industry. She obtained a bachelor's degree in business and a master's degree in business administration, specializing in international finance. Schurz was a customer of the store at the Woodbury location, which she frequented a couple of times per week. After completing a form on the D'Lites ice cream website expressing her interest in opening a franchise of her own, Schurz was contacted by one of the defendants. Thereafter, in approximately August 2010, Schurz, Coven, and Abt met in person at the Woodbury location. Schurz asked questions regarding the nutritional content of the D'Lites ice cream. They told her that "there was leeway" in the reported caloric content of 50 calories per 4-fluid-ounce serving, but that it didn't make much of a difference. At this same meeting, Coven and Abt informed Schurz that their Woodbury location operated with an overhead of approximately 35 percent, and generated revenue of $2,000 on slow days, $5,000 on busy days, and $3,000 on average days. They also informed Schurz that the Woodbury location served an average of 500

customers per day. These parties continued to communicate via email regarding the various costs of opening a franchise, such as initial inventory costs, payroll and payroll taxes, the initial ice cream order, and the estimated return per gallon of ice cream.

In January 2011, the relevant sublicense agreement was drafted. At the same time, Schurz, after first declining to open a store in Merrick, New York, located and leased a storefront in Greenvale, New York, and started building out what would become her D'Lites store. After signing the sublicense agreement on April 21, 2011, Schurz learned that Arnold Diaz, a television news reporter for Fox5 WNYW-TV, showed up at the Woodbury location, accusing the defendants of providing false nutritional information about the D'Lites ice cream. Coven and Abt reassured Schurz that the allegations were untrue, and that despite it airing on television, their sales were not affected, and business continued as usual. Schurz continued with the build-out of her store and opened for business in September 2011. Inclusive of her licensing fee, build-out costs, equipment and supplies, and furniture and fixtures, Schurz spent $327,782.84. Schurz spent $223,124.62 to keep the store operating in 2012. Schurz's sales averaged $300 to $400 per day, with her best day generating $800. From September 22, 2011 until October 28, 2012, South Shore generated $170,480.76 in revenue. Schurz eventually closed the store in September 2013. She opened another store in Syosset, New York, in December 2013, but she does not seek damages in connection with her operation of that store, and the court finds that the operation of that store is irrelevant to this dispute.

b. Robin Garman/West Caldwell

Garman obtained her bachelor's degree in psychology and economics. She thereafter attended law school, and later obtained her master's degree in corporate law. After working as an attorney for several different companies over two decades, she eventually was invited to join a firm known as Eagle Rock Capital Management, first as in-house counsel and later as chief operating officer. It was at this firm that Garman met Abt, and the two became friends. After hearing about the D'Lites brand ice cream from Abt, Garman became interested in opening her

own store. She traveled to Florida to visit a D'Lites store in Aventura, Florida. At the end of her visit, Coven handed her a "Business Plan," based on the yearly revenue and expenses of the Aventura D'Lites store. Coven's calculations, based on the sale of 11,000 gallons of ice cream in a year, projected a net income of $979,600 in the first year of opening a D'Lites store, with a net income of $1,204,600 in the second year. While she understood that the net income of that business plan was not guaranteed, Garman believe those values to be "accurate enough to use as a legitimate guide." Based on conversations with the defendants, Garman also understood that Coven and Abt were relying on that business plan with regard to the revenues that their own Woodbury store could expect to generate in its first year. Thereafter, in May 2010, Coven and Abt opened their Woodbury location store, and Garman signed her sub-license agreement on May 4, 2010. In June 2010, Garman signed a lease to a storefront in West Caldwell, New Jersey, which she later opened for business in December 2010. Garman spent $229,392.94 building out her store, $108,026.25 on furniture and equipment, and $135,883 in total rent for her store in 2010, 2011, and 2012. Garman's sales did not reach $1,000 a day. West Caldwell generated $249,676.03 in revenue between December 5, 2010 and October 29, 2013. Garman closed her store on October 31, 2013.

