

Court File No.: 06-CV-34403 PD 2

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ANDRALEX FOOD SERVICES INC.

Plaintiff

and

COUNTRY STYLE FOOD SERVICES INC., COUNTRY STYLE FOOD SERVICES HOLDINGS INC., JEFF YOUNG, CANADIAN IMPERIAL BANK OF COMMERCE, SUE FEDORINK and ROGER NOBLE

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Franchisee's lawyer or, where the Franchisee does not have a lawyer, serve it on the Franchisee, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$5,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's claim and \$100.00 for costs and have the costs assessed by the court.

Dated: *July 4/06.*

Issued by: *S. De Souza*
Local Registrar

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO:

Country Style Food Services Inc.
2 East Beaver Creek Road, Building One
Richmond Hill, ON, L4B 2N3

Country Style Food Services Holdings Inc.,
2 East Beaver Creek Road, Building One
Richmond Hill, ON, L4B 2N3

Jeff Young
Country Style Food Services Inc.
2 East Beaver Creek Road, Building One
Richmond Hill, ON, L4B 2N3

Canadian Imperial Bank of Commerce
5650 Yonge Street,
Toronto, Ontario, M2M 4G3

Sue Fedorink
Canadian Imperial Bank of Commerce
Commerce Court
Toronto, Ontario, M5L 1A2

Roger Noble

CLAIM

1. The Plaintiff claims,

As against the **Canadian Imperial Bank of Commerce:**

- i. Rescission of any and all contracts between Andrallex Food Services Inc. and the Defendant;
- ii. In the alternative, \$1,000,000.00 in damages for breach of contract, negligence, breach of fiduciary duty, and negligent misrepresentation;
- iii. \$1,000,000.00 in damages for conspiracy to use unlawful means;

As against **Country Style Donuts and Jeff Young:**

- i. \$1,000,000.00 in damages for conspiracy to use unlawful means;
- ii. \$350,000.00 in damages for misrepresentation and breach of fair dealing pursuant to the *Arthur Wishart* (Franchise Disclosure Act), R.S.O. 2000, C.3 ("Franchise Act");
- iii. in the alternative, \$300,000.00 in damages arising from the Franchisors' breach of their contractual obligations to the Franchisee;
- iv. \$500,000.00 in damages for loss of economic opportunities and consequential damages;

As against **Sue Fedorink and Roger Noble:**

- i. \$1,000,000.00 in damages for breach of contract, negligence, breach of fiduciary duty, and negligent misrepresentation;
- ii. \$1,000,000.00 in damages for conspiracy to use unlawful means;

As against all Defendants:

- i. \$500,000.00 in punitive and exemplary damages arising from the bad faith conduct of the Defendants;
- ii. pre-judgment interest pursuant to s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- iii. its costs of this action on a substantial indemnity scale, plus applicable GST; and
- iv. such further and other relief as this Honourable Court may deem just.

I. THE PARTIES

2. The Plaintiff, Andralex Food Services Inc, is a duly constituted Ontario corporation with its head office in Markham, Ontario, that carries on business as a franchisee of the Franchisor, selling coffee and donuts. The Franchisee was the owner of a Country Style franchise located at 2270 Markham Road, in Toronto, Ontario ("the Store").

3. The Defendant, Country Style Food Services Inc., is a corporation incorporated in the Province of Ontario with its head office in Richmond Hill, Ontario. At all material times, the Defendant, Country Style Food Services Inc., carried on business as a franchisor ("the Franchisor").

4. The Defendant, Country Style Food Services Holding Inc., is a corporation incorporated pursuant to the laws of the Province of Ontario having its head office in Richmond Hill, Ontario. At all material times, the Defendant, Country Style Foods

Services Holdings Inc. was the parent company of the Franchisor and is a “Franchisor’s Associate” as defined by the *Franchise Act*.

5. The Defendant, Rita McParland, an Ontario resident, is the Director of Marketing of Country Style Food Services Inc. and, at all material times, was a franchisor’s associate.

6. The Defendant, Peter Keating, an Ontario resident, is the Director of Supply Chain of Country Style Food Services Inc. and, at all material times, was a franchisor’s associate.

