

**CAUSE NO. 219-05695-2016**

<b>SANFORD ROSE ASSOCIATES</b>	§	<b>IN THE DISTRICT COURT</b>
<b>INTERNATIONAL, INC.</b>	§	
<b>Plaintiff/Counter Defendant</b>	§	
	§	
<b>Vs.</b>	§	<b>219<sup>TH</sup> JUDICIAL DISTRICT</b>
	§	
<b>ANNE JANAI and</b>	§	
<b>NEBO &amp; FINCH, INC.</b>	§	
<b>Defendants/Counter-Plaintiffs</b>	§	<b>COLLIN COUNTY, TEXAS</b>

**DEFENDANT’S FIFTH AMENDED COUNTERCLAIM**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Comes now, Anne Janai and NEBO & FINCH, INC., Defendants and Counter-Plaintiffs herein, filing this their Fifth Amended Counterclaim and respectfully shows onto the Court as follows:

Counter-Plaintiff Janai will be referred to herein as “Janai”.

NEBO & FINCH, INC. is an Assignee of the Franchise Agreement in question.

This suit is brought, in part, under the authority of TEX. BUS. & COM. CODE § 17.41 et. seq., commonly known as the Deceptive Trade Practices and Consumer Protection Act and cited in this petition as the “DTPA”.

**A. Deceptive Trade Acts and Practices, Fraud, Breach of Contract and Negligence**

Counter-Defendant committed the following deceptive acts and practices, fraud, breach of contract and negligence prior to Janai entering into the Franchise Agreement:

1. Counter-Defendant never informed Janai that they were involved in criminal activities before she signed the Franchise Agreement.
2. Before Janai signed the Franchise Agreement, Counter-Defendant misrepresented the anonymity of a survey measuring franchisee satisfaction.

3. Counter-Defendant did not provide Janai with the Entrepreneur's Express training as promised and required in the Franchise Disclosure Document and Franchise Agreement.

4. Counter-Defendant only provided Janai with less than half of the Phase I training as promised and required in the Franchise Disclosure Document and the Franchise Agreement before pressuring Janai to return to Texas for Phase II training.

5. Counter-Defendant used false advertising to induce Janai to sign the Franchise Agreement including falsely advertising that former owner of the franchise system assets, Mr. Rich Carter, Ph.D., was a newly recruited franchisee in 2016.

6. Before Janai signed the Franchise Agreement, Counter-Defendant misrepresented that she would receive a personalized franchise development approach to mitigate the fact that she did not have 20 years experience in any industry.

7. Before Janai signed the Franchise Agreement, Counter-Defendant told her she would receive a) personal, individualized assistance through a project manager who would oversee her personalized franchise development approach, b) business training through the Entrepreneur's Express training at home prior to other training, and c) a trainer to help her learn to build a database and make her calls.

8. After signing the Franchise Agreement, Janai did not receive a project manager to help her oversee a personalized approach needed because of the discrepancy between her skill-set and the skill-set of other franchisees, did not receive her Entrepreneur's Express training, did not receive a trainer to help her learn to build a database, did not receive the full number of training hours promised in the contract.

9. Counter-Defendant omitted material information in Item 3 "litigation" of the 2016 Franchise Disclosure Document which Janai signed on or around June 2, 2016, prior to signing

the Franchise Agreement. Omissions included at least one and possibly up to three lawsuit(s) against former franchisees during 2015, the fiscal year prior to the 2016 FDD. The Federal Trade Commission requires that all lawsuits against franchisees, even a very small number, in the fiscal year prior to the fiscal year of the Franchise Disclosure Document be disclosed as material information indicating the likelihood a franchisor may resort to litigation against franchisees.

Before Janai signed the Franchise Agreement, Counter-Defendant falsely assured Janai that Counter-Defendant did not resort to litigious strategies against franchisees and had a practice of quickly and easily settling with franchisees. Accordingly, Janai sent Counter-Defendant a Settlement Proposal on November 21, 2016 which Counter-Defendant ignored before wrongfully terminating Janai on November 28, 2016.

10. Regarding the matter “Fitness Evolution, L.P. and Joseph S. Mulroy v. Headhunter Fitness, Jeffrey Kaye, Nicholas Turner, et al. (Cause No. 429-00529-2010),” the Franchise Disclosure Document provided to Janai by Counter-Defendant read, in pertinent part (Item 3):

**Concluded Matter:**

At the pretrial conference on January 10, 2013, the Court granted summary judgment on all claims that Plaintiffs asserted against the defendants, including Kaye and Turner. The Court left open for consideration only the claims regarding contribution and indemnity, and ordered the parties to appear on January 16, 2013. At the January 16, 2013, hearing, Plaintiffs dropped their request for contribution and indemnity and presented the Court with a Final Judgment, which disposed of all claims.

