
CANADA / JUDGMENT

Ma v. Nutriview Systems Inc.

2014 BCSC 725

COURT

Supreme Court of British Columbia

DECIDED

28 April 2014

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2014 BCSC 725 Ma v. Nutriview Systems Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ma v. Nutriview Systems Inc.,

2014 BCSC 725

Date: 20140428

Docket: S111643

Registry: Vancouver

Between:

Harry Ma

Plaintiff

And

Nutriview Systems Inc.,

Brian Thurston and Vancity Credit Union

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff:

N. Ganapathi

M.Z. Galambos

Counsel for the Defendants, Nutriview Systems Inc. and Brian Thurston:

R.W. Cooper

J.M.S. Woolley

Place and Dates of Trial:

Vancouver, B.C.

April 2-5, 8-9, 2013

June 17-18, 2013

July 2, 2013

September 9, 2013

October 11, 2013

Place and Date of Judgment:

Vancouver, B.C.

April 28, 2014

I. Introduction

- [1] Harry Ma met Brian Thurston on June 2, 2010. Mr. Ma was gullible and naïve. He had the ability to access over \$400,000 to invest in a franchise Mr. Thurston was selling. Gullibility, naiveté and the ability to raise a large amount of money are an unfortunate combination.
- [2] Brian Thurston is a skilled salesman. He managed to convince Harry Ma to pay a grossly inflated amount of money for a vending machine business with locations in several schools in the Coquitlam school district.
- [3] Mr. Thourston did so by making a series of statements to Mr. Ma that were untrue. He then presented a contract which contained none of these promises or representations, but contained a clause purporting to deny contractual effect to all his promises.
- [4] Mr. Ma signed this contract without having obtained legal advice and without seeking to change a comma. He did so because he did not want to show a lack of trust in Mr. Thurston.
- [5] I have concluded that three of the statements made by Mr. Thurston are fraudulent misrepresentations. One of those fraudulent misrepresentations gives Mr. Ma the right to rescind the contract. He is entitled to recover the amount he paid.

II. Background

- [6] This action arises from a contract dated June 29, 2010, between the plaintiff and the defendant Nutriview Systems Inc. ("Nutriview"). The contract is in the nature of a franchise agreement. The plaintiff alleges fraud, misrepresentation, breach of contract and a breach of the Sale of Goods Act, R.S.B.C. 1996, c. 410, on the part of both Nutriview and its principal, the defendant Brian Thurston.
- [7] Nutriview and Mr. Thurston counterclaim, alleging breach of contract by the plaintiff.
- [8] The plaintiff is a technician employed by a cable television service provider. He entered into the contract with Nutriview. He paid a fee of \$414,375 and acquired the right to operate Nutriview's vending machine business in several schools in the Coquitlam School District.
- [9] The plaintiff seeks to set aside the franchise agreement and obtain an order that the franchise fee paid to Nutriview be refunded.
- [10] The plaintiff says that Nutriview and Mr. Thurston made certain misrepresentations to him regarding the business. These misrepresentations, he says, render the Franchise Agreement void ab initio and entitle him to be returned to his pre-contractual position by way of a refund of the franchise fee.
- [11] The plaintiff also argues that certain contracts between Nutriview and Coquitlam schools are not enforceable because of certain provisions of the School Act, R.S.B.C. 1996, c. 412. He also argues that he is entitled to recovery based on unjust enrichment.
- [12] Mr. Ma claims that Nutriview and Mr. Thurston defrauded him by purporting to sell to him something that Nutriview did not own. That is, he says, Nutriview did not, at the time the Franchise Agreement was executed, own any vending machine business or hold any rights over which it could grant franchise rights to Mr. Ma. That business, the plaintiff says, was only acquired the day after the Franchise Agreement was executed, when Nutriview entered into an agreement to purchase the vending machine business from a third party.
- [13] Nutriview and Mr. Thurston say that the Franchise Agreement is a valid and binding contract. Nutriview held all the rights it conveyed in the Franchise Agreement and it could, and did, validly grant the plaintiff the right to operate the business according to the terms of the Franchise Agreement. Moreover, Nutriview and Mr. Thurston deny that there were any misrepresentations made to Mr. Ma about the business.
- [14] The counterclaim alleges that the plaintiff breached the Franchise Agreement by abandoning the business in March 2011. Nutriview and Mr. Thurston say they are entitled to damages on account of that breach. The damages portion of the counterclaim has been severed from this trial.
- [15] The plaintiff had made a claim against Vancity Credit Union but has discontinued it.

Nutriview's Acquisition of the Vending Machine Business

- [16] Mr. Thurston is the sole shareholder and president of Nutriview. Nutriview was first incorporated in 1999 under the name Healthy Balance Nutrition Ltd.
- [17] Mr. Thurston's background is in sales as well as some acting and stunt work years ago. He has some experience in the vending machine business, but for several years has been focussing on his business concept of marketing healthy snacks and beverages in schools.
- [18] Mr. Thurston also has some training in motivational speaking. As will be seen, he is a skilful sales person.
- [19] Let me explain how Mr. Thurston obtained the business he sold to Mr. Ma.
- [20] Chris Farnsworth is a businessman who has been operating a vending machine business in the Vancouver area since 1989. At the beginning of 2010, Mr. Farnsworth owned and operated snack vending machines in 13 schools in the Coquitlam School District.
- [21] Mr. Thurston and Mr. Farnsworth began having discussions about Mr. Thurston purchasing his business in late 2009. These discussions extended into early 2010.
- [22] On March 5, 2010, Mr. Thurston and Mr. Farnsworth executed a document entitled "Joint Venture - Business Expansion" which contained the headings "Confidentiality Agreement", "Non-Circumvention Agreement" and "First Right of Refusal Agreement".
- [23] This document was drafted by Mr. Thurston. It is highly legalistic. For example, the text of the "Non-Circumvention Agreement" includes the following:

With this legally binding agreement, "Parties" hereby irrevocably agree and guarantee each other they shall not, directly or indirectly interfere with, circumvent or attempt to circumvent, avoid, by-pass, or obviate each other's interest and contracts, or the interest or relationship with producers, sellers, buyers, brokers, dealers, distributors, refiners, shippers, financial institutions, technology owners, or manufacturers, to change, increase, or avoid directly or indirectly the spirit or law of the projects undertaken.

"Project". This project is related to the joint venture, business partnership, business expansion, development and implementation of distribution systems, business models, merchandising equipment technology, loyalty/card payment technology systems, remote monitoring of merchandising equipment, point of sale marketing screens, development completed, development in progress, financial projections leading to the business expansion in Canada, the United States and Mexico.

- [24] Mr. Thurston did not explain at trial what all this prolixity was about. The operative part of the document is a right of first refusal that Mr. Farnsworth's company, Sherwood Vending Services, provided to Nutriview. There does not appear to be any consideration for Mr. Farnsworth's agreement to this, but the document is signed by both parties.

- [25] On April 1, 2010, Mr. Farnsworth executed a further document, which Mr. Thurston also prepared, entitled "Letter of Intent". It set out the terms for the sale of Mr. Farnsworth's business to Mr. Thurston's company. The agreement was one-sided: Mr. Farnsworth provided Mr. Thurston's company a "sole purchase option" for a period of 24 months. Mr. Farnsworth obtained nothing in return.
- [26] Mr. Thurston explained his concept of a vending machine business involving healthy snacks and beverages to Mr. Farnsworth. He told him that suppliers would provide snacks and beverages below the wholesale price.
- [27] He told Mr. Farnsworth there were national companies "wanting to partner". He said he believed he could get up to 20 companies willing to pay \$250 per month per school. That would mean \$5,000 per school per month.
- [28] The concept included placing beverage machines in the schools. Mr. Farnsworth only had snack machines. Mr. Thurston's idea was to replace Coca-Cola and Pepsi beverage machines with machines selling healthy beverages in their place.
- [29] After the Letter of Intent was executed, Mr. Farnsworth set up a number of meetings with the principals of middle schools and high schools in Coquitlam. Those meetings took place in April and May 2010. Mr. Farnsworth introduced Mr. Thurston to the school principals and informed them that he was selling his business to Mr. Thurston.
- [30] These meetings were quite a success. They resulted in a number of written "Equipment Placement Agreements" with the schools executed in April, May and June 2010. Mr. Farnsworth had not had written agreements with the schools.
- [31] These agreements resulted from the efforts of both Mr. Farnsworth and Mr. Thurston. Mr. Farnsworth knew the schools' administrators. He enjoyed a good relationship with them. He was able to introduce Mr. Thurston as his colleague.
- [32] Mr. Thurston was able to tell each school about his vision of healthy snacks and beverages for students. He appears to have made a number of representations to the schools. He assured them that they would receive 15% commission on all sales. He told them about the nutritious nature of the intended products. He told them of "remote monitoring". That is, he said, the school would at any time be able to access information online, including the level of product in a vending machine and the commissions owing to them.
- [33] For example, a written presentation was given to Dr. Charles Best Secondary School. It explained:

The mission of NutriView Inc. is to:

1. Provide healthy and nutritious snacks and beverages for students; and
2. Create profits for school administrators that equal or surpass financial levels established by the major soft drink bottlers and traditional vending companies.