7. The Defendant, Ken Monteith, an Ontario resident, is the Director of Canadian Operations of Country Style Food Services Inc. and, at all material times, was a franchisor’s associate.

8. The Defendant, Jeff Young, an Ontario resident, is the Director of New Business Development of Country Style Food Services Inc. and, at all material times, was a franchisor’s associate.

9. The Defendants, Country Style Food Services Inc., Country Style Food Services Holdings Inc., Rita McParland, Peter Keating, Ken Monteith and Jeff Young, will hereinafter be collectively referred to as the Country Style Defendants.

10. The Defendant, Canadian Imperial Bank of Commerce ("CIBC"), is a bank registered pursuant to the Laws of Canada with its offices at Commerce Court North, 10th Floor, Toronto, Ontario, M5L 1A2. At all material times, the Plaintiff was a customer of CIBC.

11. The Defendant, Sue Fedorink ("Fedorink"), an Ontario resident, was at all material times an employee of CIBC, as a Senior Small Business Banking Officer. The Defendants, CIBC and Fedorink, will hereinafter collectively be referred to as the CIBC Defendants.

12. The Defendant, Roger Noble, is an Ontario resident and is the proprietor of Choice Corporation. The Franchisee states that at all material times Noble was a franchisor's associate, notwithstanding that Noble was presented to them as an independent consultant by Young.

II. FACTS

A. Pre-Contract Misrepresentations of the Country Style Defendants

13. In February 2003, the two principals of the Franchisee, Alexandre Oudovikine ("Alex") and Andrei Oudovikine ("Andrei") attended the Franchise Show at the Metro Toronto Convention and talked with a sales representative of Country Style, Kent Chin.

14. Two months after the Franchise show, Alex and Andrei attended an open house put on by Country Style. At the open house, the attendees were told that all Country

Style franchisees were successful, due to extensive head office support which included assistance in obtaining financing and with the day to day operations of the franchise. The Franchisees were introduced to Jeff Young.

15. In 2003, Alex and Andrei incorporated the Plaintiff, Andralex Food Services Inc., pursuant to the laws of Ontario.

16. Between April and June 2003, the Plaintiff was contacted by Jeff Young about potential franchises. The Plaintiff rejected the proposed franchises.

17. During the summer of 2003, Jeff placed an urgent telephone call to Andrei, and advised him of an opportunity to participate in a great new concept store that had just become available due to a family emergency that had occurred to the previous owner.

18. The Franchisee was told that the Store would be an example for all other Country Style stores and that it would undoubtedly succeed. Young advised that if the Plaintiff was not interested it would lose out on an opportunity as the store had a long list of potential buyers willing to pay the \$350,000.00 price.

19. The Plaintiff expressed financial concerns over the transaction but was reassured by Young that money would not be a problem. The Plaintiff was introduced by Young to Roger Noble. Noble was described by Young as a Franchise consultant

who would be consulting them on all aspects of their business purchase and who would look after their future interests.

20. During discussions with Noble, the Franchisee was persuaded to withdraw an offer that they had made on a Mr. Sub franchise and to make an offer on the “new” Country Style store. Noble further advised that it would be much easier to obtain a Small Business Loan (“SBL”) for a new Country Style store, rather than an old Mr. Sub store. Noble also advised that a Country Style store would result in significantly high profits.

21. The Franchisees placed a great deal of trust in Noble, whom they believed was acting as an independent Franchise consultant, looking out for their best interest and paid him \$4,000.00 for his services.

22. The Franchisees were also advised by Noble that because the business would be financed through the Canadian Small Business Financing Business Program, the bank was under an obligation to perform a rigorous due diligence process and that they would review all documents dealing with the business. The Franchisees felt reassured by the process, and decided to attempt to obtain a small business loan.

B. Improper Lending Arrangements

23. The Canada Small Business Financing (“CSBF”) Act was enacted in April 1999 by the federal government to extend financing that would otherwise be unavailable to

small-and medium-size enterprises. While Industry Canada is responsible for the administration of the Program, financial institutions are responsible for all credit decisions and for granting the loans.

