

AMENDED THIS Jan. 23/12 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À

RULE/LA RÉGLE 26.02 (

THE ORDER OF Master Adams
L'ORDONNANCE DU

DATED / FAIT LE Dec. 29/11

Court File No. CV-11-431324

REGISTRAR
SUPERIOR COURT OF JUSTICE
GREFFIER
COUR SUPÉRIEURE EN JUSTICE
ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

(Court Seal)

CAFFÉ DEMETRE FRANCHISING CORP.

Plaintiff

and

D.L.G. & ASSOCIATES LTD., carrying on business as SPIN DESSERT CAFÉ,
SPIN EMPORIUM INC., carrying on business as SPIN DESSERT CAFÉ, SPIN
DESSERT LTD., MOLEDINA ENTERPRISE LIMITED, NASIR MOLEDINA,
DIANE SPENCE and GULBANU MOLEDINA

Defendants

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

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 Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, 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.

Date July 22/11

Issued by "B. Sadeghi"
Local Registrar

Address of
court office: 393 University Avenue, 10th Floor
Toronto, Ontario
M5G 1E6

TO: Nasir Moledina
c/o 1060 The Queensway
Toronto, ON M8Z 1P7

AND TO: D.L.G. & Associates Ltd., carrying on business as Spin Dessert Café
1060 The Queensway
Toronto, ON M8Z 1P7

AND TO: Spin Emporium Inc., carrying on business as Spin Dessert Café
626 Roy Street
Pembroke, ON K8A 6S1

AND TO: Moledina Enterprises Limited
2229 Walkens Line
Suite 29
Burlington, ON L7M 4X4

AND TO: Diane Spence
c/o 1060 The Queensway
Toronto, ON M8Z 1P7

AND TO: Gulbanu Moledina
626 Roy Street
Pembroke, ON K8A 6S1

CLAIM

1. The Plaintiff claims as against Moledina Enterprise Limited and Nasir Moledina damages for breach of contract, breach of the duty of fair dealing, and breach of confidence in the amount of FIVE MILLION DOLLARS (\$5,000,000.00).

~~(a) Punitive and exemplary damages in the amount of TWO HUNDRED THOUSAND DOLLARS (\$200,000);~~

~~(b) Prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended from the date of termination of employment to the date of payment or judgment;~~

~~(c) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;~~

~~(d) The costs of this proceeding, on a substantial indemnity basis, plus all applicable taxes; and~~

~~(e) Such further and other relief as to this Honourable Court may seem just.~~

2. The Plaintiff claims as against all of the Defendants:

(a) Damages for conspiracy and misappropriation of confidential information and trade secrets in the amount of FIVE MILLION DOLLARS (\$5,000,000.00);

(b) Damages for copyright infringement in the amount of ONE MILLION DOLLARS (\$1,000,000.00);

(c) An accounting of all profits made by the Defendants resulting from the use of the Plaintiff's confidential information and trade secrets;

(d) Punitive and exemplary damages in the amount of TWO HUNDRED THOUSAND DOLLARS (\$200,000);

- (e) An interim, interlocutory and permanent injunction to prevent the Defendants from making use of any and all confidential information and trade secrets of the Plaintiff in any manner whatsoever;
- (f) An interim, interlocutory and permanent injunction to prevent the Defendants from offering for sale franchises of an ice cream dessert café known as “Spin Dessert Café” and employing the confidential information and trade secrets of the Plaintiff; Defendant, Spin Dessert Café, while such confidential information is being used by the Defendants;
- ~~(g) — An accounting of profits of the Defendants;~~
- (h) Prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended from the date of termination of employment to the date of payment or judgment;
- (i) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (j) The costs of this proceeding, on a substantial indemnity basis, plus all applicable taxes; and
- (k) Such further and other relief as to this Honourable Court may seem just.