c. Haidee Ganz-Bonhurst/Smithtown

Ganz-Bonhurst received her bachelor's degree in sports medicine, her master's degree in physical therapy, and her doctorate in physical therapy. She has been a practicing physical therapist for 35 years, and has owned her own physical therapy practice for 29 years. Ganz-Bonhurst also coaches track and field, and assists as an athletic trainer for football teams. After hearing about the D'Lites brand, Ganz-Bonhurst visited the Woodbury location to try the ice cream, and quickly became a regular customer. In January 2011, Ganz-Bonhurst contacted Corsover, and inquired about opening a store in Smithtown, New York. Corsover connected Ganz-Bonhurst with the "master license holder for the tri-state area," that is, Coven and Abt. Abt reached out to Ganz-Bonhurst and coordinated an in-person meeting so that Ganz-

Bonhurst could see the business operations of the store at the Woodbury location. At this initial meeting, Ganz-Bonhurst was shown, inter alia, the various equipment used, where the ice cream was stored, and the cash registers. Abt told her that the store had at least 500 customers daily, made $5,000 in sales on a good summer day, $2,000 on a bad day, and $3,000 to $3,500 on an average day. At the next in-person meeting with both Abt and Coven, Ganz-Bonhurst asked about the operational cost of owning a D'Lites store, and was advised that it would entail an outlay of $75,000 to $100,000 for "the whole thing to be done." In February 2011, Abt sent Ganz-Bonhurst a spreadsheet detailing the startup costs for the Woodbury store, totaling $163,044, which included the costs of the ice cream machines, freezers, initial supplies and advertising, and build-out, among other things. On May 2, 2011, Ganz-Bonhurst signed both her sub-licensee agreement with the defendants, and a lease for a storefront in Smithtown. Shortly thereafter, the Fox5 News exposé aired, upon which Abt reassured Ganz-Bonhurst that the story had no merit, and asserted that business at the Woodbury location was unaffected. Ganz-Bonhurst continued to build out her store and opened for business in December 2011. Ganz-Bonhurst spent $152,781.08 for a contractor, and $403,230.80 to build out and open her store. In June 2012, Ganz-Bonhurt, on behalf of Smithtown, discontinued selling D'Lites brand ice cream at her store, and began selling Lite Choice brand ice cream. Ganz-Bonhurst's store averaged $1,500 to $1,600 per week in sales, with the best week generating revenue in an amount slight greater than $3,000. Smithtown generated $102,594.58 in revenue between November 5, 2011 and December 22, 2012. Ganz-Bonhurst closed her store in November 2014.

d. Revenues Generated by the Stores

West Caldwell continued to generate revenues up until two days prior to discontinuing its operations on October 31, 2013, with its revenues during that period of time totaling $249,676.03. South Shore generated revenues of $170,480.76 through October 28, 2012. The court finds that South Shore continued to generate revenues at $350 per day from October 29,

2012 through September 15, 2013, a period of 321 days, for an additional revenue of $112,000 during that time, and a total revenue of $282,830.78 during the overall period of time that it operated its store. Smithtown generated revenues of $102,594.58 through December 22, 2012. The court finds that Smithtown continued to generate revenues at $225 per day from December 23, 2012 through November 15, 2014, a period of 692 days, for an additional revenue of $155,700 during that time, and a total revenue of $258,294.58 during the overall period of time that it operated its store.