[34] The presentation said this about corporate sponsorships:

NutriView Inc. has been successful in attracting corporate sponsorship of nutritional programs to educational institutions. The financial contribution is quite substantial, to the degree that it could equate to, or surpass the dollar amount experienced before the introduction of the Ministry's Nutritional Guidelines.

Eg: Twenty corporate sponsors x \$250 per month equates to \$50,000 per school / per year.

The level of corporate contribution is solely dependent on the volume of schools enrolled in the program. The corporate sponsorship requirement is 80% of School District #43's student enrollment. This requirement is dictated by sponsor corporations in an effort to maximize the reach of their financial contribution. The collective corporate sponsors' perspective is that they will commit financially to those school districts that commit en-mass [sic] to the nutritional program in both snack food and cold beverage segments. Until this requirement is attained, NutriView Inc. will guarantee that the schools enrolled in the nutritional program will maintain the level of financial compensation from the sale of the healthy snack and beverage products. Our intention is to have the corporate financial sponsorship funds replace commissions paid to schools from the sale of healthy products.

[35] In fact, there is no evidence of any corporate sponsorships.

[36] The presentation went on:

NutriView Inc. brings a number of technological advances to vending that improve financial considerations for school administrators.

Remote Monitoring Systems

Remote monitoring systems provide new levels of accounting transparency. School administrators can go online to find real time accounting for individual school vending units. Sales are individually recorded by item and price. (The Monitoring System also guarantees immediate replenishment reliability).

Flat-Screen Educational Monitors

Flat-screen educational monitors use text and graphics to promote positive nutrition and active lifestyle choices. Students are encouraged to participate in their own healthy product marketing on nutritional monitors.

[37] There remain no remote monitoring and no flat-screen educational monitors, either during the 2010-2011 school year or since.

[38] The Equipment Placement Agreements with the various schools are largely the same. They are dated between April 30, 2010 and June 11, 2010. They covered 11 schools: Centennial Secondary School, Pitt River Community Middle School, Moody Middle School, École Maple Creek Middle School, Hillcrest Middle School, École Banting Middle School, Montgomery Middle School, Scott Creek Middle School, Minnekhada Middle School, École Kwayhquitlum Middle School and Summit Middle School.

[39] Typical of the written agreements is that between Summit Middle School and Nutriview. The "Terms and Conditions" were as follows:

The Supplier or one of its assignees will place in the Location's premises new merchandising equipment or equipment in good working order and will be responsible for the stocking and maintenance of the described equipment.

The equipment shall remain in the initial placement area unless the Supplier or one of its assignees, and the Location choose a new spot.

The Location agrees that the equipment is the sole property of the Supplier.

During the term of this Agreement, Nutriview Systems or its assignees shall be the exclusive supplier of merchandising equipment to the Location. The Location is prohibited from competing either directly or indirectly with Nutriview Systems or its assignees by selling products similar to those sold in Nutriview Systems' equipment.

The Location is in no way responsible for the damage to equipment or product loss.

The Supplier or its assignee will carry insurance on equipment placed.

The school is guaranteed that the financial contribution to the school in the first year of operation from the sale of healthy snack and beverage products will be equal to or greater than the amounts achieved in the previous year of operation. 15%/sales snack and beverage products sold. Subsequent to this, corporate sponsorship will replace funds achieved through the sale of healthy products, or whichever amount is greater. Any shortfall attributable to the decline in school student enrollment will be prorated.

A monthly statement will be available on line for verification of commissions.

Agreement to be for the duration of sixty months from placement of merchandising equipment. The agreement to be reviewed annually to assure it is beneficial for all parties.

Location to give ninety days notice in writing to Nutriview Systems regarding intention to end Agreement. Failing said notice, Agreement will be considered renewed in its entirety.

Time shall be the essence of this Agreement.

All details pertaining to this Agreement will remain confidential between all individuals and or parties involved.

The agreement covered both a beverage and a snack machine.

- [40] The benefit to the schools is 15% commission on the products sold. The funds generated can be used for school purposes, such as band equipment and athletics.
- [41] The agreement refers to "corporate sponsorship". Mr. Thurston felt corporations would pay a fee to be sponsors. These fees he said would likely exceed and replace the 15% commission.
- [42] Messrs. Thurston and Farnsworth agreed that Mr. Farnsworth would operate the business until the end of the 2009-2010 school year. They also agreed that they would meet on June 30, 2010, to conclude a formal agreement for the sale of the business and settle on a purchase price.
- [43] Messrs. Thurston and Farnsworth met on June 30, 2010, and signed a document entitled "Business Purchase Agreement". The agreement was for "goodwill and equipment assets in various locations". It included an agreement by Mr. Farnsworth to engage in "training of staff, employees, agents, assignees of Purchaser". The purchase price was \$68,891.09, comprised of \$20,793.33 for equipment and \$48,097.76 for "goodwill".
- [44] By June 30, 2010, when this transaction occurred, Mr. Thurston had already entered into the Franchise Agreement with the plaintiff.

Sale of the Franchise to Mr. Ma

- [45] Mr. Thurston and Mr. Ma first met on June 2, 2010. Mr. Ma attended at Mr. Thurston's home in North Vancouver to install cable television service on behalf of Shaw Cable.
- [46] At this time, Mr. Thurston had been planning to acquire the business from Mr. Farnsworth and needed to find someone to operate it. To that end, he had placed an ad on a website called Kijiji.
- [47] Mr. Ma was 22 years old at the time. He had sold Amway products in the past and had an interest in "self-improvement" and business. He was very impressed by Mr. Thurston.
- [48] Mr. Thurston told him that he did some motivational speaking and gave him a compact disc featuring T. Harv Eker, a well-known motivational speaker. He told Mr. Ma that he was also in the health products business and gave him some ginseng supplements.
- [49] Mr. Thurston also told Mr. Ma that he had a profitable vending machine franchise for sale. He told them that it covered seven schools for a guaranteed five years in Coquitlam and that the price was \$210,000.
- [50] Mr. Ma was interested in this business opportunity. He told his girlfriend about it and then contacted Mr. Thurston again.

- [51] Mr. Thurston and Mr. Ma met at a coffee shop in North Vancouver a few days later. Mr. Thurston showed Mr. Ma 15-20 pieces of paper with sales figures. These figures were the sales achieved by Mr. Farnsworth.
- [52] Mr. Ma testified that Mr. Thurston said that he had "deals" with a number of suppliers: Frito-Lay, Happy Planet, Kellogg's, Dan-D-Pak, mySmoothie, So Good So Nice and Nature's Path. Mr. Ma took from this that he would get products at wholesale cost or preferred prices from these suppliers.
- [53] Mr. Thurston said, according to Mr. Ma, that he had a corporate sponsorship agreement with EA Sports and that he was about to finalize a similar deal with Lululemon.
- [54] Mr. Ma was also told about "remote monitoring". This was a computer program that would enable Mr. Ma to determine "real time sales", i.e. the level of product in each machine, without having to physically inspect the machine.
- [55] Mr. Thurston also told him that the machines would have "wrapping", that is, advertising by corporate sponsors, which would generate \$150 per month.
- [56] Mr. Thurston told him that the machines would also have interactive screens with corporate logos and this would produce revenue.
- [57] The central promise Mr. Ma relies on in these proceedings was Mr. Thurston's statement that he would buy the business back for the full purchase price within a year if the deal did not turn out the way Mr. Ma thought it would, "no questions asked". Mr. Ma testified that this promise was made on several occasions.
- [58] Mr. Thurston denies much of what Mr. Ma says he was promised. His evidence is that on June 2, 2010, Mr. Ma came to do a cable installation at his home. Mr. Thurston said that the vending machine business came up in the course of conversation with Mr. Ma.
- [59] At the time, Mr. Thurston was seeking to sell the "exclusive right" to operate the vending machine business in Coquitlam. He had placed an ad on the Kijiji website and had received what he called some "quality responses". According to Mr. Thurston, Mr. Ma said he was interested. He contacted Mr. Thurston and they met. Mr. Thurston showed him some sales figures that he had received from Mr. Farnsworth.
- [60] Mr. Thurston agrees that he mentioned product suppliers to Mr. Ma, but denies telling him of any contractual relationship. He did not "recall" telling him of corporate sponsorships.
- [61] Mr. Thurston denied telling Mr. Ma of any "agreement" with EA Sports. He testified that he told Mr. Ma he had conversations with EA Sports in the United States, but he "absolutely" denied telling him EA Sports was "on board". He agreed that he told Mr. Ma he approached Lululemon. Mr. Thurston never did achieve a sponsorship agreement with EA Sports, Lululemon or, for that matter, any other corporate sponsor.

- [62] Mr. Thurston testified that he "never" made a statement assuring Mr. Ma he would buy the business back at full price if Mr. Ma was not satisfied.
- [63] Mr. Thurston was asked in examination in chief whether he tried to dissuade Mr. Ma from getting legal advice. His answer was "absolutely not".
- [64] Mr. Thurston denies promising to buy the business back. His evidence is that he "never" made such a statement.
- [65] I find that Mr. Thurston did make this promise and, as Mr. Ma testified, on more than one occasion. I accept Mr. Ma's statement to this effect.
- [66] The often-quoted words of Mr. Justice O'Halloran in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.) are apposite here:
11. The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency, with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial expression of the truth.
- [67] Mr. Thurston shrewdly painted a rosy picture for Mr. Ma of a high potential of success and profits: remote monitoring, corporate sponsorship, advertising from sponsors, preferential pricing. Yet he appeared to be sufficiently sophisticated to understand that if he made promises to Mr. Ma, omitted them from the contractual document, then included an "entire agreement" clause in the contract, his promises were unenforceable.
- [68] Thus, it is entirely consistent with Mr. Thurston's approach to these negotiations for Mr. Thurston to make a promise of a money back guarantee. He obviously knew that such a promise would give comfort to Mr. Ma.
- [69] In the words of *Faryna v. Chorny*, Mr. Ma's evidence is entirely consistent with the probabilities surrounding the existing conditions.
- [70] On June 10, 2010, Ma paid a deposit of \$38,250. At Mr. Thurston's request, it was made payable to Mr. Thurston personally.