The Parties

3. The Plaintiff is a corporation incorporated in the Province of Ontario. The Plaintiff is the franchisor of a chain of specialty ice cream dessert cafés, known as Caffé Demetre. operates franchise restaurants retailing gourmet desserts throughout Ontario.

4. The Defendant, D.L.G. & Associates Ltd., carrying on business as Spin Dessert Café (hereinafter “D.L.G.”), is the registered business name of the Defendant, a corporation incorporated in the Province of Ontario and is the owner and operator of a restaurant located at 2177 Yonge Street in the City of Toronto, in the Province of Ontario. Spin Emporium Inc., a corporation incorporated in the Province of Ontario and operates a restaurant retailing gourmet desserts throughout Ontario

5. The Defendant Spin Emporium Inc., carrying on business as Spin Dessert Café (hereinafter “Emporium”) is a corporation incorporated in the Province of Ontario and is the owner and operator of a restaurant located at 1060 The Queensway in the City of Toronto, in the Province of Ontario.

6. The Defendant, Spin Dessert Ltd., is the name under which Spin Emporium Inc. purports to conduct business. Spin Dessert Ltd. is not an incorporated entity in Ontario. The Defendants, Spin Dessert Café, Spin Emporium Inc. and Spin Dessert Ltd. will be collectively referred to as “Spin”

7. The Defendant, Moledina Enterprise Limited (hereinafter “M.E.L.”) is a corporation incorporated in the Province of Ontario.

8. The Defendants, Nasir Moledina (hereinafter “Moledina”) and Diane Spence (hereinafter “Spence”) are, is an individuals residing in the City of Toronto, Ontario. Moledina holds himself out as the owner of Spin, and Spence, are the owners, directing minds and operators of D.L.G. and Emporium.

9. The Defendant, Diane Spence (“Spence”), is an individual residing in the City of Toronto, Ontario and holds herself out to be an owner of Spin. Spence is the common-law spouse of Moledina.

10. The Defendant, Gulbanu Moledina (hereinafter “Gulbanu”), is an individual residing in the City of Pembroke, Ontario and is the sole director and officer of Spin Emporium Inc. Gulbanu is the mother of Moledina.

The Caffé Demetre Concept

11. The Plaintiff is the franchisor of eleven independently owned specialty ice cream dessert cafés operating under the name “Caffé Demetre”. All eleven cafés are located in the Greater Toronto area.

12. The Caffé Demetre concept was developed by the Plaintiff and its principal, Gary S. Theodore, utilizing ice cream recipes given to Theodore by his grandfather. In addition to ice cream made on the restaurant premises, the cafés offer an extensive dessert menu featuring ice cream crepes, freshly baked waffles, sundaes and a la mode cakes.

Relationship Between the Parties

13. On or about August 26, 2004, the Plaintiff entered into a Franchise Agreement with M.E.L., as franchisee, and Moledina, as guarantor, pursuant to which M.E.L. was authorized to utilize the proprietary marks and systems of the Plaintiff in the operation of a Caffé Demetre at 3280 Dufferin Street in the City of Toronto, for a term of 10 years.. ~~entered into a Franchise Agreement with the Plaintiff to operate a Caffé Demetre franchise at 3280 Dufferin Street in Toronto, Ontario.~~

14. In the Franchise Agreement, M.E.L. and Moledina expressly acknowledged the Plaintiff’s ownership of a unique, comprehensive and distinct marketing plan and system of uniform methods, procedures, merchandising and advertising for the distribution, sales and marketing of ice cream desserts and the establishment and operation of locations in which to carry on the business of a specialty ice cream dessert café.

15. The Franchise Agreement protected the confidential information of the Plaintiff during the ~~tenure~~ term of the Franchise Agreement and subsequent to its termination pursuant to section 4.05:

The Franchisee acknowledges that all information relating to the operation of the Franchise is confidential and a trade secret of the Franchisor. The Franchisee agrees to maintain the absolute confidentiality of all such information during the term of this Agreement and after termination or expiration. The Franchisee further agrees not to use

any such information in any other business not specifically approved in writing by the Franchisor. The restriction contained herein shall not apply to any financial information that maybe [sic] disclosed by the Franchisor to the Franchisee.