24. Prior to applying for a loan under the CSBF program, the Franchisee reviewed the process involved in obtaining a Small Business Loan through the CSBF program. The Franchisee noted that CIBC required extremely detailed information about the nature of the business and the ability of the owner/borrower to repay the loan. In fact, the application was so detailed that it was reassured that any problems with the business would be caught by CIBC, particularly given the disclosure obligations placed on franchisors in Ontario.

25. The Franchisee was concerned that it would not be able to secure a loan given the high cost of the franchise. The Franchisee raised this concern with Noble. Noble reassured the Franchisee that he had a longstanding relationship with CIBC and that he would help them through the SBL process.

26. The Franchisee provided Noble with the tax, banking information and their credit history of its principals. Noble advised that he would obtain sales projections, a list and price of the equipment and/or a list of expenses, from Country Style. Noble further advised that he would do all the necessary paper work for the franchise, including a review of the disclosure documents and fill out all forms for obtaining the SBL. Young further corroborated Noble's abilities by informing the Franchisee that CIBC only dealt

with select persons, and that Noble was one of those select individuals with whom they dealt.

27. The Franchisee states that Noble completed all the loan documents, and on or about on August 19, 2003, he met with the Franchisee and had them sign the loan documents. The Franchisee states that it only saw one (1) page of the loan application, which it believes to be the last page of the application, as Noble approached them in haste, and informed them that their loan, in the amount of \$232,500.00 had already been approved, and that the signing of these documents was just a formality. He further informed them that they should go to the CIBC branch located at 1129 Bloor Street West, Toronto, Ontario to see loan Officer, Sue Fedorink.

28. The Franchisees expressed concerns about the nature in which the loan had unfolded and raised their concerns with Noble. In particular, the franchisee noted that the onerous process that had been set out by CIBC had not been followed. Noble failed to respond to the concerns and assured it that there was nothing improper with the way in which the loan had been obtained.

29. On August 19, 2003, Fedorink informed the Franchisee that everything had been completed, including the opening of a new business account with CIBC. The Franchisees asked whether any further documentation from Country Style was required, to which Fedorink responded that she had everything she needed, and that this business opportunity was a solid one, and she was absolutely certain that the loan

would be properly repaid by them. It is important to note that as of August 19, 2003, the Franchisee had not executed a franchise agreement or been provided with any disclosure or other franchise information from the Franchisor. Accordingly, the loan had been approved without the most basic information about the franchise business.

30. The Franchisee proceeded to deposit \$103,000.00 of the personal savings of its principals into a new CIBC account. Fedorink informed them that the loan proceeds would also be deposited into this account. At all times, the Franchisee expected that the funds that it had deposited, along with the loan funds, would not be disbursed to anyone without their prior consent.

31. On August 21, 2003, \$129,500.00 and \$100,000.00 loan deposits were made into the Franchisee's account. On that same day, a withdrawal of \$129,000.00 was made. A second withdrawal was made from the account on August 22, in the amount of \$184,850.88. Both of these withdrawals were made without the Franchisee's knowledge or consent.

32. As of August 22, 2003, the Franchisee had not yet entered into a Franchise Agreement with Country Style or been provided with any disclosure documentation. As a result, the Franchisee states that the funds should not have been transferred to Country Style. Further, the Plaintiff states that at that point in time, the Country Style Defendants were under an obligation, under the *Franchise Act*, to return the money.

33. The Franchisee contacted Fedorink, who explained that all the money had been transferred to Country Style. The Franchisee was advised that she was merely following CIBC's practices for the disbursement of loan funds.

34. The Franchisee states that as a result of the improper transfer of the funds by CIBC, and the improper acceptance of the funds by the Country Style Defendants, as of August 22, it had little choice but to proceed with purchasing the Toronto franchise. Notwithstanding that it had not executed a franchise agreement, received disclosure or even visited the store.

35. The Franchisee states that the Defendants, Young, Noble and Fedorink, purposely arranged the transaction to unfold in this manner in order to force the Franchisee to purchase the franchise.