- [71] Mr. Thurston drafted the Franchise Agreement. It was scheduled to be signed on June 29, 2010. Mr. Ma picked it up four to seven days before that. Mr. Ma read it but did not obtain any legal advice. He said that Mr. Thurston told him not to "bother" taking it to a lawyer. Mr. Ma said Mr. Thurston told him that he would "pay a few thousand dollars" and the lawyer would tell him to "sign on the dotted line".
- [72] However, the plaintiff testified that he did discuss the Franchise Agreement with Mr. Chan. Mr. Chan advised him the promise to buy back the franchise should be contained in the agreement. Mr. Ma told him that he did not want to offend Mr. Thurston by asking Mr. Thurston to put his promise in writing. He told the court he did not want to show a lack of trust in Mr. Thurston.
- [73] The defendants argue that the plaintiff's evidence in this regard is not consistent with what he stated when he was cross-examined on an affidavit. He stated in the affidavit that he had not obtained any legal advice. He said that no one had read the agreement but himself. It is clear to me that he and Mr. Chan discussed the contract. If Mr. Chan read the agreement, Mr. Ma is mistaken in his testimony. I am satisfied, however, that Mr. Ma did not take the contract to anyone with legal training.
- [74] Mr. Ma also claimed that he did not understand certain terms of the Franchise Agreement. He said his English was not very good.
- [75] I do not accept this claim. Mr. Ma was asked in cross-examination which words he did not understand. He mentioned formal adverbs such as "hereto" and "hereunder".
- [76] The Franchise Agreement is not written clearly, but Mr. Ma's difficulties do not include the English language. His parents speak Cantonese but he speaks to them in English. All of his schooling was in English. His work at Shaw Cable is conducted in English.
- [77] I also find as fact that Mr. Thurston discouraged Mr. Ma from seeking the advice of a lawyer. The Franchise Agreement is completely one-sided. Mr. Thurston made several promises that are not contained in the document. I conclude that it is far more likely than not that Mr. Thurston told Mr. Ma not to waste money on a lawyer.
- [78] Mr. Thurston's advice in this regard was cynical and manipulative. Mr. Thurston was taking advantage of Mr. Ma's naiveté. A reasonable person in Mr. Ma's position would see the advice for what it was: the mere fact that Mr. Thurston advised him not to see a lawyer would be a cogent reason for Mr. Ma to seek independent legal advice.
- [79] Mr. Ma was entering into the largest financial transaction of his young life. He had only met Mr. Thurston a couple of weeks earlier. Of course he should have sought legal advice.
- [80] But Mr. Ma did not see it that way. He believed and trusted Mr. Thurston and let this trust overwhelm his common sense.

- [81] Mr. Thurston was argumentative in cross-examination. He seemed to consider cross-examination an opportunity to simply debate with Mr. Ganapathi.
- [82] For example, he disagreed with what everyone else understood by the phrase "remote monitoring": a combination of computer hardware and software which would permit a person to determine the sales and inventory of the vending machine by accessing the information online.
- [83] Mr. Thurston argued that remote monitoring was a much more "elastic" concept. The promise of remote monitoring would be met if one were able to go to the vending machine and obtain the information by connecting a handheld device to it.
- [84] That is simply arguing for the sake of arguing. There is nothing "remote" about Mr. Thurston's definition of "remote monitoring".
- [85] The contract was signed on June 29, 2010.
- [86] The Franchise Agreement is between Nutriview and Mr. Ma. It is 16 pages long, excluding schedules. The obligations and covenants of Mr. Ma are many; the obligations and covenants of Nutriview are few.
- [87] The preamble reads as follows:

WHEREAS:

A. Nutriview Systems has developed a unique marketing plan and system of specifications, standards and operating procedures for the development and operation of merchandising equipment and a servicing and maintenance business for the supply, presentation and sale of food and beverage sold in merchandising equipment, primarily in schools. Which reflect the philosophy of Nutriview Systems to promote healthy food and beverage standards;

B. Nutriview Systems has procured the Agreements attached hereto as Schedule "A", and has developed goodwill with respect to its name and business;

C. The Franchisee wishes to acquire the right to sell food and beverage products pursuant to the Location Agreements, utilizing the name and support of Nutriview Systems, and Nutriview Systems has agreed to grant rights to the Franchisee on the terms and conditions contained herein;

[88] Article 1.8 defines "Schedules":

"Schedules": The Schedules to this Agreement, which are incorporated herein by reference and form a part hereof, are as follows:

- (a) Schedule "A" - Service Agreements (written and/or verbal) will be specified;

(b) Schedule "B" - Specifications and Standards, and without restricting the generality thereof but for greater certainty, and operations and procedures manual or manuals and any standards of performance manuals which Nutriview Systems may provide, and any amendments thereto;

(c) Schedule "C" - Equipment and Product Requirements;

[89] The central term of the contract is article 2.1:

2.1 Subject to the provisions of this Agreement and for the term hereinafter specified, Nutriview Systems hereby grants to the Franchisee an exclusive right to operate the Business at and from each Location found within the School District where agreements have been and will be committed to in written and/or verbal form. Termination or expiration of this Agreement shall constitute a termination or expiration of the rights and licence granted herein.

[90] Articles 3.1 and 3.2 set out the fees:

3.1 In consideration of the Franchisee receiving the opportunity to operate the Business, the Franchisee shall pay to Nutriview Systems, forthwith upon the execution of this Agreement, an initial, non-refundable franchise fee in the amount of:

\$414,375.00

Plus 5% GST

\$20,718.75

\$435,093.75

Less Deposit Received

<\$38,250.00>

Balance

\$396,843.75

Plus Equipment Costs

This initial franchise fee shall be deemed to be fully earned by Nutriview Systems when paid and in consideration of the grant by it to the Franchisee of the opportunity to establish and operate the Business as herein provided.

3.2 A royalty shall be payable to Nutriview Systems in the amount of fifteen (15%) percent of receipts from each location where the business is performed.

[91] The termination clause is one-sided. It only provides for termination of the Franchise Agreement by Nutriview:

7. Termination

7.1 Nutriview Systems shall have the right to terminate this Franchise Agreement and the rights granted hereunder (always provided, however, that the covenants set forth in Section 6 (Obligations of Franchisee), Section 9 (Confidentiality), Section 10 (Non-Competition) and Section 11 (Non-Solicitation) shall continue in full force and effect as if the Agreement had not been terminated, and such termination of this Agreement shall be without prejudice to the enforcement of any other legal right or remedy), immediately upon giving written notice of such termination upon the happening of any of the following events:

- (a) If the Franchisee defaults in the due and punctual payment of any amount payable under this Agreement when and as same shall become due and payable;
- (b) If the Franchisee breaches any other of the terms or conditions of this Franchise Agreement, any other agreement or undertaking entered into between Nutriview Systems and the Franchisee, or any of the Agreements with locations or School District, and (if and only if such breach can be remedied) if such breach continues for a period of ten (10) days after written notice thereof has been given to the Franchisee;
- (c) If the Franchisee threatens to cease to carry on business for any reason, including death of one or more persons comprising the Franchisee, or takes or threatens to take any action to liquidate its assets, or stops making payments in the usual course of business; or
- (d) If any person comprising the Franchisee makes or purports to make a general assignment for the benefit of creditors, or if such person institutes any proceedings under any statute or otherwise relating to insolvency or bankruptcy or if any proceeding any under statute or otherwise is instituted against such person.

[92] There is an "entire agreement" provision:

13.6 This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements and understandings between the parties in any way relating to the subject matter hereof.

13.7 It is expressly understood and agreed that Nutriview Systems Inc. has made no representations, inducements, warranties, or promises whether direct, indirect, has collateral, oral or otherwise, concerning this Agreement, the matters contained herein, or concerning any other matter which are not embodied herein.

[93] Finally, article 13.12 provides:

13.12 The Franchisee acknowledges that the Franchisee has had all adequate opportunity to be advised by advisors of the Franchisee's own choosing regarding all pertinent legal and business aspects of this Agreement and the relationship created hereby and that the Franchisee has been requested by Nutriview Systems and its representatives to seek independent advice.

[94] Mr. Ma and Mr. Thurston met on June 29, 2010, at Mr. Thurston's bank. They signed the Franchise Agreement. Mr. Ma gave Mr. Thurston a draft for \$396,843.75.