Other than these [two] concluded matter[s], no litigation is required to be disclosed in this Item.

In actuality, Counter-Defendant omitted the fact that on May 22, 2015, after January 16, 2013, and during the fiscal year prior to the 2016 FDD signed by Janai, the Dallas Court of Appeals

issued an Opinion regarding the above matter. Counter-Defendant omitted the fact that the matter had returned from the Court of Appeals to the Trial Court. In the 2016 FDD Counter-Defendant provided to Counter-Plaintiff, Counter-Defendant falsely claimed the matter was “concluded” when it was, in fact, “pending.” The matter is currently still “pending” and is set to go to trial on June 18, 2018.

In addition, Counter-Defendant omitted to disclose that Kaye Bassman International Corporation (KBIC), the parent company of Counter-Defendant, is also a defendant in the above-named matter. In the 2016 FDD Counter-Defendant only disclosed that Jeffrey Kaye and Nicholas Turner were defendants. The FTC Franchise Rule requires that Counter-Defendant’s parent company also be disclosed as a Defendant in the FDD.

In actuality, the name of the matter is:

Fitness Evolution, L.P. and Joseph S Mulroy, and Gleneagles Shopping Center Plano, Texas, L.P., v. Headhunters Fitness, L.L.C., Jeff Kaye, Nicholas L. Turner, Michael Kittleson, Jeff Wittenburg, Bill Baker, Willow Bend Fitness Club, LLC, Kaye Bassman International Corporation, Sagebrush Partners, Ltd, Vaughn R. Heady, Jr., Mark W Lewis, James Duggan, and Duggan Realty Advisors, L.L.C.

Omission of material information about litigation is a violation of the Franchise Rule of the FTC and constitutes fraud and a deceptive trade practice because information about litigation informs potential franchisees of Counter-Defendant’s liabilities as well, in this case, as the personal liabilities of Counter-Defendant officers Jeffrey Kaye and Nicholas L. Turner and the liabilities of Counter-Defendant’s parent company, Kaye Bassman International Corporation (KBIC).

11. Counter-Defendant failed to disclose that the actions required or permitted to properly conduct the business of the Franchise or the Counter-Defendant’s parent Kaye-Bassman (KBIC), were illegal activities- recording telephone conversations without proper consent with the intent to use illegally obtained information for commercial gain sometimes at the detriment of

individuals or corporations about whom or which the information was gained; and which illegally obtained information has a monetary value and which Counter-Defendant or Counter-Defendant's parent, KBIC, may sell or license to third parties for commercial gain.

12. Before Janai signed the Franchise Agreement, Counter-Defendant recorded phone calls between themselves and Janai without informing Janai. This was a misdemeanor because Janai lives in New Hampshire.

13. After Janai signed the contract, Counter-Defendant recorded her making phone calls between her home in New Hampshire and residents of Massachusetts, Connecticut and Florida without informing her and violating federal wiretapping statutes.

14. While Janai was in Texas, Counter-Defendant illegally monitored phone calls between Janai and residents of Massachusetts, also a state that requires two-party consent.

15. After Janai signed the contract, Janai discovered that Counter-Defendant is involved in criminal activity and that she could not work with the company without being complicit to crimes — even if Counter-Defendant did not require her to also personally commit the crimes — and without personally damaging Janai through requiring her complicity should she maintain her business associations with Counter-Defendant.

16. Counter-Defendant omitted informing Janai of Counter-Defendant's criminal liabilities, including the criminal liabilities of Counter-Defendant's parent, Kaye Bassman International Corporation (KBIC), prior to Janai's signing of the Franchise Agreement. Omission of criminal liabilities constitutes fraud and a deceptive trade practice because involvement in crime affects the value of any investment. Janai would not have invested any money in Counter-Defendant's business if Janai had known about Counter-Defendants' crimes prior to signing the contract.

17. The Franchise Disclosure Document provided to Janai by Counter-Defendant read, in pertinent part (Item 1):

**THE FRANCHISOR, ANY PARTENTS, PRECEDESSORS AND AFFILIATES**

To simplify the language in this Disclosure Document, “SRAI”, “we”, “our”, or “us” means Sanford Rose Associates International, Inc., a Texas corporation, the franchisor. “You” means the person who buys the franchise or “franchisee”, and can include owners/partners/members when the purchaser is a business entity. When you become a franchisee of SRAI, you are not in any way acting as a partner, employee, agent or joint venture of SRAI.