36. Since August 22, 2003, the date by which the funds were improperly transferred by CIBC and Fedorink to Young and Country Style, the Franchisee has learned that:

- a) the lending procedures of CIBC and the Small Business Loan program, and the requirements of the *Franchise Act* were not followed by Fedorink;
- b) that the funds should not have been transferred by CIBC to Country Style and Young without the express consent of the Franchisee;
- c) that Country Style and Young should not have accepted any funds from CIBC without first having an executed Franchise Agreement and having complied with their disclosure obligations under the *Franchise Act*;
- d) the purchase price for the franchise was over inflated;
- e) the equipment which was purchased with the loan funds was over inflated;

- f) the representations made to it about a new concept store, which was sure to succeed were untrue;
- g) that CIBC has routinely withdrawn funds above and beyond the credit limits that it established, and that the Franchisee requested, in order to ensure payments to Country Style;
- h) that Noble was not an independent consultant and that he routinely directs and refers prospective franchisees to Country Style;
- i) that Country Style routinely directs and refers prospective franchisees to Noble for "independent" advice which results in Noble suggesting to the franchisees that they purchase a Country Style franchise; and
- j) that Young, Noble and Fedorink have worked together and structured a number of Small Business Loans for Country Style franchises, in a similar manner as is detailed above.

37. The Franchisee states that sometime between February 2003 and August 2003, Young, Fedorink and Noble were participants in a conspiracy to market and sell a Country Style franchise which was doomed to fail at over inflated prices. The Franchisee states that they did this for the express purpose of improperly profiting from the Franchisee and the CSBF program.

38. The Franchisee states that in their zeal to finalize the transaction, Fedorink and Noble did not meet the most minimal formalities required to obtain a loan through the federal government program and the *Franchise Act*.

C. The Failure of the Franchise and Misrepresentations

39. As set out above, notwithstanding the transfer of funds on August 21 and 22, 2003, the Franchisee did not have a copy of a Franchise Agreement, did not have any disclosure information and had not been permitted to view the store.

40. The first time that the Franchisee visited the store was approximately one week after the funds were transferred by CIBC to Country Style. Upon seeing the store, the Franchisee found equipment which it estimated to be twelve (12) years old and found a store which was not any different from the numerous other Country Styles located throughout the Greater Toronto Area. The Franchisee states that this was in direct contradiction to Country Style's representations that the equipment would be new and that this would be a new concept store.

41. The Franchisees contacted Country Style to express their concern with the condition of the equipment and were advised that "this is it, deal is done" and that nothing further could be done.

42. The Franchisee immediately contacted Fedorink to request the loan documentation that had been provided by Country Style to CIBC. The Franchisee was specifically looking for the list of equipment, prices and receipts. In furtherance of the conspiracy, Fedorink and CIBC refused to provide these documents to the Franchisee.

43. Despite repeated requests for disclosure documents and the Franchise Agreement, it was not until 2003/2004 that the Franchisee received the documentation. In fact, the Franchise Agreement was not executed until well after the Franchise Agreement was signed by the principals of the Franchisee. The Franchisee states that this violated the *Franchise Act*.

44. The old equipment which was provided by the Country Style Defendants caused significant problems for the Franchisee. The equipment did not operate properly and at one point in time the Franchisee was required to close down the store due to serious gas problems with the equipment.

45. The store's monthly over head expense has been approximately \$45,000.00 per month. A figure which the Country Style Defendants were fully aware could not be achieved when they initially proposed this store to the Franchisee. In fact, the Country Style Defendants were fully aware that the store's sales would never exceed \$25,000.00 per month. As a result, the Franchisee has been operating at a loss of approximately \$23,000.00 to \$25,000.00 per month, since the date the store opened.

46. Country Style also refused to deal with additional operational problems and did not provide much guidance or support to the Franchisee, in direct violation of their initial representations that all Country Style franchises are successful and that extensive operational support is provided.

D. Refinancing Loan in January 2006 and Further Violations by CIBC

47. The Franchisee continued to make its monthly loan payments from June 2004 to January 2006. During this time, the Franchisee attempted to discuss the suspicious actions of Sue Fedorink, Roger Noble, and Country Style in approving a loan and

transferring funds to the Franchisor, before the business had been purchased. The Franchisee did not receive a response from CIBC.