- [95] There is a factual dispute concerning whether the plaintiff was given the documents comprising Schedule "B". Mr. Thurston's evidence is that at the time they signed the contract, he provided a number of documents constituting Schedule "B", including:
1. a list of products with comments about whether they meet health guidelines;
 2. a document called "Plan/Timelines to Market Healthy Products in Educational Institutions";
 3. a manual for Automatic Products International Ltd. merchandising equipment;
 4. a "Programming Guide" for Crane Merchandising Systems;
 5. an instruction manual for Automatic Products International Ltd. Snackshop LCM3-LCM4;
 6. a manual for Rowe 5900 snack/candy vending machine;
 7. a document called "Healthy Balance Net Proceeds from Beverage Sales";
 8. a Ministry of Education and Ministry of Health publication called "Guidelines for Food and Beverage Sales in B.C. Schools"; and
 9. a document from "Dash B.C." called "Healthy Fundraising for Schools".
- [96] Mr. Ma's evidence is very clear: he did not receive any of these documents, except for the eighth document listed, the Guidelines for Food and Beverage Sales.
- [97] I accept Mr. Ma's denial. It is more consistent with all the circumstances than the confident assertion of Mr. Thurston.
- [98] After signing the contract, Mr. Ma took the necessary steps to commence operating the business. He purchased a business licence, registered with the Canada Revenue Agency for GST purposes and registered with WorkSafeBC.
- [99] Mr. Ma received assistance from Mr. Farnsworth. Mr. Ma and his brother, Raymond, met Mr. Farnsworth at one of the schools in early July. Mr. Farnsworth showed him how to load and operate the vending machines. He gave him keys and coin counting equipment.
- [100] Mr. Farnsworth told him of the suppliers he had used: Vending Products of Canada and Olympic Distributors. Thanks to Mr. Thurston's efforts, Mr. Ma did receive 24 complimentary cases of So Good So Nice soy beverage products.
- [101] Mr. Ma said he soon learned there were no other deals with distributors or suppliers. He said that the products cost 40-45% of the retail price. He had understood from his discussions with Mr. Thurston that his profit margin would be much larger.
- [102] Lori Evans was a contractor engaged by Mr. Thurston or Nutriview to install remote monitoring. She worked on this in November and December 2010, but the program was not successful. Even today, there is no remote monitoring.

[103] Mr. Ma operated the business starting in the fall of 2010. He testified that he was paying more for product than he was given to understand. He was unable to pay Nutriview the 15% commission under the Franchise Agreement. He was also unable to pay the 15% commission to the schools.

[104] The schools expressed concerns almost from the beginning. On September 8, 2010, the principal of Moody Middle School sent Mr. Farnsworth an email:

Hi Chris. The kids are fascinated with our new drink machine and are buying product just to see it work. I wonder, though, where the healthy choices are? We cannot sell pop whether or not it is diet, so the Orange Crush has to go (it has gone - sold out!) and cannot be replaced. Could we possibly balance the flavoured water with some flavoured soy milk products? I expected to see these from the brochures that Brian showed us. Also wondering where the snacks are for the snack machine. The sooner we can have that fully loaded, the sooner we all see a return.

Thanks Chris.

Terry Watt

[105] Mr. Farnsworth forwarded the email to Mr. Thurston with a message indicating that Moody Middle School was not an isolated example:

Hi Brian. I wonder if you would like to reply to this email from Terry Watt? I have had several calls and comments along these lines in the last two days and my reply is that this is a temporary situation and they will start to see the changes in the next few weeks. Better let me know if there is any delay, I don't want to look foolish.

[106] Mr. Farnsworth testified that the problems continued throughout the fall. Mr. Ma wondered where to source products. When Mr. Farnsworth called Mr. Thurston to learn where to purchase product, Mr. Thurston told him he did not have suppliers and that Mr. Ma should use Mr. Farnsworth's suppliers.

[107] Two examples of dissatisfaction are in emails received by Mr. Farnsworth in November 2010. On November 16, he received this message (although addressed to Mr. Thurston) from the principal at Moody Middle School:

Hi Brian. I thought we were to be receiving monthly statements and payments for the vending sales. Have not heard anything and we are into the third month. Please respond.

[108] On the same day, the head secretary at Summit Middle School sent this message:

Hi Chris - I've tried to call you a couple of times on your cell and at home, but no answer. Left a message at the home # I have. Now that the new machines are in place, I am wondering how to monitor them. I have reviewed the contract and it indicates that "a monthly statement will be available online for verification of commissions". I do not see anywhere in the contract or portfolio any indication of how to do that, and since we're up and running, other than Raymond coming and assisting us with filling the machines, and float, etc., I have not had any

'administrative' followup regarding how to obtain this monthly statement or view/verify commissions. Would you or [Brian], or whomever is representing you in this respect, please contact me at your earliest convenience? That would be great - thanks.

[109] Mr. Farnsworth said he received enquiries from the schools asking about products, remote monitoring and video screens. When he contacted Mr. Thurston about these matters, he was told there were "glitches" with the video screens and that new products would be available within a couple weeks.

[110] The problems persisted. By February 2011, schools still lacked product and had no remote monitoring or video screens. Mr. Farnsworth said he was embarrassed.

[111] In February 2011, Mr. Ma became dissatisfied with the contract he had signed. He sought legal advice from Mr. Ganapathi in late February.

[112] Mr. Ma testified that he spoke by telephone to Mr. Thurston on March 3, 2011. He told Mr. Thurston that the arrangement was not working out and that he wished to be repaid the franchise fee, as Mr. Thurston had promised. He said that Mr. Thurston said "I never said that." He told Mr. Ma that he could sell the business for perhaps \$285,000.

[113] After the telephone conversation, Mr. Ma wrote to Mr. Thurston as follows:

After getting off the phone with you today, I have put a lot of thought about continuing to operate this business. I am now sure that this business is not well suited for me and I want to withdraw from this business. I remember several occasions you stated to me that you will provide me with "a one year buy back guarantee", if the business didn't turn out the way you told me it will turn out to be. The total drink sales are not \$2000/month per school as discussed and the snacks are not averaging \$1000/month per school as discussed. And also my margin are no where close to 40%. Those reason I have listed are more than enough for me to justify my decision on using your offer of the one year buy back guarantee.

[114] A few minutes later he wrote a further email:

Also, why is there a dramatic change in the price I paid for the business and what you think its worth now? I bought the business for \$414,000 plus GST and now you have stated that the business is only worth \$285,000. Why is there such a big change since purchasing this franchise?

[115] On March 4, Mr. Ma called Mr. Farnsworth and told him that Mr. Thurston had sold the business to him before he acquired it from Mr. Farnsworth.

[116] Mr. Farnsworth testified that he was angry, insulted and frustrated. He wrote to Mr. Thurston a few days later, on March 7, 2013. His email provides:

Brian, I got your message but I have no desire to talk to you. You have lost all credibility in my mind I no longer visit the schools its too embarrassing.

I was present in many meetings with you and school Principals where deals and contracts were made between you and them. Specifically, where are the sponsors that you implied were waiting to come on board? Where are the new products? You said you had arrangements with manufacturers i.e.: Dan-D-Pac, Natures Path, Ruth's, Kellogg's, SoGood, SoNice, My Smoothy, Happy Planet ect. [sic] Where are the Remote Monitoring devices? Where are the Video Screens? I haven't seen one working model yet. Where is all this giving back which you were so vocal about? I think we all realise now that you were less than honest and the some Principals are freely calling you much worse.

If you don't address these concerns immediately I believe you will be in breach of your contract and could possibly be in a position where you are asked to remove your equipment.

I feel very sorry for Harry for he has been left holding the bag so to speak and definitely taken to the cleaners. I know what he paid you and I know some of the terms of the sale and for the record he didn't divulge that information to me.

[117] Mr. Thurston did not reply to Mr. Ma's email, but did reply to Mr. Farnsworth. His email to Mr. Farnsworth of March 8, 2011, reads as follows:

Here we go again with you and your over the top responses. Again, you and the schools will find that we at Nutriview have putting together exactly what we presented to the schools. As you recall, we have the first year in the agreement to complete all product and services offerings. You and whom ever you are referring to in your email reply are premature in your assesment [sic] of my character and my company's ability to follow through with our commitments. You have raised and articulated the very same concerns last school year when we signed the agreements with the schools. Do you also remember how badly that you felt when you were proven wrong? Do you recall asking me to forgive you? Well be prepared to do so once again.

With respect to your contract with me to act as a supervisor to the franchisee to take care of any and all concerns regarding the business, you sir, have let me down. With respect to your contract with me to act as a liaison between the School District and Nutriview Systems Inc. You effectively now, have let me, the school district, and yourself down. Why is this the first time that you have communicated to me that there are serious problems with our agreements with the Schools? There are all kinds of operating issues with Harry that I am only now finding out. Why, because you have not been around to communicate anything to me or any other representative of my company.

Chris, now that you have identified some significant problems with respect to the business, you have a descision [sic] to make. Either you will, as contracted, liaise between Nutriview Systems Inc. and the Coquitlam School district to resolve the issues or, to not communicate with Nutriview and further contribute to the problems. In which case, if the later [sic] is chosen then we have no choice but to name you in the lawsuit that will be filed shortly. This is not what I want had expected nor discussed with you. You gave me your assurance that you would handle the Franchisee when and if issues arrive. You failed in this. I can not stand idly by and have you, and as you have expressed in your email, others, maliciously slander my character and or my

company.

You now have breeched [sic] your agreement with me. You have been paid to do a job. The choice is yours, chose carefully.