III. CONCLUSIONS OF LAW

The Appellate Division, First Department, already has ruled that the defendants violated the NYFSA, in that "they failed to provide the required pre-sale written disclosures, including with respect to the actual revenues they were to derive from the required purchase by plaintiffs of the ice cream mix at a marked-up price" (*S. Shore D'Lites LLC v First Class Prods. Group, LLC*, 215 AD3d 412, 413 [1st Dept 2023]). The Court concluded that, in accordance with General Business Law §§ 691(1) and 691(3), Coven and Abt, as "control persons" (*id.*) of First Class, were to be held jointly and severally liable with First Class for any damages that may be awarded against First Class for violation of NYFSA (*see id.*). The Court, however, denied summary judgment to the plaintiffs on the issue of whether the defendants' violation of that statute was willful and material and, thus, warranted both rescission of the sub-franchise agreements and additional damages in the amount of 6% of the recovery, along with an award of attorney's fees and costs, as permitted by the NYFSA (*see id.*). It thus determined that a trial on that issue was warranted. Finally, the Court ruled that triable issues of fact existed as to the plaintiffs' causes of action to recover for fraudulent inducement, based on the plaintiffs' contention that the defendants made misrepresentations to the plaintiffs about the past and present profitability of their D'Lites store, and the failure to disclose the ice cream markup (*see id.*). This court now addresses these remaining issues here.

a. The Franchise Act

The NYFSA, codified under New York General Business Laws §§ 680-695, governs the offer to sell or the sale of a franchise in New York. Enacted in 1980, the Legislature expressly

> "determined and declared that the offer and sale of franchises, as defined in this article, is a matter affected with a public interest and subject to the supervision of the state, for the purpose of providing prospective franchisees and potential franchise investors with material details of the franchise offering so that they may participate in the franchise system in a manner that may avoid detriment to the public interest and benefit the commerce and industry of the state."

(General Business Law § 680[2]). Consequently, the NYFSA, which must be liberally construed, contains "'comprehensive disclosure and registration requirements and an expansive antifraud provision,' violation of which gives rise to civil liability" (*Sea Tow Servs. Intl., Inc. v Tampa Bay Mar. Recovery, Inc.*, 632 F Supp 3d 91, 107 [ED NY 2022]). Of relevance here are sections 683, 687, and 691 of the NYFSA.

Pursuant to section 683 of the NYFSA,

> "[i]t shall be unlawful and prohibited for any person to offer to sell or sell in this state any franchise unless and until there shall have been registered with the department of law, prior to such offer or sale, a written statement to be known as an 'offering prospectus' concerning the contemplated offer or sale, which shall contain the information and representations set forth in and required by this section. Any uniform disclosure document approved for use by any agency of the federal government or sister state may be utilized and sought to be registered, provided that said uniform disclosure documents comply with the provisions of this article"

(General Business Law § 683[1]). Moreover, the offering prospectus shall contain "[o]ther information or such additional disclosures related to the offer or sale of the franchise as the department of law may prescribe by rules or regulations . . . as will afford prospective franchisees an adequate basis upon which to found their judgment" (General Business Law § 683[2][u]). Of relevance here, the New York State Department of Law requires an offering prospectus to disclose "[w]hether, and if so, the precise basis by which the franchisor or its affiliates will or may derive revenue or other material consideration as a result of required purchases or leases" (13 NYCRR 200.2 [Item 8(D)]). Additionally, any earnings claim made in

connection with an offer of a franchise must be included in the offering prospectus and must have a reasonable basis at the time it is made (*see* 13 NYCRR 200.2 [Item 19(A)]).

Section 687 of the NYFSA states in pertinent part that,

> "[i]t is unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly:
>
> (a) Employ any device, scheme, or artifice to defraud.
>
> (b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. It is an affirmative defense to one accused of omitting to state such a material fact that said omission was not an intentional act.
>
> (c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person"

(General Business Law § 687[2]). To successfully state a claim under section 687, the plaintiff must plead that (1) the defendant made an untrue or misleading statement of material fact, and that (2) the plaintiff reasonably relied on that statement, (3) causing harm to the plaintiff (*see Coraud LLC v Kidville Franchise Co., LLC*, 121 F Supp 3d 387, 393 [SD NY 2015]).

Finally, section 691 of the NYFSA provides that,

> "[a] person who offers or sells a franchise in violation of section six hundred eighty-three, six hundred eighty-four or six hundred eighty-seven of this article is liable to the person purchasing the franchise for damages and, if such violation is willful and material, for rescission, with interest at six percent per year from the date of purchase, and reasonable attorney fees and court costs."