48. In January 2006, the Franchisee approached CIBC to refinance the small business loan agreement in an attempt to ensure it did not default on its loan payments, and for principal loan payment deferral for the months of February, March and April 2006.

49. On or about on February 7, 2006, the Franchisee met with Paul Costa, Senior Business Adviser with CIBC, who provided a new copy of a CIBC Small Business Credit Agreement. The Franchisee states that it executed the new agreement and had it reviewed by its accountant. Upon review, the accountant realized that there had been an error on the loan agreements, which resulted in an increased debt. Two further versions of the loan agreements were drafted by CIBC which contained similar errors.

50. On or about on March 21, 2006, Costa provided the Franchisee with a third version of the agreement. The Franchisee noted the following:

- (a) The outstanding balance on Loan Two (2) continued to reflect an incorrect amount of \$55,000.18;
- (b) The BIL Security portion was completely altered from the previous two versions of February 7, and March 7, 2006, and in violation of section 19 of the *Canada Small Business Finance Regulations (CSBFR)*;
- (c) The agreement was marked up with pen marks; and

(d) Entire sections of the Security Agreement of CIBC Small Business Credit Agreement had been left blank.

51. When the Franchisee raised these concerns with Costa, Costa became curt and advised the Franchisee he did not have to sign the agreement, but that this was the only agreement that would be presented for execution.

52. On or about on March 23, 2006, the Franchisee sent a message to Mr. Clarence Layne, CIBC Customer Care, via email, outlining the problems with the third version of the loan agreements, as he had explained them to Costa at his office on March 21. Layne informed the Franchisee that he could speak with Philip Capitao, General Manager, Imperial Service & Business Banking, at CIBC in regards to his concerns.

53. On or about on March 29, 2006, Capitao provided the Franchisee with a fourth version of the loan agreements. The Franchisee quickly noticed that the amount for loan two (2) had been reduced to \$53,333.54, and as such the repayment term was now correct. However, the Franchisee's concerns with respect to the BIL Security, had not been dealt with in this fourth version. The BIL Security demanded fifty per cent (50%) of the original amount of the loans, as an unsecured personal guarantee, which was in direct violation of section 19 of the *Canada Small Business Financing Act*, SOR/99-141, which reads:

Personal Guarantees and Suretyships

19. (1) A lender, in addition to the primary security referred to in section 14, may take one or more unsecured personal guarantees or suretyships for an amount of not more than the aggregate of

(a) 25% of the original amount of the loan

54. On June 30, 2006, the Franchisee determined that the loan practices of CIBC were improper, in violation of the SBCF program and advised CIBC that it was no longer going to make payments on the loans.

55. On July 4, 2006, the Franchisee determined that it could no longer continue to finance the operation of the store and in order to mitigate its damages it turned over control of the store to the Franchisee.

III. LAW

A. BREACHES BY CIBC

56. The Franchisee pleads that as a customer of CIBC it was owed a duty by CIBC to implement and follow commercially reasonable banking procedures prior to approving a loan or disbursing loan funds.

57. The Franchisee states that CIBC was negligent and breached its duty of care.

In particular, the Franchisee states that CIBC was negligent in:

- (a) failing to obtain authorization from it prior to transferring funds to Country Style;
- (b) failing to ensure that it had executed a franchise agreement prior to transferring funds to Country Style;
- (c) failing to ensure that Country Style had complied with its disclosure obligations prior to transferring funds to CIBC;

- (d) failing to advise it that the documents required of the business would not be carefully scrutinized and authenticated;
- (e) failing to follow the procedures that it set out for obtaining a loan; and
- (f) failing to adequately train its staff with respect to the due diligence procedure required in order to obtain a Canada Small Business Loan, and to supervise the conduct of its staff in providing such service.

58. The Franchisee states that as a result of the aforementioned negligence of CIBC it has suffered damages which were reasonably foreseeable. Full particulars of the damages will be provided to the Defendants prior to trial.

