

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

MASSEY, INC., *et al.*,

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Plaintiffs,

:

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v.

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CIVIL ACTION NO.

:

1:07-CV-0741-RWS

MOE'S SOUTHWEST GRILL,  
LLC, *et al.*,

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Defendants.

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**ORDER**

This case came before the Court for a bench trial beginning January 12, 2015. After reviewing the record and considering the evidence and arguments of counsel, the Court enters the following findings of fact and conclusions of law.

### **III. Damages**

64. Each side called expert witnesses to testify as to damages issues.

Plaintiffs called Kevin Golding, who testified that the fees CRM and SOS charged in the form of the CRM Commission from IJ damaged Plaintiffs

because the money was not given back to Plaintiffs.

65. He further testified that he had studied the chicken costs of Plaintiffs during the years 2003-2007 and determined that the price of chicken IJ charged to Moe's franchisees was inflated. Mr. Golding testified that he assumed that all of the chicken purchased by Plaintiffs from Filet of Chicken during the relevant time frame had a 20% "pump" or maximum solution. He testified that he estimated overpayments on IJ products to try to put some scope and dimension on what the processing costs should have been, but that his objective was not to determine the amount of damages.

66. The Filet of Chicken cost structure for each of the Moe's marinated chicken products in use from 2002-2007 was complicated. It included raw material costs for chicken, marinade and related ingredients. It further varied depending upon the mix of 5% fat and down trim with the 15% fat and down trim. Mr. Golding did not know what the percentage of the 5% and down product was used in the preparation of marinated chicken. He further admitted that 5% chicken was more expensive, and its inclusion would tend to narrow the difference between the hypothetical cost of chicken in his analysis and the actual price paid by the franchisees.

67. Plaintiffs also called Shayne Smith, an accountant, to calculate the actual amount of CRM Commissions paid by each of the Plaintiffs and the amount of each Plaintiff's chicken purchases, in order to attempt to quantify damages.

68. Defendants called Daniel Cenatempo in rebuttal, who testified that Mr. Golding's CRM Commission-based damages were not damages at all. Mr. Cenatempo explained that regardless of whether Mr. LaGratta was a contractor working with Moe's or an in-house purchaser working for a salary, he still needed CRM to obtain volume-based pricing and avoid street pricing. The CRM Commission charged by CRM in this case was its standard and customary fee for the benefit of access to CRM's Chain Links Buying Group used in purchasing negotiations and was not affected by the relationship between Moe's, CRM, SOS, Mr. LaGratta, and Mr. Sprock.

69. Mr. Cenatempo also showed that Mr. Golding's "chicken damages" analysis was faulty. He pointed out flawed assumptions by Mr. Golding relating to costs that factor into the price of the Moe's marinated chicken product. Specifically, Mr. Golding used the market price data for raw

chicken, but not any of the other ingredients (such as marinade, additives and preservatives) used in the Moe's marinated chicken product.

70. Additionally, Mr. Cenatempo showed that the use of a 15% and down fat product decreased the "raw chicken cost" Mr. Golding used as the basis for his calculations. Mr. Cenatempo further showed that adding in the more expensive 5% fat product that was actually blended with the 15% and under product resulted in a higher raw cost.

71. Without providing any support, Mr. Golding estimated based on his experience that the 35 cent estimate he used for processing plant cost and margin for chicken product was "in the realm of reason" for each year of damages for which he created a raw chicken cost.

72. Further, Mr. Cenatempo showed that Mr. Golding used an assumed 20% "pump" figure to account for the amount of water added to the chicken before packaging into 1 pound bags for shipment. In contrast, Mr. Cenatempo used the actual pump data provided by the manufacturer, Filet of Chicken, which shows a range of 12% to 25% over time, to show that the pump figure used by Mr. Golding was exaggerated. Mr. Cenatempo's analysis showed that when the proper amount of "pump" was factored in and the proper costs of

ingredients accounted for, the Plaintiffs actually *saved* money on chicken by using the supply chain established by CRM and Mr. LaGratta. He concluded that Moe's franchisees, including the Plaintiffs, saved on average \$0.15 per pound over prevailing market rates.

73. Mr. Cenatempo also showed that Mr. Golding's rate of chicken overcharge – a fluctuating rate for each year of claimed damages – was unsupported by the record. Specifically, Mr. Golding claimed that the "Actual Price" paid by franchisees he used to calculate the alleged overcharge was derived from Paul Parker. However, as noted by Plaintiffs' other expert, Mr. Smith, the invoices produced by Mr. Parker's entities (Parde and Parde Roswell) were limited and sporadic. Mr. Golding failed to describe an appropriate methodology or source for the "Actual Price" data.

74. Mr. Cenatempo showed that the data for seven of the eleven stores owned by the Plaintiffs were incomplete. In particular, he showed that the absence of IJ invoices called into doubt calculations regarding the amount of chicken that was purchased and the amount of product sales to be excluded since they were exempt from the CRM Commission.