(General Business Law § 691[1]). For purposes of the NYFSA, willful means "no more than voluntary or intentional, as opposed to inadvertent" (*Reed v Oakley*, 172 Misc 2d 655, 658 [Sup Ct, Saratoga County 1996]), *affd* 240 AD2d 991 [3d Dept 1997] [citation omitted]).

The defendants' failure to provide an offering prospectus, while in violation of section 683 of the NYFSA, and causing damage to the plaintiffs in the amount of their total expenses in purchasing the sublicense, renting a store location, building out their ice creams stores, purchasing equipment and furniture, purchasing ice cream and related products, and paying employees, minus their revenues, was not willful. On the other hand, the defendants' failure to

inform the plaintiffs about the $5 markup on the sale of ice cream was willful. The defendants knew that the plaintiffs were paying more for the same ice cream than the defendants paid to DEI. In fact, Coven testified that, in deciding to sign with sublicensees, he was thinking about the math, and projected he would earn $25,000 per store, per year, in markups. The defendants' failure to disclose the $5 markup was also material, as all the plaintiffs testified that they would not have entered into a sublicense agreement with First Class had they known about the markup (*see A Love of Food I, LLC v Maoz Vegetarian USA, Inc.*, 70 F Supp 3d 376, 409 [D DC 2014] [finding that, while defendant intentionally did not register its offering prospectus before making the franchise sale, its violation was not material, since neither plaintiff testified that they would not have gone forward with the sale if they knew the prospectus was not yet registered]). Thus, the plaintiffs are entitled to rescission, along with damages arising from the failure to disclose the markup on the sales price of the ice cream, with interest at six percent per year from the date of purchase, and reasonable attorneys' fees.

The defendants are also in violation of section 687 of the NYFSA. The defendants misrepresented their own store's earnings, and thereby misrepresented what the plaintiffs could anticipate earning in their respective stores. The defendants advised the plaintiffs that their Woodbury location averaged $3,000 per day in sales, whereas the Woodbury location averaged only $1,278 per day in 2010, which was its first year in business, and averaged $1,029 per day in 2011. The plaintiffs relied on those exaggerated earnings claims to the extent that they influenced their decisions to enter into sublicense agreements with First Class. The plaintiffs' right to reliance, however, must be reasonable to substantiate a section 687 claim. Of the many factors a court may consider in evaluating reasonable reliance is "whether the investor received any 'clear and direct' signs of falsity; whether the investor had access to relevant information; whether the investor received a written (purported) confirmation of the truthfulness of the representations at issue, and whether the investor is 'sophisticated'" (*Coraud LLC v Kidville Franchise Co., LLC*, 121 F Supp 3d at 394 [citations omitted]). The court concludes that

the plaintiffs' reliance, though it may have been misplaced, was reasonable. There were no "clear and direct" signs of falsity, and the plaintiffs did not have access to the relevant information, except for what Coven and Abt provided verbally, in emails, and/or in purported business plans. The court notes, however, that given all the plaintiffs' levels of higher education and sophistication, their lack of due diligence is staggering. The court, however, is constrained to award damages simply because of the liberal and remedial nature of the NYFSA. Here too, the court finds that the violation of section 687 of NYFSA was willful and material, necessitating rescission, plus an award of actual damages arising from the plaintiffs' losses in connection with their investment and operating expenses, minus their revenues, along with interest at six percent per year from the date of purchase, and reasonable attorneys' fees.