16. Further, the Franchise Agreement stated at section 13.02:

The Franchisee covenants that after the termination or expiration of this Agreement, regardless of the cause of termination or expiration, the Franchisee shall not, without the Franchisor's prior written consent, directly or indirectly:

...

(3) copy, communicate, or otherwise use for the benefit of the Franchisee or of any other person any information deemed confidential pursuant to Article 4.05 hereof.

17. Under the terms of his guarantee, Moledina covenanted and agreed as follows:

"The Guarantor of the THIRD PART herein, in consideration of the Franchisor granting the Franchise herein to the Franchisee and of the sum of TWO DOLLARS (\$2.00) of lawful money of Canada paid by the Franchisor to the Guarantor, the receipt of which is hereby acknowledged, for himself, and his heirs, executors, administrators, successors and assigns, does hereby covenant with the Franchisor to guarantee as a primary and principal party to the Agreement and not as a surety, that the Franchisee will duly observe, perform and keep all the covenants contained in the Franchise Agreement.

18. The Plaintiff states that, as a result of entering into the Franchise Agreement with the Plaintiff, M.E.L. and Moledina owe the Plaintiff a duty of fair dealing in the performance and enforcement of the Franchise Agreement, pursuant to and in accordance with section 3 of the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3.

19. From on or about August 26th, 2004 until June 30th, 2008, Moledina personally managed the Caffé Demetre at 3280 Dufferin Street and, together with M.E.L., Moledina thereby obtained access to all of the Plaintiff's confidential systems including the concept of a specialty ice cream dessert café, recipes, As a franchisee of the Plaintiff, Moledina was privy to confidential information regarding the operation of the Plaintiff's business, including recipes for all of the products which were sold at the franchise location, product descriptions, materials, equipment,

supplier lists, operating manuals and other such business knowledge regarding the successful operation of a gourmet dessert restaurant (hereinafter the “Confidential Information”).

Sale of the Franchise

20. On or about June 30, 2008, M.E.L. sold its Caffé Demetre to a third party, FOOG Corporation. The Plaintiff, M.E.L., Moledina, FOOG Corporation and Forge Figiano thereupon entered into an agreement (hereinafter the “Assignment and Consent”) containing, *inter alia*, the following terms:

- a) M.E.L. would transfer all of its right and interest in the obligations under the Franchise Agreement to a third party FOOG Corporation, together with all of the assets of M.E.L., for the sum of \$805,000;
- b) The Plaintiff consented to the transfer of M.E.L.’s right and interest in the Franchise Agreement, provided that such consent would not relieve Moledina of his continuing obligations, liabilities and responsibilities under the Franchise Agreement; and
- c) Moledina’s guarantee of the obligations contained in the Franchise Agreement would continue in full force and effect, notwithstanding any releases contained in the Assignment and Consent.

Opening of the Spin Dessert Cafés

21. On or about August 21, 2008, Moledina incorporated Spin Emporium Inc. By 2009, Spin opened was operating a specialty ice cream dessert café gourmet dessert restaurant at 1060 The Queensway in Toronto, Ontario, known as Spin Dessert Café.

22. ~~As of July~~ In June, 2011, D.L.G. opened a second Spin Dessert Café location at 2177 Yonge Street in Toronto, Ontario.

23. On a date known to the Defendants, Spin Emporium Inc. was cancelled by the Companies Branch of the Ministry of Government Services. This claim is brought against Spin Emporium Inc., and its registered business name, Spin Dessert Café, pursuant to sections 242(1)(b), (c) and (d) of the Ontario *Business Corporations Act*.

24. Both Spin Dessert Cafés are owned, either directly or indirectly, controlled and directed by Moledina, Spence and Gulbanu.