B. FIDUCIARY DUTIES

59. The Franchisee further pleads that CIBC as a party who had complete and utter control over its financial affairs, owed it a fiduciary duty to:

- (a) act in good faith and in the best interest of the Franchisee;
- (b) ensure that the SBL granted to the Franchisee was in the best interest of the Franchisee; and
- (c) ensure that the review of documents to substantiate the terms of the loan were in the best interest of the Franchisee.

60. The Franchisee states that CIBC (through its agent Fedorink) failed to comply with its fiduciary duties by improperly transferring funds from its account to Country Style, when it was fully aware that it did not have its consent.

61. CIBC was also fully aware or should have been aware that the business plan proposed by Noble and Young were not commercially reasonable and that the business did not have any chance of success.

62. Furthermore, CIBC was fully aware that franchise agreement had not been executed, disclosure documentation had not been provided, and that the price of the franchise and equipment was overpriced.

63. The Franchisee states that as a result of CIBC's fiduciary duties it suffered damages and that it is entitled to compensation. The full particular of the Franchisee's damages are unknown at this time but will be provided prior to trial.

C. MISREPRESENTATIONS

64. The Franchisee alleges that CIBC's representations with respect to its Small Business Loan procedures were false and misleading. The CIBC's actual audit of business documentation were inconsistent with or contrary to CIBC's representations and were inconsistent with its duties under the CSBFA and regulations.

65. The Franchisee states that the Representations by CIBC were made negligently and in breach of the Duties of Care and Fiduciary Duties and in breach of the implied terms of the contract and the collateral agreement and the following are the particulars of the misrepresentations ("Misrepresentations") known to the Franchisee:

- (a) CIBC failed to disclose or concealed the magnitude of the laxity existent within the banking system, which allowed fraudulent Franchisors to use the SBL services to their advantage;
- (b) CIBC knew or ought to have known (and concealed such knowledge) that the due diligence procedures were inconsistent or contrary to the Franchisee's expectations.

66. The Franchisee pleads that CIBC was aware or ought to have been aware of the misrepresentations at the time that said representations were made. In the alternative, if CIBC and its employees were not so aware (which is denied), CIBC was in breach of its Duties of Care to adequately train its loan officers and to disclose to its loan officers and employees the fact that the Representations being made by them were Misrepresentations.

67. The Franchisee pleads that CIBC's representations were made with reckless abandon that CIBC did not hold an honest belief in the due diligence procedure of the audits of documentation.

68. The Franchisee further pleads that the Misrepresentations constitute a false, misleading and deceptive consumer representation within the meaning of a section 2 of the *Business Practices Act*, R.S.O. 1990 c. D. 18 and plead that as a consequence, the Franchisee is entitled to the relief as set out below. The Plaintiff pleads and relies upon section 2 and 4 of the *Business Practices Act*.

69. The Franchisee further pleads that the misrepresentations constitute a false and/or misleading representation within the meaning of Section 52(1) and (2) of the *Competition Act* R.S.C. 1985 c. C-34.

70. The Franchisee further pleads and relies upon section 52(4) of the Competition Act. In addition, as a result of the aforesaid breach of the *Competition Act*, the Franchisee seeks damages as set out in Section 36(1) of the *Competition Act*.

71. In the alternative, the Franchisee pleads that the Misrepresentations constitute a false and/or misleading representation within the meaning of Section 74.01 (1)(a), (b) and (c) of the *Competition Act*.

D. BREACHES OF THE FRANCHISE ACT

72. The Franchisee states that in 2003, the Franchisor was fully aware that the Toronto Franchise was suffering significant financial losses and that it purposely withheld this fact from the Franchisee.

73. Furthermore, the Franchisee states that in 2003 the Franchisor was fully aware that it had no intention of turning the Toronto store into the model store for all other franchises, and merely made these statements as an inducement to the franchisee to improperly lure them into purchasing the existing corporate store which the previous Franchisor was having a hard time operating and which was having financial difficulty.

74. The Franchisee states that this was a material fact that the Franchisor was under an obligation to reveal to the Franchisee.

75. The Franchisee further states that this was bait, and the Franchisor was in violation of its obligation to deal with the Franchisee in good faith.