Although the regulations implementing NYFSA require a franchisor to disclose any pending or prior litigation against it with respect to the franchise or its affiliates (*see* 13 NYCRR 200.2[c][Item 3(A)]), the court concludes that, although the defendants may have been obligated to disclose the Florida action against DEI to the plaintiffs, their failure to disclose it did not cause or contribute to any of the plaintiffs' damages. Moreover, there is no basis for any claim that the defendants themselves knowingly misrepresented the caloric content or nutritional value of the ice cream to the plaintiffs.

b. <u>Common-Law Fraudulent Inducement</u>

To successfully plead common-law fraudulent inducement, a plaintiff must assert the misrepresentation of a material fact, known by the defendant to be false and intended to be relied on when made, and show that there was justifiable reliance and resulting injury (*see Braddock v Braddock*, 60 AD3d 84, 86 [1st Dept 2009]). Inasmuch as the Appellate Division, First Department, reinstated the fraudulent inducement cause of action, we decline to dismiss it as duplicative of the General Business Law § 687 causes of action (*cf. EV Scarsdale Corp. v Engel & Voelkers N. E. LLC*, 48 Misc 3d 1019, 1042 [Sup Ct, NY County 2015]), even though the elements of both claims are very similar. Rather, the plaintiffs are entitled to one recovery

for both the common-law fraudulent inducement and General Business Law § 687 causes of action.

c. Damages

The plaintiffs are entitled to recover consequential damages to compensate them for common-law fraudulent inducement and the violation of a fraud-rectifying or commercial disclosure-mandating statute such as NYFSA, where those damages proximately were caused by reasonable reliance upon the defendants' misrepresentations or withholding of information statutorily required to have been disclosed (*see Clearview Concrete Prods. Corp. v S. Charles Gherardi*, 85 AD2d 461, 468 [2d Dept 1982]). The award of these damages entails the plaintiffs' recovery of "expenditures which would not otherwise have been incurred" (*id.; see Imaging Intl. v. Hell Graphic Sys., Inc.,* 17 Misc 3d 1123[A], 2007 NY Slip Op 52120[U], *8, 2007 NY Misc LEXIS 7368, *22 [Sup Ct, N.Y. County, Oct. 29, 2007]) but for the misrepresentations or withholding of the information, less any mitigation of damages which, here, consists of revenue that the plaintiffs generated despite the expenditures that they otherwise would not have incurred (*see generally Center for Specialty Care, Inc. v CSC Acquisition I, LLC,* 187 AD3d 46, 56 [1st Dept 2020] [plaintiff townhouse owner had no duty to mitigate damages, but by continuing to accept rent from co-plaintiff during the same time period that defendants were obligated to pay rent, the townhouse owner did so for defendants' benefit, and those payments properly were credited to reduce the amount of defendants' obligations]; *Grutman v Katz*, 202 AD2d 293, 294 [1st Dept 1994] [plaintiff tenant mitigated damages in breach of contract action against putative partner and cotenant by subletting leasehold]).

All three plaintiffs mitigated their damages by generating revenue for a period of time after opening their stores. The burden of proving that the plaintiffs failed to mitigate damages, or that damages could have been further prevented, lies with the defendants (*see LaSalle Bank N.A. v Nomura Asset Capital Corp.,* 47 AD3d 103, 107-108 [1st Dept 2007]; *Oneonta Dress Co. v Ozona-USA, Inc.*, 120 AD2d 899, 901 [3d Dept 1986] [Levine, J.]). The defendants did not

establish that the plaintiffs failed to mitigate their damages to a greater extent than the plaintiffs actually did so, that is, by generating revenues in the course of operating their stores, or that the plaintiffs should have done something more or something different further to mitigate their damages. Nor did the defendants challenge the amount of revenues that the plaintiffs established by their testimony and submission of documents.

The court notes that, while it is awarding damages under both sections 683 and 687 of the NYFSA, the plaintiffs are only entitled to one total recovery encompassing both claims. Moreover, inasmuch as the damages for overpaying $5 per gallon of ice cream are minimal, amounting to $9,000 per plaintiff, those damages shall be included in the total award of damages, set forth herein.

d. Rescission

The court rejects the defendants' contention that rescission is an inappropriate equitable remedy here because two of the plaintiffs continued to operate their stores for several months after they commenced this action (*see West Side Federal Sav. & Loan Assn. of N.Y.C. v Hirschfeld*, 101 AD2d 380, 386-387 [1st Dept 1984]; *Weigel v Cook*, 193 App Div 520 [3d Dept 1920]). Moreover, the right to rescission here is based on statute and not on common-law principles.