25. Both Spin Dessert Cafés are advertised as having “new and unique dessert concepts” featuring homemade ice cream made fresh each day on the restaurant premises, together with crepes, waffles, sundaes and a la mode cakes.

26. The Plaintiff pleads that both Spin Dessert Cafés were created and are operated utilising the Confidential Information acquired by M.E.L. and Moledina under the Franchise Agreement and disclosed to B.L.G. and Emporium by M.E.L. and Moledina.

Breach of Contract

27. The Plaintiff states that the terms of the Franchise Agreement prohibit Moledina from making use of any Confidential Information and further require Moledina and M.E.L. to maintain such information absolutely confidential during the term of the Franchise Agreement and after termination or expiration thereof. Moreover, the Franchise Agreement expressly prohibits M.E.L. and Moledina from utilizing the Confidential Information in any other business not specifically approved in writing by the Plaintiff. subsequent to the termination of the Franchise Agreement.

28. The Plaintiff states, and the fact is, that M.E.L. and Moledina have failed to maintain the Confidential Information confidential and that Moledina and M.E.L. have provided the Confidential Information to B.L.G. and Emporium, without the permission or approval of the Plaintiff.

29. The Plaintiff states pleads that M.E.L. and Moledina’s use and disclosure of the Confidential Information, including, but not limited to the unique dessert concept of Caffé Demetre, recipes for homemade ice cream and all of the desserts sold at the Spin Dessert Cafés, product descriptions, materials, equipment, supplier lists, operating manuals and other such business knowledge constitute a breach of sections 4.05, 12.04, 13.02 and 17.01 of the Franchise Agreement and of sections 1 and 11 of the Assignment and Consent.

30. The Plaintiff also pleads that the unauthorized disclosure of the Confidential Information and its use in the establishment and operation of businesses in competition with the Plaintiff constitutes a breach of the duty of fair dealing owed to the Plaintiff by M.E.L. and Moledina pursuant to the provisions of the *Arthur Wishart Act*, aforesaid.

31. The Plaintiff states that it has suffered damages as a result of M.E.L. and Moledina's breach of contract and breach of the duty of fair dealing, including but not limited to, profits the Plaintiff would have earned as the franchisor of dessert cafés at the locations from which the Spin Dessert Cafés are operated. Full the particulars of the Plaintiff's damages which will be provided prior to trial.

Breach of Confidence

32. The Plaintiff claims that Moledina has misused ~~made use of~~ the Confidential Information acquired during his tenure as a franchisee of the Plaintiff in the operation of Spin. in violation of the confidentiality agreement which formed part of the Franchise Agreement and the Authorization and Consent.

33. The Plaintiff claims that the Confidential Information was developed specifically by the Plaintiff and is not public knowledge and includes recipes, product descriptions, materials, equipment, supplier lists, operating manuals and other business knowledge specific to the operation of a gourmet dessert restaurant offering, *inter alia*, homemade ice cream, ice cream crepes, waffles and a la mode cake.

34. The Plaintiff claims that the Confidential Information was imparted to M.E.L. and Moledina under the express provision of confidence as outlined in the Franchise Agreement.

35. The Plaintiff claims that M.E.L. and Molendina knew or ought to have known that the Confidential Information communicated to him by the Plaintiff was confidential and that he was they were prohibited from making use of this information for his their benefit or for the benefit of any other party.

36. The Plaintiff claims that Moledina has saved unfairly procured for himself, B.L.G. and Emporium and Spin a great deal of labour and expense by using the benefits of the system,

concept, recipes, product descriptions, suppliers, equipment, materials and business knowledge gained from his time as a franchisee of developed the Plaintiff.