76. The Franchisee states that the Franchisors have violated a number of significant sections of the Act, the particulars of which include, but are not limited to, the following:

- a) the Franchisor improperly accepted payment of the \$81,850.88 franchise fee from the Franchisee prior to providing the Franchisee with the disclosure documentation required under the Act, in direct violation of section 5(1)(b) of the Act;
- b) the Franchisor improperly accepted payment of \$232,500.00 for inventory from the Franchisee, prior to providing the Franchisee with any of the disclosure documentation required under the Act, in direct violation of section 5(1)(b) of the Act;
- c) the Franchisor failed to advise the Franchisee that the Toronto franchise was suffering significant financial losses;
- d) the Franchisor misled the Franchisee into believing that the franchise located in Toronto was a new concept store that would be an example for all other stores, and would receive an elevated level of support from Head Office; and
- e) the Franchisor, throughout this franchise relationship, failed to provide the Franchisee with the guidance and support necessary to successfully operate the franchise.

77. The Franchisee states that, pursuant to section 7(1) of the Franchise Act, it is entitled to all damages suffered as a result of the Franchisor's failure to provide it with proper disclosure.

78. The Franchisee states that pursuant to section 7(3) of the Act, it is deemed to have relied on the failure of the Franchisor to disclose to its detriment.

79. The Franchisee states that as a result of the Franchisor's failure to comply with its disclosure obligations under the Act, it has suffered damages, the particulars of which include, but are not limited to:

- a) it has borrowed money to pay for the franchise fee and the inventory and has had to incur interest payments;
- b) the principals of the Franchise have foregone other employment opportunities since August 2003 and as a result have suffered a loss of income; and,
- c) the Franchisee has lost opportunities to invest the money paid to the Franchisor, and as a result, has suffered an economic loss.

80. The Franchisee states that, as a franchisee, its relationship with the Franchisor is governed by section 3 of the Act, which requires the Franchisor to act in good faith and in a commercially reasonable manner when dealing with the Franchisee. Section 3 states:

Fair dealing

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

Right of action

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.

Interpretation

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

81. The Franchisee states that the Franchisor's failure to provide disclosure documents in the requisite time, as required under the Act, was high handed and commercially unreasonable. In the circumstances, the Franchisee states that these are fit and proper circumstances in which the Court ought to exercise its discretion and award punitive and exemplary damages against the Franchisor.

E. CONSPIRACY TO USE UNLAWFUL MEANS

82. The Plaintiff states that all the Defendants have conspired to use unlawful means directed against the Plaintiff, knowing in the circumstances that the Plaintiff would suffer irreparable harm. The Plaintiff pleads and relies on the following facts:

- a) they conspired to sell a franchise which was over priced;
- b) they conspired to sell the over priced franchise to the Franchisee;
- c) they conspired to advise the Franchisee that CIBC, Country Style and Noble were all separate and independent when they were in fact working towards a common purpose;
- d) they effected the sale of the franchise to the Franchisee, through the CIBC loan, before the most basic and essential documents necessary for the transaction were executed;
- e) after the Franchisee raised suspicions about the loan and the purchase of the franchise, they conspired to hide the true nature of what had happened in order to avoid detection.

83. The Plaintiff states that as a consequence of the conspiracy to use unlawful means, the Plaintiff has suffered significant damages, including loss of business and profits, the full particulars of which are unknown at this time, but which will be provided prior to trial.

F. HIGH-HANDED CONDUCT

84. The Plaintiff pleads that the aforesaid conduct of the Defendants, amounts to conduct that is callous, high-handed, intentional, wrongful, outrageous, and shows a wanton disregard to its rights, and falls well below acceptable business standards, thereby entitling an award of punitive, exemplary and/or aggravated damages by this Honourable Court.

85. The Plaintiff proposes that this action be tried at Toronto.

DATE: July 4, 2006

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ANDRALEX FOOD SERVICES INC.

v.

COUNTRY STYLE FOOD SERVICES INC. et al.

Court File No.: *06-CV-314403RDD2*

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at: TORONTO

STATEMENT OF CLAIM

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