

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT

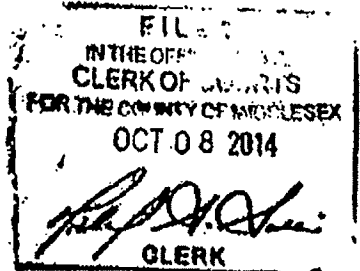
BENJAMIN HATHAWAY,  
Plaintiff,

v.

PEPPERIDGE FARM, INC.  
Defendant.

14-7838

Civil Action No.



COMPLAINT AND JURY DEMAND

I. INTRODUCTION

1. Plaintiff Benjamin Hathaway ("Hathaway") brings this cause of action against defendant Pepperidge Farm, Inc. ("Pepperidge Farm" or "The Bakery") for damages suffered to him as a result of the purchase of his distribution route and his employment as a Pepperidge Farm distributor.

2. At all times relevant hereto, Pepperidge Farm employed Hathaway to distribute its cookies to area supermarkets and convenience stores. Rather than classifying Hathaway as an employee, as required by Massachusetts law, Pepperidge Farm improperly classified Hathaway as an independent contractor.

3. In other litigation, Pepperidge Farm took the position that its classification of distributors like Hathaway as "independent contractors" was based on the element of a Consignment Agreement (the "Agreement") it entered into with its consignees that granted them a distributorship that Pepperidge Farm called a "valuable asset . . . akin to real estate or a similar market-based investment." See DEFENDANT PEPPERIDGE FARM, INCORPORATED'S

MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFFS' CLASS ACTION ALLEGATIONS, C.A. No. 1:13-cv-12770-GAO [Doc. 27] (D. Mass. Mar. 14, 2014).

4. Pepperidge Farm, through unlawful, improper and malicious means took the one thing away from Hathaway that could (according to Pepperidge Farm) plausibly make the relationship that of an independent contractor. Pepperidge Farm unilaterally and unlawfully confiscated a portion of Hathaway's distributorship (i.e., the so-called valuable asset akin to real estate), and forced him to sell the remaining portions of his now-devalued distributorship.

5. This conduct, which was purposefully designed to sever Hathaway's employment relationship with Pepperidge Farm the only way it believed it could, also deprived Hathaway of the benefits of the bargain of both the contract to purchase the distributorship and the Consignment Agreement.

## II. PARTIES

6. Plaintiff Hathaway is a resident of Wareham Massachusetts.

7. Since 2007, and continuing through 2014 Hathaway was an employee of Pepperidge Farm in Massachusetts, serving as a distributor. Pepperidge Farm describes this relationship as one of an independent contractor.

8. Defendant Pepperidge Farm is a Connecticut corporation that maintains a principal place of business in Woburn, Massachusetts.

9. Pepperidge Farm regularly conducts business in Middlesex County and elsewhere in Massachusetts, and operates facilities in various parts of the state.

10. Pepperidge Farm's business activities in Massachusetts were, and are still subject to, the Massachusetts wage and hour laws, which required it to compensate Hathaway in accordance with those requirements imposed on employers by the laws of Massachusetts.

### III. FACTUAL BACKGROUND

#### A. COMPANY STRUCTURE

11. Pepperidge Farm was founded over 75 years ago, and manufactures, markets, sells, and distributes delicious, yet moderately overpriced snack products (cookies and crackers) and bakery products (fresh bread, stuffing and croutons). Pepperidge Farm sells its products to grocery stores, conveniences stores, mass merchandisers, military commissaries, and various other stores.

12. Pepperidge Farm has used a Direct-Store-Delivery system to deliver its products to market. Pepperidge Farm employs over 3,500 distributors over more than 4,000 distribution routes throughout the United States.

13. Individuals interested in becoming a Distributor contract with Pepperidge Farm either directly or with a third party and the consent of Pepperidge Farm to purchase a distribution route. Individuals are screened by Pepperidge Farm and evaluated for their character, ability, financial responsibility, business acumen, and adequacy of facilities before they can acquire a distribution route from Pepperidge Farm directly, or by sale by the current owner of the route.