37. The Plaintiff states that the Caffé Demetre Confidential Information took 23 years in the gourmet dessert business to create and that M.E.L. and Moledina's use and unauthorized disclosure of this Confidential Information has saved the Defendants years of labour to develop their own concept, systems and recipes.~~business to develop its own Confidential Information.~~

38. In fact, the Plaintiff states that a crepe recipe utilizing the word "spin" was designed on behalf of the Plaintiff immediately prior to execution of the Assignment and Consent and that the Defendants' Moledina's assignment of his franchise location which used the term "spin". ~~The Plaintiff asserts that Moledina's incorporation of a company using use of this word in naming their cafés this term mere months later~~ was directly related to copied from the new recipe created for the Plaintiff.

Conspiracy of the Defendants

39. The Plaintiff states that all of the Defendants entered into an agreement to misappropriate the Confidential Information and to carry on business utilizing the Confidential Information in competition with the Plaintiff and its franchisees.

40. The said conspiracy was entered into, pursued and continues to be pursued by the Defendants with full knowledge that M.E.L. and Moledina would breach their obligations in the Franchise Agreement, and the Authorization and Consent, to keep confidential all of the Confidential Information.

41. The Plaintiff states that the Defendants knew that the conspiracy to misappropriate the Confidential Information and to utilize same in the operation of competing businesses would harm the Plaintiff. The Plaintiff therefore states that the Defendants intended by their actions to cause economic harm to the Plaintiff.

42. In furtherance of the said agreement, the Defendants engaged in the overt acts described in paragraphs 21-22, 25-26, 28-29, 32, 34, 36 and 38, supra, and paragraph 45, infra.

43. The Plaintiff further states that the Defendants have wrongfully profited from the conspiracy and should be required to fully account for and disgorge the profits received as a result of the conspiracy described herein.

Copyright Infringement

44. The Plaintiff states that its menu is an original work protected under the provisions of the *Copyright Act*, R.S.C. 1985, c. C-42.

45. The Plaintiff claims that the Defendants have created, or have had created for them, a menu which uses all or substantially all of the product descriptions and lay-out as the menu created for the Plaintiff without the Plaintiff's permission and therefore ~~has~~ have infringed upon the Plaintiff's copyright.

46. The Plaintiff, therefore, states that it is entitled to damages for breach of copyright or statutory damages, as the Plaintiff may elect.

Injunction

47. The Plaintiff claims that there is a serious issue to be tried regarding the Defendants' use and disclosure of the Confidential Information ~~imparted to~~ acquired by M. E. L. and Moledina.

48. The Plaintiff claims that it would suffer irreparable harm should the Defendants' be permitted to sell franchises for Spin Dessert Cafés locations while making use of the Plaintiff's Confidential Information.

49. The Plaintiff claims that the balance of convenience favours the Plaintiff in granting an injunction to prevent the Defendants from making continued use of the Confidential Information of the Plaintiff and from profiting from the use of this Confidential Information.

50. The Plaintiff pleads and relies upon section 242 of the Ontario *Business Corporations Act*, sections 3 and 27 of the *Copyright Act*, and the common law relating to contracts and breach of confidence.

Punitive Damages

51. As a result of the dishonest, reprehensible and egregious acts of the Defendants, the Plaintiff is entitled to an award of punitive damages. The conduct of the Defendants, M.E.L. and Moledina, was deceitful and in breach of their contractual and statutory obligations. All of the Defendants assisted in and benefitted from the deceitful conduct of M.E.L. and Moledina and, therefore, are similarly liable for punitive damages.

52. The Plaintiff proposes that this action be tried at Toronto, Ontario.

(Date of issue)

MCKENZIE LAKE LAWYERS LLP
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London, ON N6B 1T6

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Fax: 519-672-2674

Lawyers for the Plaintiff

RCP-E 14A (July 1, 2007)

CAFFÉ DEMETRE FRANCHISING CORP.
Plaintiff

-and- D.L.G. & ASSOCIATES LTD et al.
Defendants

Court File No. CV-11-431324

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

AMENDED STATEMENT OF CLAIM

MCKENZIE LAKE LAWYERS LLP
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Lawyers for the Plaintiff

RCP-E 4C (July 1, 2007)