[118] Mr. Ma walked away from the business at the beginning of March 2011.

After Mr. Ma Left the Business

[119] After Mr. Ma left, Mr. Thurston obviously needed to service the machines or locate someone to do so. He needed someone to run the business. He called Ashik Kara in this regard.

[120] Mr. Kara had originally contacted Mr. Thurston in February or March of 2010. He was responding to an advertisement on Craigslist about a business opportunity. He learned that Mr. Thurston wanted "hundreds of thousands" of dollars for the business. Mr. Kara did not have the money to invest and did not think more about it.

[121] Mr. Kara heard from Mr. Thurston in March 2011. He was told that the other operator had walked away from the contract and that Mr. Thurston needed the machines serviced.

[122] They agreed to split revenue on a 50/50 basis for the rest of the school year. Mr. Kara's immediate task was to find product, fill the machines, get the machines back in working order and pay commissions to the schools.

[123] The machines were empty. There were no keys. Mr. Kara located a locksmith and re-keyed the machines. He found there was no money in any of the machines.

[124] Mr. Thurston told Mr. Kara the schools had to be paid for unpaid commissions for the period of January to March 2011. However, Mr. Kara learned that they had not been paid for the entire 2010-2011 year to date. Mr. Kara paid \$6,700 to the schools as commission, from his own pocket.

[125] Mr. Kara and Mr. Thurston made arrangements for the following school year. The agreement they reached was that Mr. Kara would pay \$2,000 per month to Mr. Thurston and continue to operate the business, keeping any profit he earned.

[126] The business has done well. The two schools that left, Dr. Charles Best Secondary School and Pinetree Secondary School, came back to Mr. Kara. There are now six high schools under five year agreements and a total of 17 schools. He was able to add Port Moody Secondary School and Glen Eagle Secondary School.

[127] Mr. Kara testified that Lori Evans was installing remote monitoring. They were tested for one month in 2011, but were taken offline after a dispute between Ms. Evans and Mr. Thurston resulted in her leaving.

Procedural History

[128] The plaintiff commenced this action on March 11, 2011. On the same day, he made an application without notice seeking an injunction restraining the defendants Nutriview and Mr. Thurston from transferring or using funds. The matter was heard that day and the following order was made:

That the Defendants are restrained and enjoined from transferring, selling, disposing of, encumbering or otherwise dealing with any assets or other property in which the Plaintiff has or may have an interest, including specifically accounts of the Defendants at the Vancity Credit Union at Lynn Creek Community Branch, 1370 Main Street in North Vancouver, British Columbia, [to a maximum of \$435,093.75,] in any manner whatsoever pending final determination of this action or the written agreement of the Plaintiff or without a further Order of this Court, pursuant to s. 39 of the Law and Equity Act and Rule 10-1 and 10-4 of the Supreme Court Civil Rules.

[129] On March 29, 2011, the defendants Nutriview and Mr. Thurston filed a Response to Civil Claim. They also filed a counterclaim, alleging that the plaintiff breached various provisions of the Franchise Agreement.

[130] On June 6, 2011, the plaintiffs applied to set aside or, in the alternative, vary the injunction. After cross-examination on affidavits, the application to set aside the injunction came before Mr. Justice Savage on July 12, 2011.

[131] Savage J., on the basis of the material before him, concluded that the test for a Mareva injunction had not been met: *Ma v. Nutriview Systems Inc.*, 2011 BCSC 1033.

[132] The court stated that the Mareva injunction has a two-part test:

[10] A Mareva injunction is a harsh and exceptional remedy that should only be available in the clearest of cases; see *Netolitzky* at paragraph 22. In order to obtain an injunction, the applicant must:

- (a) establish a strong prima facie case on the merits; and
- (b) the interests of the parties, upon being balanced, taking the relevant circumstances into account, must favour the granting of the injunction; see *Mooney v. Orr*.

[133] He concluded:

[16] In my opinion, treating this matter as a hearing de novo, the plaintiff has failed to make out a case for a Mareva injunction on both branches of the test. This is not a case where fraud is admitted. To the contrary, the allegation of fraud is hotly contested. From all the documentary evidence and course of dealings between Thurston and Farnsworth which are now before the court, arguments are advanced that reasonably could give rise to a defence to the action. In my view, a strong prima facie case, the first branch of the test, has not been made out.

[17] Similarly I am not convinced that a balancing of the interests of the parties favours the granting of an injunction. Substantial arguments will be made based on the submissions before me that there was no fraud as alleged. Nutriview's account, which transactions are before the court, reveals a series of transactions which appear to be made in the ordinary course of business. Although there has been repayment of a shareholder's loan, I do not view the payments to Thurston as raising the spectre that the accounts will be depleted to avoid judgment. However, I view the matters regarding GST registration and payment or non-payment at this point as raising such a spectre. Of course, should Thurston fail to follow through on what he says he is doing with respect to the GST owing, that might well affect his credibility in the forthcoming action.

[134] The injunction was set aside. The plaintiff then applied for leave to appeal the decision of Savage J. It was dismissed on October 3, 2011, in reasons indexed at 2011 BCCA 389.

III. Analysis

[135] In entering into the Franchise Agreement of June 29, 2010, Mr. Ma made an entirely improvident bargain.

[136] There was no expert evidence concerning the value of what Mr. Ma acquired. There is, however, some evidence: Mr. Thurston paid \$68,891.09 to Mr. Farnsworth for his business, comprised of \$20,793.33 for equipment and \$48,097.76 for goodwill. What Mr. Thurston added to it in value was his obtaining of written contracts in place of the oral arrangements that Mr. Farnsworth had with the schools. In addition, Mr. Thurston had a vision and planned to implement remote monitoring, corporate sponsorships, healthy and nutritional products, the addition of beverage machines and so on. Arguably, all of that is substantial.

[137] The sales figures Mr. Farnsworth provided to Mr. Thurston were also in evidence. In the 2008-2009 school year, Mr. Farnsworth's total sales were \$125,508.60. Less purchases (\$60,112.10) and commissions (\$17,432.08), there was a profit of \$47,964.42 that year, or approximately 40% of gross sales. For the 6-month period of September 2009 to February 2010, the total sales were \$76,428.85. Less purchases (\$38,657.71) and commissions to the schools (\$11,318.35), there was a profit of \$26,452.79, or approximately 35% of gross sales.

[138] From September 2010 to the beginning of March 2011, Mr. Ma's sales totalled approximately \$111,000. However, this amount included beverage sales, something that Mr. Farnsworth's sales figures did not. Mr. Ma's evidence is that the cost of product was 35-40%, or approximately \$40,000.

[139] The arrangement that Nutriview made with Mr. Kara is further evidence of the value of the business. For the 2011-2012 school year and thereafter, Mr. Kara's evidence is that he paid Mr. Thurston \$2,000 per month to operate the business. That is a small fraction of what Mr. Ma paid.

[140] But the law does not protect Mr. Ma from entering into an improvident bargain or even a highly improvident bargain.

[141] It is noteworthy that the plaintiff does not allege that the Franchise Agreement is unconscionable. The only reference to unconscionability is found at paragraph 16 of the Notice of Civil Claim. The plaintiff alleges that the 15% royalty on sales payable to Nutriview is "harsh and unconscionable".

[142] However, that provision of the Franchise Agreement has not been enforced between the parties. Mr. Thurston stated that he would not look for such a payment until the business was profitable.

[143] Mr. Ma made a number of arguments other than misrepresentation. I will explain briefly why none of them, in my view, can succeed.

(i) Sale of the Franchise to Mr. Ma Before Nutriview Acquired It

[144] The plaintiff argues that on June 29, 2010, Nutriview did not own the business and had nothing to sell Mr. Ma. The result, the plaintiff says, is that the Franchise Agreement is void ab initio. The plaintiff argues that "it is illegal to sell something that the seller does not own as being against public policy".

[145] This argument cannot succeed. That is because the Sale of Goods Act has no application to this transaction.

[146] Sections 16 and 26 of the Sale of Goods Act provide:

16. In a contract of sale or lease, unless the circumstances of the contract are such as to show a different intention, there is

(a) an implied condition on the part of the seller or lessor that

(i) in the case of a sale or lease, the seller or lessor has a right to sell or lease the goods, and

(ii) in the case of an agreement to sell or lease, the seller or lessor will have a right to sell or lease the goods at the time when the property is to pass or the lessee is to take possession of the leased goods,

(b) an implied warranty that the buyer or lessee is to have and enjoy quiet possession of the goods, and

(c) an implied warranty that the goods are free from any charge or encumbrance in favour of any third party, not declared or known to the buyer or lessee before or at the time when the contract is made.

26. (1) Subject to this Act, if goods are sold by a person who is not the owner of them, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner's conduct precludes the owner from denying the seller's authority to sell.
- (2) Nothing in this Act affects the validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction.