14. Once approved, Pepperidge Farm offers to sell a distribution route to the approved candidate. These routes are sold either from routes held by Pepperidge Farm at the time, or Pepperidge Farm brokers a deal with an existing distributor. However, no person may distribute Pepperidge Farm products without purchasing a distribution route.

15. Individuals that successfully purchase a distribution route are designated as consignees by Pepperidge Farm.

16. Before work as a distributor can begin, individuals are forced to sign a "Consignment Agreement" drafted by Pepperidge Farm adhering them to the requirements set

forth below.

**B. THE CONSIGNMENT AGREEMENT**

17. In the Agreement, Pepperidge Farm describes the distributors as “independent contractors.” This agreement is drafted exclusively by Pepperidge Farm, and is effectively a contract of adhesion. Consignees are afforded no meaningful opportunity to negotiate the terms of the Agreement, and are instead forced to either accept or decline the Agreement as is.

18. Pepperidge Farm has substantial control over the Consignee’s business actions.

19. Pepperidge Farm sets standards for Consignees in realizing the sales potential of their Territory.

20. Pepperidge Farm requires Consignees to deliver their products to locations designated by Pepperidge Farm and that are not demonstrably unprofitable. Consignees are required to “accept sufficient quantities of Consigned Products to maintain at all times an adequate and fresh supply” in all stores throughout the Consignee’s territory. Such inventory is deemed to be the “sole and exclusive property” of Pepperidge Farm.

21. Pepperidge Farm prohibits Consignees from granting a lien or any other security interest on the products/inventory.

22. Pepperidge Farm requires that Consignees keep records of consigned products received as well as sales and deliveries. These records may be requested by Pepperidge Farm at any time.

23. Possession of the physical inventory of the Consignee can be taken by the Bakery at any time.

24. Pepperidge Farm requires that each Consignee use their best efforts to realize the full sale potential of their territory by:

- A. Actively soliciting stores in their territory;
- B. Maintaining a fresh and adequate supply of consigned products in stores in their territory;
- C. Providing distribution service to all stores at proper intervals to maximize sales potential;
- D. Making available all authorized consigned products to stores in their territory;
- E. Cooperating with the Baker in effective utilization of advertising, sales promotion, space merchandising programs; and
- F. Keeping up to date with the policies and methods of the Bakery for increasing sales and efficiency of distribution.

25. Consignees are prohibited by the Bakery from selling or distributing products that are in competition with Pepperidge Farm, or that may interfere with the successful performance of the Consignee as a distributor of Pepperidge Farm products.

26. Pepperidge Farm requires that the Consignee maintain the appearance and condition of their truck and equipment in accordance with the standards established by Pepperidge Farm.

27. Pepperidge Farm requires that the Consignee and their helpers maintain an appearance and deportment consistent with the standards established by Pepperidge Farm.

28. The Agreement expressly limits who the Consignee can sell or deliver products to, as well as the products that they can sell.

29. Pepperidge Farm requires that each Consignee must maintain adequate public liability, property damage, and other applicable insurance to protect the Consignee as well as Pepperidge Farm.

C. ADDITIONAL CONTROL OVER DISTRIBUTION

30. Training for routes is provided by Pepperidge Farm during the first few months of

a Consignee's purchase of their route:

31. Consignees are supposed to follow a "plan o gram", a photographic depiction of model product displays, for proper display and mix of Pepperidge Farm products within the stores in their distribution Route.

32. Pepperidge Farm conducts store evaluations to rate and discipline Consignee's based on the techniques and standards of Pepperidge Farm.

33. Pepperidge Farm sets the quantity of product that is to be delivered to each store within the Consignee's territory.

34. The retail price of each consigned good is set by Pepperidge Farm, which the Consignee cannot change.

35. In order to receive their consigned product, distributors are required to report to a Pepperidge Farm facility during the morning hours of specific days, where they are provided with the products that Pepperidge Farm has determined should be delivered.