We formed as SRA International, Inc., an Ohio corporation incorporated on November 24, 1992, to acquire the assets of the former franchisor, Sanford Rose Associates International, Inc. (“Former Franchisor”). On January 2, 2012, Richard J. Carter and Glenda F. Carter sold 100 percent of the stock of SRA International, Inc. to Kaye/Bassman International Corporation, a Texas corporation (“Kaye/Bassman”), our parent. Our parent’s principal business address is 6860 North Dallas Parkway, Suite 301, Plano, Texas, 75024. SRA International, Inc. was merged into Sanford Rose Associates International, Inc., a Texas corporation which was formed on February 27, 2012 to acquire the stock of franchisor. Our principal business address is 6860 North Dallas Parkway, Suite 301, Plano, Texas, 75024.

18. Although the Counter-Defendant (“Franchisor”) was incorporated on February 27 2012, the only exemption under the Texas Business Opportunities Act on file at the Secretary of State’s office was for a different corporation of the same or similar name in 2008.

**B - Wrongful Termination**

19. Paragraph 3 of the First Amendment to Franchise Agreement between Janai and Counter-Defendant states as follows:

3. Section 4(a) of the Franchise Agreement is hereby replaced in its entirety by: In consideration of your granting franchise rights to you, you agree to pay us an Initial Franchise Fee of \$88,000.00 with a down payment of 10% (\$8,800.00) due upon the signing of this Agreement and the remaining 90% (\$79,200.00) due no later than the first day of Phase I New Franchisee training program if “self-funding” process

complete otherwise, available exception: Franchisee is using the service for “self-funding”, as a result, final balance due will be delayed. Once process is complete per service provider, Franchisee will pay in full. If the process of “self-funding” through service provider should fail to occur, then Parties agree to resort to defined payment scheduled as follows: Balance of \$31,200.00 would be due no later than the five (5) business days following the notification that “self-funding” process failed. Then, the remaining \$48,000.00 plus an additional payment plan fee of \$7,200.00 is due (defined as 15% of outstanding balance) to SRAI within 24 months of the Franchise Agreement Effective Date. Should Franchisee elect to pay the remaining balance in full prior to 24 months, the remaining debit balance applicable to the \$7,200 payment schedule fee would be adjusted on a prorated basis to the following month following the complete payment. Initial Franchise Fee is nonrefundable.

Janai opted for the “self-funding program”.

20. On or about November 11th, Counter-Defendant sent a default notice which stated as follows:

According to our records you, individually as guarantor, and Nebo & Finch, Inc. (“You”) are in default of your franchise agreement dated August 23, 2016 with Counter-Defendant International, Inc. (“SRA”) (the “Franchise Agreement”) for failing to make the required payment of \$79,200 due toward the franchise fee on the first day of the Phase I New Franchise Training Program which began on September 26, 2016. SRA is, therefore, providing ten (10) days written notice of your default and an opportunity to cure by making this payment within the aforementioned ten (10) days.

21. On or about November 28th, Counter-Defendant sent a notice of termination which stated as follows:

Counter-Defendant International (“SRA”) hereby gives notice that it is terminating the Franchise Agreement dated August 23, 2016 (the “Franchise”) between SRA and you, as subsequently assigned to Nebo & Finch, Inc., collectively referred to as (the “Franchisee” or “You”) effective December 1, 2016 for failing to pay the sum of \$79,200.00 due toward your franchise fee on September 26, 2016 the first day of your Phase I training, and no remaining open.

22. Both the default notice and the notice of termination were in error in that the First Amendment to the Franchise Agreement did not require payment of the remainder of the Franchise

Fee on the first day of Phase I training, but, rather, upon denial of the “self-funding” which has not yet occurred and 5 days written notice.

23. Counter-Defendant has wrongfully sued Janai on her personal guaranty.

24. Consequently, the termination is wrongful and constitutes both a deceptive trade practice and material breach of the Franchise Agreement which excuses further performance by Janai.

### **C – Causes of Action**

25. The conduct described in the preceding paragraphs 1 through 18 gives rise to the following causes of action:

DTPA. In violation of DTPA § 17.46(b)(2),(5), (7), and (24) and are actionable under DTPA § 17.50(a)(1). Furthermore, Counter-Defendant’s conduct was unconscionable which is defined in DTPA §17.45(5) and is actionable under DTPA § 17.50(a)(3). The conduct was done knowingly. Janai is a consumer as that term is defined in the DTPA. In the transaction that is the subject to this case, she sought to purchase goods and services. She is an individual and her net worth is substantially less than \$25 million.