IV. CONCLUSION

The court thus concludes that the defendants' violation of General Business Law § 683 was willful and material with respect to their failure to disclose that they were deriving revenue from the required purchase by plaintiffs of the ice cream mix at a marked-up price, and their violation of General Business Law § 687 was willful and material regarding both the exaggeration of their earnings and the anticipated earnings of the plaintiffs. The court further concludes that (a) South Shore is entitled to rescission of its agreement with First Class and an award of damages against First Class, Coven, and Abt, jointly and severally, in the principal sum of $277,076.68, representing expenses of $550,907.46, plus $9,000 in overpayments for

ice cream, minus revenues of $282,830.78, plus simple interest at the rate of six percent per annum from April 1, 2011, (b) West Caldwell is entitled to rescission of its agreement with First Class and an award of damages against First Class, Coven, and Abt, jointly and severally, in the principal sum of $232,626.16, representing expenses of $473,302.19, plus $9,000 in overpayments for ice cream, minus revenues of $249,676.03, plus simple interest at the rate of six percent per annum from May 1, 2010, and (c) Smithtown is entitled to rescission of its agreement with First Class and an award of damages against First Class, Coven, and Abt, jointly and severally, in the principal sum of $306,717.30, representing expenses of $556,011.88, plus $9,000 in overpayments for ice cream, minus revenues of $258,294.58, plus simple interest at the rate of six percent per annum from May 1, 2010.

Although the court concludes that the plaintiffs are entitled to an award of reasonable attorneys' fees, it notes that they have yet to submit an affirmation of attorneys' services, bills, or invoices to support their request for such an award. Hence, they are directed to submit such an affirmation and supporting documentation on or before July 10, 2024, after which the court will issue a supplemental order addressing the issue and directing the entry either of amended or separate money judgments.

In light of the foregoing, it is,

ADJUDGED that the sublicense agreement between the plaintiff South Shore D'Lites, LLC, and the defendant First Class Products Company, LLC, dated April 21, 2011, be, and hereby is, rescinded; and it is further,

ADJUDGED that the sublicense agreement between the plaintiff D'Lites of West Caldwell, LLC, and the defendant First Class Products Company, LLC, dated May 4, 2010, be, and hereby is, rescinded; and it is further,

ADJUDGED that the sublicense agreement between the plaintiff HGB D'Lites of Smithtown, LLC, and the defendant First Class Products Company, LLC, dated May 2, 2011, be, and hereby is, rescinded; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff South Shore D'Lites, LLC, and against the defendants First Class Products Company, LLC, Todd Coven, and Magda Abt, jointly and severally, in the principal sum of $277,076.68, plus costs and simple interest on that principal sum at the rate of 6% per annum from April 21, 2011; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff D'Lites of West Caldwell, LLC, and against the defendants First Class Products Company, LLC, Todd Coven, and Magda Abt, jointly and severally, in the principal sum of $232,626.16, plus costs and simple interest on that principal sum at the rate of 6% per annum from May 4, 2010; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of the plaintiff HGB D'Lites of Smithtown, LLC, and against the defendants First Class Products Company, LLC, Todd Coven, and Magda Abt, jointly and severally, in the principal sum of $306,717.30, plus costs and simple interest on that principal sum at the rate of 6% per annum from May 2, 2011; and it is further,

ORDERED that, on or before July 10, 2024, the plaintiffs shall submit an affirmation of attorneys' services, bills, and invoices to support their application for an award of attorneys' fees.

This constitutes the Decision, Order, and Judgment After Nonjury Trial of the court.

5/14/2024	**JOHN J. KELLEY, J.S.C.**
DATE	

CHECK ONE:	X	**CASE DISPOSED**				**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**		**GRANTED IN PART**	X	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**