36. During the times when a Pepperidge Farm product is on a discounted sale at a location, the Bakery requires that the distributors deliver the sale product on the same day that the sale is to begin. This sale date and the sale's locations are decided solely by Pepperidge Farm.

37. Consignees are required to visit stores throughout the week in order to stock shelves and ensure correct product placement. Compliance and efficiency in this task is tracked by Pepperidge Farm.

38. Consignees are required to purchase and maintain a specialized hand-held computer, printer, and modem that must be carried with the distributor at all times. This device is used to provide detailed information regarding the performance of the distributor to Pepperidge

Farm.

39. Pepperidge Farm requires that the Consignee purchase their own delivery truck that meets specifications and standards that are set by the Bakery.

40. Pepperidge Farm provides truck decals for route owners.

**D. HATHAWAY'S AGREEMENT**

41. On or about January 29, 2007, Hathaway was approved by Pepperidge Farm to acquire a distributorship and to sign a Consignment Agreement with Pepperidge Farm.

42. As a result, he was responsible for merchandizing and providing services to retail customers within his defined territory.

43. Hathaway was responsible for realizing full sales potential of Pepperidge Farm products by utilizing service, distribution, space management, and merchandising and promotion techniques.

44. Hathaway was required by Pepperidge Farm to provide adequate equipment and storage facilities for the receipt, handling, storage and delivery of Pepperidge Farm products.

45. Hathaway was required to adhere to all responsibilities delineated in the preceding paragraphs.

46. Pepperidge Farm brokered a deal that allowed Hathaway to purchase the exclusive right to distribute Pepperidge Farm products in a territory including Middleborough, Bridgewater, West Bridgewater, East Bridgewater, and Carver, Massachusetts (the "Territory").

47. This territory was arranged by Pepperidge Farm and included territory previously owned by three other Consignees, including Edward Broderick, Donald "Barney" Mayer and Ray Beauchemin.

48. Even prior to acquiring the distributorship, Pepperidge Farm began to exert

control over Hathaway by controlling every aspect of the deal.

49. Hathaway, who had extensive experience of over 25 years as a bread route deliveryman set out to purchase a bread route for approximately \$190,000.00.

50. Pepperidge Farm, however, talked him into purchasing the Territory for \$270,000.00, which only distributed cookies and snacks.

51. This sales price was set by Pepperidge Farm by multiplying the average weekly sales by a multiplier – for the sale of a cookie route such as the one to Hathaway, the value was set at 40 times weekly sales to the stores within the Territory.

52. Pepperidge Farm also arranged financing through Bank of America at an exorbitant interest rate. Upon information and belief, Pepperidge Farm had an improper relationship with Bank of America. Bank of America was the exclusive lender approved by Pepperidge Farm and Pepperidge Farm benefited from the loans that financed these distributorship. This improper relationship was made apparent when Bank of America refused to release specific details of the loan to Hathaway, such as interest rate, payoff amounts, etc., without Pepperidge Farm's approval.

53. Hathaway had concerns about financing a distributorship that cost more than \$80,000.00 more than he had initially set out to purchase. However at the time of the sale, Pepperidge Farm through its District Sales Manager Darleen Almeida, falsely represented that the route would be profitable despite the hefty monthly loan payment Hathaway would need to make to keep the Bank of America loan current.

54. Hathaway reasonably relied on these statements made by Pepperidge Farm in making the decision to purchase the newly formed Territory and acquiring the distributorship necessary to be employed by Pepperidge Farm.



55. Over the course of Hathaway's employment that spanned more than seven years, Hathaway was now obligated to make monthly installment payments to Bank of America in the amount of \$2,852.96 (i.e., approximately \$250,000.00) for the right to work for Pepperidge Farm.

**E. FABRICATED BASES TO TERMINATE HATHAWAY'S DISTRIBUTORSHIP**

56. Six months after acquiring the distributorship, there were problems that arose in Hathaway's Territory.

57. At a meeting that took place at Pepperidge Farm's warehouse in Wareham, Pepperidge Farm acknowledged that it knew at the time of the sale, that the route it brokered and sold to Hathaway could not be profitable.