[147] The Sale of Goods Act only applies to transactions that are primarily for the purpose of selling goods. In *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, the Supreme Court of Canada discussed the application of the Sale of Goods Act to contracts for both goods and other things. The Court put it this way at para. 67:

[67] In order for the Sale of Goods Act to apply, a contract must primarily be for the purpose of selling goods. If the sale of a good is merely incidental to what is primarily a contract for services, then the statute will not imply a warranty. As Legg J. observed in *Gee v. Whitespot Ltd.* (1986), 7 B.C.L.R. (2d) 235 (S.C.), in order to come within the Sale of Goods Act, a contract need not be one exclusively for the sale of goods. However, the sale of a good must be the primary purpose of the contract. Whether a contract is primarily one for the sale of goods or primarily one for services depends upon the essential character of the agreement. As G.H.L. Fridman wrote at p. 25 of *Sale of Goods in Canada* (2nd ed. 1979):

if the primary object of the contract is the transference of property in something which was not originally the property of the "buyer", the contract will be one of sale of goods: but if the primary purpose of the parties is the performance of certain work, or the provision of services, incidentally to which property in goods is to pass from one party to another, the contract will not be one of sale of goods.

[148] The contract between Nutriview and Mr. Ma cannot be said to be primarily for the sale of goods. The goods are not even mentioned in article 2.1, the operative term of the Franchise Agreement:

2.1 Subject to the provisions of this Agreement and for the term hereinafter specified, Nutriview Systems hereby grants to the Franchisee an exclusive right to operate the Business at and from each Location found within the School District where agreements have been and will be committed to in written and/or verbal form. Termination or expiration of this Agreement shall constitute a termination or expiration of the rights and licence granted herein.

[149] The balance payable on June 29, 2010, was described in article 3.1 as "\$396,843.75 Plus Equipment Costs". I take this to mean that the Franchise Agreement included the sale of the existing vending machines, but that Mr. Ma would have to pay for the new beverage machines that were to be added.

- [150] The value of the existing machines was not substantial. Mr. Thurston paid less than \$21,000 for the machines which he acquired the following day. Clearly, the sale of the vending machines to Mr. Ma was merely incidental to the central purpose of the contract.
- [151] Even if the Sale of Goods Act applies, s. 26 does not confer any rights on a purchaser. It is not a rule of law but a principle. Section 26 is a codification of the legal maxim expressed in Latin as *nemo dat quod non habet*. That is, a purchaser acquires no better title to goods than the vendor held. A seller cannot be in breach of s. 26 of the Sale of Goods Act.
- [152] The sale of the franchise to Mr. Ma in this case is arguably a breach of an implied condition described in s. 16(a)(i), that is, the seller did not have the right to sell the "goods". But what flows from that breach? The plaintiff suffered no harm because of it. If the Act applied and the plaintiff had learned of the breach before it was rectified, the plaintiff may have had the right to rescind the agreement. But the breach is meaningless because there never was any knowledge. It was many months after the breach had been cured that Mr. Ma first learned of it.

(ii) Validity of Nutriview's Contracts with the Schools

- [153] Part of the plaintiff's claim is that the Location Agreements or Equipment Placement Agreements that Nutriview entered into with the schools are voidable. The plaintiff amended his pleadings and argues that the power to enter into such contracts is reserved for the secretary/treasurer of the school district.
- [154] Chris Nicolls, the assistant secretary/treasurer with the Coquitlam School District, testified that the school district has an internal policy that contracts of a certain length ought to be authorized by the secretary/treasurer. He conceded, however, that this internal policy has not been enforced.
- [155] In this regard, the plaintiff relies on s. 23 of the School Act, R.S.B.C. 1996, c. 412:

23. (1) A board must

- (a) appoint a secretary treasurer of the board, and
 - (b) arrange for the bonding of the secretary treasurer in an amount the board considers adequate.
- (2) The secretary treasurer of a board is its corporate financial officer and must perform those duties set out in the regulations.

[156] Section 7 of the School Regulation, B.C. Reg. 265/89 provides:

7. (1) The secretary treasurer of a board shall:
- a. become familiar with and comply with the accounting and administrative procedures specified by the minister and shall keep a record of the proceedings of the board and perform the other duties the board may assign in relation to its corporate affairs,

- b. perform the duties specified for a secretary treasurer by the Act and the regulations, rules or orders made under it, and
 - c. perform those duties assigned by the board.
- (2) The records referred to in subsection (1) (a), and all books, accounts, vouchers and papers of the board, shall at all times be subject to inspection by the minister or his or her designated representative and the comptroller general of the Province.

[157] I do not find anything in those provisions restricting the ability of the schools to enter into contracts. In any event, a failure by a school administrator to follow an internal district policy does not affect the validity of a contract with a third party. This aspect of the claim must be dismissed.

(iii) Unjust Enrichment

[158] The plaintiff also argues that Nutriview and Mr. Thurston were unjustly enriched when they carried on the operation of the business after Mr. Ma decided not to continue and walked away.

[159] The elements of a claim for unjust enrichment are well-known:

1. an enrichment of the defendant;
2. a corresponding deprivation of the plaintiff; and
3. an absence of juristic reason for the enrichment.

See *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.

[160] The relationship between the parties was governed by a contract. The plaintiff abandoned the business in March 2011. Nutriview was required to perform its obligations under the contracts that it had with schools in the Coquitlam School District. This is also in line with Nutriview's duty to mitigate its damages.

[161] The contractual relationship between the parties provides a juristic reason for any enrichment and corresponding deprivation. I agree with the defendants that the doctrine of unjust enrichment has no application here.

Duty of Good Faith and Legal Advice

[162] The parties to a franchise agreement are entitled to act in their own self-interest, but they must deal honestly and reasonably with each other.

[163] What flows from Mr. Thurston's advice that the plaintiff ought not to consult a lawyer? I conclude that no cause of action arises. First, I note that article 13.12 of the Franchise Agreement provides:

13.12 The Franchisee acknowledges that the Franchisee has had all adequate opportunity to be advised by advisors of the Franchisee's own choosing regarding all pertinent legal and business aspects of this Agreement and the relationship created hereby and that the Franchisee has been requested by Nutriview Systems and its representatives to seek independent advise.

[164] Notwithstanding this clause, I have found as a fact that Mr. Thurston did actively discourage Mr. Ma from obtaining advice.

[165] However, the only possible cause of action arising from this bad advice would be negligence in the provision of advice, that is, negligent misrepresentation.

[166] That requires Mr. Ma to establish that Mr. Thurston owed him a duty of care in this regard and that he reasonably relied on his advice.

[167] Mr. Thurston did not owe Mr. Ma such a duty of care. In *Andronyk v. Williams* (1985), 21 D.L.R. (4th) 557 (Man. C.A.), Mr. Justice O'Sullivan said the following with respect to a duty of care between parties engaged in pre-contractual negotiations:

[92] Representations made in the course of negotiations, but not incorporated into a contract as a term thereof, are not actionable in damages for economic loss, unless they are made in breach of an actionable duty to take care. The fact that a representation made by a person with such duty was made in the course of pre-contract negotiations does not preclude tortious liability. Whether a duty of care exists depends on circumstances pointing to a relationship between the plaintiff and defendant, according to which it is reasonable for the plaintiff to expect there is an actionable duty to care in making statements which are foreseen to cause economic loss. The fact that parties are in pre-contract negotiations is not in itself sufficient to create such an actionable duty of care.

[168] At most, Mr. Thurston owed Mr. Ma a limited duty of care to provide accurate information regarding the business. That is based on the imbalance of knowledge between Mr. Thurston and Mr. Ma, the special relationship envisaged by the Supreme Court of Canada in *Queen v. Cognos Inc.*

[169] However, I agree with the defendants that the imposition of a duty of care on arm's length negotiating parties does not extend to the protection of Mr. Ma's legal and/or economic interests.

[170] Moreover, it was unreasonable for Mr. Ma to rely on such advice in any event. He was entering into a large financial transaction. He should have sought independent legal and business advice. He should never have relied on Mr. Thurston's cynical advice to the contrary.

Misrepresentation

[171] Three potential causes of action arise in the context of pre-contractual representations: fraudulent misrepresentation, negligent misrepresentation and innocent misrepresentation. The plaintiff in this case alleges only fraudulent misrepresentation and negligent misrepresentation.

[172] In my view the exclusion clause in the contract operates to exclude liability for negligent but not fraudulent misrepresentation.

[173] The test for fraudulent misrepresentation was set out by Bauman J.A., as he then was, in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 at para. 55:

[55] Counsel for UPE cited G.H.L. Fridman, *Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 309-310, where the learned author described a case of fraudulent misrepresentation as consisting of four elements:

- (a) the wrongdoer must make a representation of fact to the victim;
- (b) the representation must be false in fact;
- (c) the party making the representation must have either known it was false or made it recklessly without knowing whether it was true or false; and
- (d) the victim must have been induced by the representation to enter into the contract.

[174] In G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 284, Professor Fridman described the distinction between fraudulent and non-fraudulent misrepresentations. He stated that a fraudulent representation "is one which is made with knowledge that it is untrue and with the intent to deceive."

[175] At 287, Professor Fridman went on to state that an allegation of fraud is a very serious matter:

Clearly, while the courts will protect an innocent party from gross fraud, they will not attempt to protect a contracting party from all types of conduct. In accordance with the general principles of the law of contract, a party is expected to look out for himself, and make his own bargains. If he has done foolishly, that is his own fault and he is left to his own devices. Only from totally improper conduct, in this instance fraud, will he be granted protection and a remedy by the courts.