Sec. 51.302. DECEPTIVE TRADE PRACTICE; REMEDIES. (a) A violation of this chapter is a false, misleading, or deceptive act or practice under Section 17.46.

(b) A public or private right or remedy prescribed by Chapter 17 may be used to enforce this chapter.

(c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. § 45(a)(1)].



The Franchise Rule of the FTC requires franchisors to require to comply with state franchising laws. The Texas Business Opportunity Act requires that a franchisor either file a registration or an exemption. Counter-Defendant has done neither and, accordingly, this failure is a per se violation of the Texas Deceptive Trade Practices Act.

26. Fraud. Counter-Defendant's false representations about the nature of the franchise constitutes fraud, fraud in the inducement, fraud in the factum. Janai relied on the representations and omissions when entering into the Franchise Agreement to her detriment.

27. Breach of Contract. Counter-Defendants' wrongful termination and wrongful demand and suit on the Personal Guaranty constitutes a breach of the Franchise Agreement and the Personal Guaranty.

Counter-Defendants' failure to provide Janai with the Entrepreneur's Express training and all of the Phase I training as promised in the Franchise Disclosure Document and the Franchise Agreement and, specifically, Counter-Defendants' failure to provide the Entrepreneur's Express training and all of the Phase I training before pressuring Janai to attend Phase II training, constitutes a breach of the Franchise Agreement and the Personal Guarantee.

28. Negligent Misrepresentation the statements, misrepresentations and omissions set forth above constitute negligent misrepresentations.

29. Rescission/Restoration Order. In the alternative, Counter-Plaintiffs seek the remedy of rescission/Restoration Order. Janai has returned all things of value received from Counter-Defendant.

**D – Damages.**

30. Because of the conduct described in the preceding paragraph, Janai has been damaged in an amount in excess of the minimum jurisdictional limits of this Court not to exceed five million dollars (\$5,000,000.00).

**E – Punitive Damages.**

31. The Janai will further show that the conduct of the Counter-Defendant as described above was fraudulent and malicious, and that the Counter-Defendant's false representation and omissions were made knowingly and with actual awareness of its falsity. As a result, the Counter-Plaintiffs are entitled to recover exemplary damages to deter fraudulent conduct by others in its situation. In this connection, the Counter-Plaintiffs will show that as a result of the Counter-Defendants' conduct, the Plaintiffs have suffered losses the 10% down payment, startup costs, travel costs and other expenses, including attorneys' fees incurred in the investigation and prosecution of this action. Additionally, she has suffered damages to reputation, time, credit and emotional damages. Accordingly, the Counter-Plaintiffs suggest that exemplary damages be awarded against the Counter-Defendants in a sum within the jurisdictional limits of this Court.

**F - Attorneys Fees.**

32. As a result of having to bring this claim against the Counter-Defendant, Counter-Plaintiffs were compelled to retain the services of a licensed attorney. As a result, and in addition to the other actual damages and costs, the Counter-Plaintiffs are entitled to an award of reasonable attorney's fees as allowed under §38.001 of the Texas Civil Practice and Remedies Code, as well as under the Texas DTPA, Counter-Plaintiffs and would ask that the Court award reasonable attorney's fees as against the Counter-Defendant.

**G – Conditions Precedent**

33. All conditions precedent to Counter-Plaintiffs’ right to recovery have been performed or have been waived.

**WHEREFORE PREMISES CONSIDERED**, for all of the reasons set forth above, Counter-Plaintiff asks that Counter-Defendant be cited according to law to appear and answer this lawsuit, and that after a final trial, they have judgment be entered against Counter-Defendant and in favor of for damages, or rescission, enhanced and punitive damages, attorney’s fees and such other relief to which Counter-Plaintiffs may be entitled.

Respectfully submitted,

GARY E. SMITH, P.C.  
GRAHAM, BRIGHT & SMITH, P.C.  
Attorneys and Counselors

By: /s/ Gary E. Smith  
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**ATTORNEYS FOR DEFENDANTS/  
COUNTER-PLAINTIFFS**

**CERTIFICATE OF SERVICE**

The foregoing has been served upon the Plaintiff/Counter-Defendant by and through its attorney of record, Ms. Julie Pettit via email correspondence only on this the 20<sup>th</sup> day of February, 2017.

/s/ Gary E. Smith  
Gary E. Smith