75. With respect to the category of chicken damages, Mr. Golding did not determine the rate at which franchisees overpaid for chicken in 2002. As such, Mr. Smith assumed that the rate of overpayment was the same in 2002 as it was in 2003 (10.88%), even though the alleged rate of overpayment fluctuated from 2003 to 2007 from 3.46% to 23.85%.

76. The Court finds the opinions of Mr. Cenatempo convincing. The damages evidence presented by Plaintiffs fails to establish that they suffered any losses caused by the relationship between CRM, SOS, Mr. LaGratta, and Mr. Sprock. On the contrary, the evidence shows that it is more likely that the relationship resulted in net savings to Plaintiffs.

#### **IV. Damages**

46. The Court has found in favor of Defendants and against Plaintiffs on each of the causes of action except the TCPA claim. The Court found in Part III that though Plaintiffs could show a violation of the TCPA, they could not establish an ascertainable loss they suffered as a result of the violation. Nor are Plaintiffs entitled to recover damages under any other claims.

##### **A. *Losses to Plaintiffs***

47. Even had the Court found Defendants liable, Plaintiffs failed to adequately prove their damages.

48. Plaintiffs failed to prove they suffered any loss as a result of commissions paid to CRM, SOS, Mr. LaGratta, or Mr. Sprock. The CRM Commission-based damages were not damages at all. Regardless of whether Mr. LaGratta was a contractor working with Moe's or an in-house purchaser working for a salary, he still needed CRM to obtain volume-based pricing and avoid street pricing. The CRM Commission charged by CRM in this case was its standard and customary fee for the benefit of access to CRM's Chain Links Buying Group used in purchasing negotiations. Plaintiffs failed to establish that they suffered any losses caused by the relationship between CRM, SOS, Mr. LaGratta, and Mr. Sprock. On the contrary, the evidence shows that it is more likely that the relationship resulted in net savings to Plaintiffs.

49. Plaintiffs' evidence of "chicken damages" was not convincing. Plaintiffs' experts reached conclusions that either ignored relevant evidence or were based on unreliable evidence. The data supporting their findings were often unreliable or incomplete.

50. Therefore, the Court concludes that Plaintiffs failed to establish that Defendants caused damages to them as a result of any of the claims asserted in this action.

***B. JSW Cascade, LLC's Lost Investment***

51. Plaintiff JSW Cascade, LLC seeks damages for lost investment in operating the Moe's Cascade store.

52. Assuming *arguendo* that the Walkers or JSW Cascade, LLC were able to establish Defendants' liability on their claim, they would not be entitled to recover for lost investment in operating the Moe's Cascade store. The relief they seek is essentially a rescission. "In general, a party alleging fraudulent inducement to enter a contract has two options: (1) affirm the contract and sue for damages from the fraud or breach; or (2) promptly rescind the contract and sue in tort for fraud. Critical to rescission is the tender of benefits, the prompt restoration or offer to restore whatever the complaining party received by virtue of the contract." Dodds v. Dabbs, Hickman, Hill & Cannon, LLP, 324 Ga. App. 337, 340, 750 S.E.2d 410 (2013). In essence, awarding "loss of investment" in this case would be tantamount to putting Plaintiffs into the position they would be in if the transaction with Moe's had never taken place. But here JSW Cascade did not promptly rescind the franchise agreement with Moe's and is therefore strictly limited to remedies consistent with its election to sue on the contract. "[T]he defrauded purchaser may seek as damages the difference in the

value of the property sold to him and its value if the property had been the same as it was represented to be.” Ben Farmer Realty Co. v. Woodard, 212 Ga. App. 74, 74, 441 S.E.2d 421 (1994). Plaintiffs failed to offer evidence from which the Court could calculate such damages. Therefore, the Court concludes that Plaintiffs failed to establish damages for lost investment in the Moe’s Cascade store.

***C. JSW Embry Village, LLC’s Diminished Value***

53. JSW Embry Village, LLC, seeks to recover diminished value damages, asserting the amount they received from the sale of the Embry Village restaurant’s assets in November 2006 – more than 4 years after the franchise was purchased – was diminished by Defendants’ alleged misrepresentations. The proper measure of damages for this claim is the difference in the value of the franchise as purchased and the value of the franchise as represented to be at the time of purchase, not the difference in value when sold at a later time. (Id.) JSW Embry Village has provided no evidence to establish damages for diminished value.

54. The Court also concludes that, assuming *arguendo* JSW Embry Village was entitled to diminished value damages, the methodology used by

Steven Walker to calculate the diminished value is unreliable. Specifically, Mr. Walker put the amount of the “IJ Markup” and “Chicken” damages back into the store’s calendar year 2005 profit margins, and then used earnings before interest, taxes, depreciation, and amortization (“EBITDA”) for calendar year 2005 of the Embry Village store, in order to calculate a hypothetical value of the store. He ignored the financial performance of the store throughout 2006, which was declining in comparison to 2005 numbers. Though the sale occurred near the end of 2006, he failed to show why the EBITDA should not have been based on the most recent performance of the store.