[176] The tort of negligent misrepresentation was described by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;

- (3) the representor must have acted negligently in making said representation;
- (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Exclusion Clause

[177] Article 13.7 of the Franchise Agreement provides:

13.7 It is expressly understood and agreed that Nutriview Systems Inc. has made no representations, inducements, warranties, or promises whether direct, indirect, has collateral, oral or otherwise, concerning this Agreement, the matters contained herein, or concerning any other matter which are not embodied [sic] herein.

[178] Such clauses will generally exclude a party's liability for misrepresentations that are not fraudulent. In *Peters v. Parkway Mercury Sales Ltd.* (1975), 10 N.B.R. (2d) 703 (C.A.), there was a used car guarantee that included the following provision:

This guarantee is expressly IN LIEU OF all other guarantees, warranties or representations, express or implied, including ALL IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS, and of all other obligations or liabilities on the part of the dealer with respect to this vehicle, any part thereof or the sale thereof. This guarantee must be presented with the vehicle described herein for any and all adjustments and is not transferable or assignable.

[179] The New Brunswick Court of Appeal concluded:

[28] In my opinion, the exemption provision quoted above has the effect of excluding all liability for any misrepresentation except where the misrepresentation is one of a fraudulent character rendering the contract of sale voidable.

[180] That decision was relied upon by Wong Co. Ct. J. (as he then was) in *Leimbigler v. Rabbiosi*, [1983] B.C.J. No. 843 (Co. Ct.). This case involved the purchase of a cattle ranch. It was alleged that the defendant had made negligent misrepresentations in the course of pre-contractual dealings. The contract provided:

It is understood and agreed by and between the Vendor and the Purchaser that there are no further or other representations, warranties, undertakings or agreements save those contained herein.

[181] Judge Wong held at para. 48:

[48] The wording of the exclusion clause is explicit and broad: it excludes "other representations" and "warranties". Not only does the exemption provision have the effect of excluding liability for indemnification in warranty, but would also, I venture to say, go so far as to exclude all liability for any misrepresentation, except fraud.

Franchise Agreements

- [182] There has been some discussion in the case law about the nature of the franchisor-franchisee relationship. Courts have recognized that there is a common law duty of good faith between a franchisor and a franchisee. There is no fiduciary duty: *Jirna v. Mister Donut of Canada*, [1975] 1 S.C.R. 2.
- [183] A duty of good faith is different from a fiduciary duty. In *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), the Ontario Court of Appeal put it this way:
- [69] There is at least one important difference between the duty of good faith and a fiduciary duty. If, for example, A owes a fiduciary duty to B, A must act only in accordance with B's interests when A exercises its powers or exercises a discretion arising out of the relationship: see *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.) at p. 467 O.R., p. 289 D.L.R., leave to appeal to the Supreme Court of Canada refused [1981] 1 S.C.R. xi; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161. If, on the other hand, A owes a duty of good faith to B, A must give consideration to B's interests as well as to its own interests before exercising its power. Thus, if A owes a duty of good faith to B, so long as A deals honestly and reasonably with B, B's interests are not necessarily paramount: see for example *Mason v. Freedman*, [1958] S.C.R. 483, 14 D.L.R. (2d) 259.
- [184] In at least one case, the duty has been described as one of *uberrima fides*, that is, "utmost good faith": *Machias v. Mr. Submarine Ltd.* (2002), 24 B.L.R. (3d) 228 (Ont. S.C.J.). That characterization has not been supported by other cases. I conclude that the duty is one of simple good faith. See also: *TDL Group Ltd. v. Zabco Holdings Inc.*, 2008 MBQB 239, and *Ismail v. Treats Inc.*, 2004 NSSC 16.
- [185] The duty of good faith does not rise to a fiduciary standard. The duty of good faith requires parties to deal honestly and reasonably with each other, but permits the parties to act in their own self-interest.
- [186] The plaintiff argues that the defendants made numerous, material, negligent and/or false representations "amounting to fraud" in order to induce the plaintiff into purchasing the business. These alleged misrepresentations include:
1. that the remote monitoring system would cut down on time and labour costs;
 2. that Nutriview had a unique marketing plan;
 3. that there were 11 written agreements with schools for five years and six agreements for one year, when those agreements were in fact contrary to school district policies and are voidable;
 4. that Nutriview had a manual for operating procedures;
 5. that Nutriview would provide continuing advice and guidance;

6. that the machines would have promotional material or "wrapping" and that would generate revenue;
7. that Mr. Thurston would buy back the franchise at the price paid for it if Mr. Ma was not satisfied;
8. that Nutriview had agreements with suppliers to provide products at the best prices;
9. that Nutriview had a corporate sponsorship agreement with EA Sports and there was a similar deal with Lululemon on the horizon; and
10. that each machine would have a video screen.

[187] These claims conflate two different legal concepts. The plaintiff alleges fraud, but many of the allegations, even if proved, would not amount to fraud. Generally, a promise to perform in a particular way, if unmet, does not become fraud.

[188] For example, the fifth allegation listed above, that Nutriview would provide continuing advice and guidance, is not a representation of fact. It is a promise to perform. In fact, it is a promise contained within article 5 of the Franchise Agreement. However, the plaintiff did not advance a breach of contract claim in this regard.

[189] In any event, many of these claims are not established in the evidence. Many, even if proved, are not representations of fact and could not amount to fraud. Moreover, the plaintiff faces the difficulty that these representations are not contained in the written Franchise Agreement, which has an entire agreement clause. To use the words of Judge Wong, I find that the entire agreement clause contained in article 13.7 is "explicit and broad" and would "go so far as to exclude all liability for any misrepresentation, except fraud."

[190] In short, the plaintiff's argument in this regard and allegations of fraud are made loosely. Allegations of fraud are very serious. They must be proved by clear and cogent evidence.

[191] The general rule is that when a person promises to do something and fails to fulfill his or her promise, that is not a misrepresentation of fact. It is only a promise to perform in the future.

[192] However, it is a misrepresentation if a person makes a statement of his/her present intention and in fact has no such intention.

[193] This distinction was discussed by Professor Fridman in *The Law of Contract in Canada*, 6th ed., at 286:

There must be a positive misstatement of fact. "Representation to give grounds for the avoidance of a contract must be matters of fact and this means either an existing fact or a past event."

However, an intention as to the future may in some instances be treated as a fact. For example, in *International Casualty Co. v. Thomson* [(1913), 48 S.C.R. 167] the plaintiff contracted to buy shares in an insurance company on condition that within a fixed time the company would be in business

in Vancouver and the plaintiff would be made the medical examiner of the company for that city. When the stipulated event did not happen it was held that the contract could be rescinded for fraudulent misrepresentation. The "intention" of the company to do business in the future, was a misstatement as to fact, that is, its present state of mind.

[*Italic emphasis in original; underlining added.*]

[194] The point was also made by G.H. Treitel in *The Law of Contract*, 13th ed. (London: Stevens & Sons, 2011) at 364:

A person who promises to do something may simply be making a statement as to his future conduct; if so, he does not misrepresent a fact merely because he fails to do what he said he would do. But he may also be making a statement of his present intention; if so, he does misrepresent a fact if, when he made the statement, he had no such intention. The courts tend to construe statements as to the future in the second of these two ways in order to protect the interests of persons deceived by them. In *Edgington v. Fitzmaurice*, the directors of a company procured a loan of money to the company by representing that the money would be used to improve the company's buildings and to expand its business. In fact the directors intended to use the money to pay off the company's existing debts. They were held liable in deceit. Bowen L.J. said:

There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

[195] There are three misrepresentations which, I find, were made. First, Mr. Thurston told Mr. Ma that there was a corporate sponsorship agreement in place with EA Sports and that he was about to finalize a similar deal with Lululemon. That statement was not true. Second, Mr. Thurston told Mr. Ma that he had arrangements with a number of suppliers or distributors to provide products at preferred prices. This was not true either.

[196] Third, Mr. Thurston promised to buy the business back in the first year if Mr. Ma was dissatisfied. This was a misstatement of fact.

[197] I am satisfied that when Mr. Thurston made this promise, he had no intention of living up to it.

[198] I have reached that conclusion for four reasons. First, Mr. Thurston completely denies the statement. It would be entirely different if Mr. Thurston admitted he made such a statement but explained why he was unable to carry out this commitment.

[199] Second, it was Mr. Thurston who drafted the contract. The omission of this promise from the written document is further evidence that he had no intention of honouring it.

[200] Third, when Mr. Ma sent an email on March 3, 2011, seeking to invoke this guarantee to buy back the franchise, Mr. Thurston did not even reply.

- [201] Fourth, Mr. Thurston was surely aware that he had succeeded in obtaining an unreasonably high price for the franchise. Having done so, it is inherently unlikely that he had any intention of paying this money back if Mr. Ma were later dissatisfied.
- [202] I find on all of the evidence that Mr. Thurston made promises and representations knowing they were not true in order to induce the plaintiff to enter this improvident contract. Thus, this is a promise which Mr. Thurston made and which he had no intention of keeping. As such, and as Professors Fridman and Treitel discuss above, this is a fraudulent misrepresentation.
- [203] These three misrepresentations satisfy the test for fraudulent misrepresentation from Catalyst Pulp and Paper Sales Inc.:
- (a) Mr. Thurston made representations of fact to Mr. Ma;
 - (b) the representations were false in fact;
 - (c) Mr. Thurston knew they were false; and
 - (d) Mr. Ma relied on the representations and they induced him to enter into the contract.
- [204] I conclude that Mr. Ma relied on these misrepresentations, particularly the offer to buy back the franchise. It was operative in his decision to purchase the franchise. The inference in this regard is irresistible. The buy back guarantee was the subject of a discussion between Mr. Ma and his friend Mr. Chan. It was the first claim he made in his telephone call to Mr. Thurston on March 3, 2011. He also referred to it in his email of the same day, the email to which Mr. Thurston did not reply.
- [205] For all Mr. Ma's gullibility and naiveté, I find that he must have looked at this promise as a crucial element in his decision to enter into the franchise agreement. I find as a fact that Mr. Ma would not have entered into the contract if the promise of the one year buy back guarantee had not been made.
- [206] The promise to buy the business back also satisfies the criteria for fraudulent misrepresentation.
- [207] In sum, I have found three instances of fraudulent misrepresentation in this case:
- there was no sponsorship agreement in place with EA Sports;
 - there were no agreements in place with suppliers or distributors for preferred pricing; and
 - Mr. Thurston made the promise that he would buy the franchise back within a year if it was not profitable, when he had no intention of doing so.

[208] The other allegations made by the plaintiff are promises to perform in the future. A number of them were not kept. For Mr. Ma's purposes, there simply was no remote monitoring. The promise that the machines would have a video screen that would increase revenue was not kept either. No causes of action arise with respect to the remaining allegations.

IV. Remedy

[209] A contract induced by fraud is voidable at the election of the defrauded party: Fridman at 291-92.

[210] The measure of damages is the loss suffered through the deceit, so as to put the injured party in the position he would have been in had the fraud not occurred: Fridman at 292.

[211] In *Parna v. G. & S. Properties Ltd.*, [1969] 2 O.R. 346 (C.A.), rev'd as to liability (1970), [1971] S.C.R. 306, the Court of Appeal held that in damages for fraud, the plaintiff is to be put in the same position the plaintiff would have been in if the representation had not been made, not the position if the representation had been true. See also: *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.* (1981), 33 B.C.L.R. 291 (C.A.), leave to appeal to S.C.C. refused (1982), 42 N.R. 358.

[212] Here, the plaintiff seeks rescission of the contract and a refund of the franchise fee. As I have found above, the plaintiff would not have entered into the contract but for the promise of the one year buy back guarantee.

[213] In some cases involving fraudulent misrepresentation, rescission is not possible or is not sought. This may be for a variety of reasons. For example, see: *1565831 Ontario Limited v. Klupt*, 2007 ONCA 440, varying [2005] O.J. No. 4946 (S.C.J.); *Goldstar Management Ltd. v. Varvis* (1995), 34 Alta. L.R. (3d) 74 (Q.B.); *Jak-B-Jak Investments Inc. v. Sadowick*, 2004 BCCA 201, varying 2003 BCSC 1011; *Wiebe v. Gunderson*, 2004 BCCA 456, varying 2003 BCSC 1282. In such cases, successful plaintiffs are entitled to the difference between the monies paid and the actual value of the business at the time of sale, plus any consequential losses.

[214] Rescission may be precluded by affirmation of the contract. For that reason, the first two misrepresentations do not give a right to rescission. Mr. Ma must reasonably have learned in the first few months after the contract was formed that there were no corporate sponsorships and that there were no agreements in place for suppliers or distributors for preferred pricing. Nonetheless, Mr. Ma continued to operate the business.

[215] There was no affirmation with respect to the buy-back guarantee.

[216] In fact, Mr. Ma elected to void it. He contacted Mr. Thurston and invoked the buy back guarantee when he concluded the business was performing poorly in relation to his expectations in reliance on Mr. Thurston's representations. Further, the plaintiff has already left the business. Mr. Kara is currently running it on behalf of the defendants. Mr. Ma is entitled to rescission and to be restored to his former position. On that basis, the

plaintiff is entitled to rescission and judgment for the amount he paid to purchase the franchise, that is, \$435,093.75.

[217] However, if I am mistaken in that conclusion and rescission is not available, then the plaintiff is only entitled to the difference between the price paid and the actual value. Therefore, I wish to address the actual value of the business at the time Mr. Ma purchased it. That entails a consideration of the value of the vending machine business without any agreements with suppliers, without sponsorship agreements and without any kind of buy back guarantee.

[218] The evidence of the actual value of the business consists of the following:

1. Mr. Thurston paid approximately \$70,000 for the business a day after he sold it to Mr. Ma. This was comprised of roughly \$20,000 for the vending machines and \$50,000 for goodwill. Mr. Thurston added value to the business in the form of written agreements with the schools and his concept of expanding the business through promoting healthy snacks and beverages; and
2. Mr. Kara pays a fee of \$2,000 per month to Mr. Thurston to operate the business. That is far below what Mr. Ma paid.

[219] In considering all of the evidence, I assess the value of the business that Mr. Ma acquired at \$175,000, inclusive of equipment (i.e. the vending machines that came with the contract) and taxes. Under this alternate analysis, there would be damages for fraudulent misrepresentation in the amount of \$260,093.75.

V. Liability of Mr. Thurston

[220] I turn to the liability of Mr. Thurston. The Franchise Agreement is between Mr. Ma and Nutriview. However, the claim for damages for misrepresentation is against both Nutriview and Mr. Thurston. The fraudulent misrepresentation was made by Mr. Thurston. In my view, Mr. Thurston is liable, along with Nutriview, in damages.

[221] It is settled law that directors and officers of companies are personally liable for their fraudulent misrepresentations if the evidence warrants it: *Noble v. Hueson Pharmaceutical Corp.*, 2002 BCSC 1791 at para. 66. Even though Mr. Thurston is not a party to the contract, he is the sole shareholder and president of Nutriview. See *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (C.A.).

[222] Accordingly, I find Mr. Thurston personally liable in deceit for the same amount. Mr. Thurston and Nutriview are jointly and severally liable for the damages I have awarded. It is so ordered.

VI. Counterclaim

[223] I turn now to the counterclaim. For the reasons I have stated above, the contract was voidable and Mr. Ma elected to treat it as void when he walked away from the business in March 2011. It follows that there can be no legal basis for the defendants' counterclaim.

[224] However, if I am mistaken in that conclusion and the contract was in effect, I will consider the merits of the counterclaim.

[225] Nutriview seeks damages from the plaintiff for breach of the Franchise Agreement. Nutriview says that the plaintiff breached the agreement in three respects:

1. first, the plaintiff had an obligation to perform services under the agreement, namely the maintenance and/or servicing of merchandising equipment in order to meet Nutriview's obligations under its agreements with the schools (article 6.1);
2. second, the contract required the plaintiff to devote his full-time attention to the business and at all times faithfully, honestly and diligently perform, or cause to be performed, the obligations in the agreement (article 6.7); and
3. third, there is an obligation in article 6.10 to ensure that all obligations of Nutriview under the location agreements are met.

[226] The alleged breaches stem from failing to pay commissions and royalties to the schools. Nutriview says Mr. Ma failed to manage the business and deliver the required services when he abandoned the business in March 2011.

[227] The relevant provisions in the Franchise Agreement provide:

6.1 The Franchisee shall perform the Services in accordance with all of the terms and conditions contained in the Location Agreements and the Franchisee shall be deemed to be bound by each Location Agreement as if the Franchisee had executed the same as a party thereunder. Generally, the Franchisee will continue the Business to the same standards as has been developed by Nutriview Systems, and the Franchisee acknowledges that, to foster and preserve goodwill in the Business, it is necessary for the Franchisee to operate the Business in a manner and to a quality consistent with the manner in which the Business has been heretofore operated by Nutriview Systems or any other of its business associates, agents or previous business owners. The Franchisee acknowledges that, in order to maintain such uniformity and quality consistency, it is necessary for Nutriview Systems to exercise a degree of control over the operation of each and every franchisee, and, therefore, the Franchisee agrees to operate the Business strictly in accordance with the directions of Nutriview Systems from time to time, whether found in the Manual, or otherwise.

6.7 The Franchisee shall devote its full time and attention to the Business and at all times faithfully, honestly and diligently perform, or cause to be performed the obligations hereunder.

6.10 The Franchisee will ensure that all obligations of Nutriview Systems under any of the Location Agreements is met with respect to payment of commissions to each Location in the amounts and at the times required, and the Franchisee acknowledges that the current obligations to pay any Location under its respective Location Agreement is to ensure payment in full for any calendar month of operations of the Business under such Agreement by no later than the 10th of the following month. This payment of commissions structure may be evaluated and changed to allow Nutriview Systems to pay said locations commissions, paid for by the Franchisee to Nutriview Systems as a flow through to locations. Failure to make any such payment shall be a fundamental breach of this Agreement.

[228] Under this alternate analysis, I agree with the defendants that when Mr. Ma abandoned the business, he was in breach of articles 6.1, 6.7 and 6.10 of the Franchise Agreement.

VII. Conclusion

[229] To summarize, I have found the defendants Mr. Thurston and Nutriview engaged in fraudulent misrepresentation. Damages totalling \$435,093.75 are awarded to the plaintiff.

[230] I have concluded as well that the counterclaim must be dismissed.

[231] Special costs, commonly awarded when there is a fraudulent misrepresentation, are sought by the plaintiff. If the parties wish to speak to the question of costs, they may make arrangements to appear before me again within the next 30 days.

Kelleher J.

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