58. This meeting included Hathaway, Almeida and Pepperidge Farm's Vice President Timothy Mulchy. At this meeting Mulchy scolded Almeida by saying something to the effect of "I told you that you did not put enough stops on this route," and "there is no way [Hathaway] can make his monthly payments and pay for this route." As part of this conversation, Mulchy indicated that the route should have also included the Stop and Shop grocery store located in Raynham to ensure that Hathaway could earn a living.

59. Because Almeida was reprimanded in front of Hathaway, she began an aggressive campaign of conduct that interfered with Hathaway's ability to properly distribute Pepperidge Farms products pursuant to the terms of the Consignment Agreement.

60. Pepperidge Farm sends employees to various retailers to evaluate performance of its Consignees. Almeida began to speak negatively about Hathaway to retailers within the Territory.

61. At the Trucci's store in Middleboro, for example, Almeida spoke to owner Eddie

Trucchi and falsely accused Hathaway of stealing from his store because some of the stock was kept in the back room of the store. Of course, such a statement had no basis in fact and the statement was only intended to encourage Trucchi to complain about Hathaway's performance.

62. In another instance, Almeida went to a Tedesci's convenience store in Bridgewater, examined the Pepperidge Farm display and told the clerk "I am sorry the shelf is such a mess, this is the worst deliveryman we have." When Almeida found out that the store was not on Hathaway's route and not serviced or stocked by him, she told the clerk that she made an error and left the store.

63. Almeida continued to harass Hathaway and find ways to terminate his employment. Among other underhanded actions aimed at making Hathaway look bad, Almeida would push products to the back of shelves and take photographs so as to claim that the shelves were improperly stocked.

64. After Almeida sufficiently "papered the file," she began to take affirmative action to take territory away from Hathaway.

65. On November 16, 2012, Pepperidge Farm revoked Hathaway's authorization to service Trucchi's Middleboro, and Trucchi's Bridgewater stores.

66. In December 18, 2013, Pepperidge Farm threatened to take away additional territory including two of Hathaway's largest grossing stores: the Walmart in Raynham and the Market Basket in West Bridgewater. Pepperidge Farm knew that losing these stores would result in a net monthly loss (after paying the loan payment) and his employment would no longer be profitable without these stores.

67. Mulchy made Hathaway an ultimatum -- sell the entire distributorship or the Raynham Walmart and West Bridgewater Market Basket will be taken away involuntarily.

68. Left with no choice, Hathaway was forced to sell his route and sever his employment relationship with Pepperidge Farm.

**IV: CAUSES OF ACTION**

**COUNT ONE**  
**MISCLASSIFICATION**  
**G. L. c. 149, §148B**

69. The Plaintiff readopts and realleges the preceding paragraphs, and incorporates them into this count.

70. Pepperidge Farm has violated G. L. c. 149, § 148B, by misclassifying Hathaway as an independent contractor instead of as an employee.

71. Hathaway has been damaged by said violation of G. L. c. 149, § 148B. These damages include, but are not limited to the amounts Hathaway had to pay for the right to work for Pepperidge Farm as a distributor.

72. Pursuant to G. L. c. 149, § 150, Pepperidge Farm is liable for treble damages, prejudgment interest, plus costs and reasonable attorneys' fees.

**COUNT TWO**  
**BREACH OF CONTRACT**

73. Plaintiff readopts and realleges the preceding paragraphs and incorporates them into this count.

74. On or about January 29, 2007 Hathaway purchased a distribution route and entered into a Consignment Agreement with Pepperidge Farm.

75. Hathaway has fully performed all covenants, conditions and obligations required by him to be performed by reason of the Agreement, except to the extent made impossible by the defendant's breach of the contract.

76. The defendant has breached the Agreement as discussed herein, including,

without limitation, by preventing him from performing, by confiscating portions of his Territory, by falsifying bases to terminate the Agreement, and by forcing him to terminate the Agreement.

77. As a direct and proximate cause of Pepperidge Farm's breach, Hathaway has incurred significant financial damages.

**COUNT THREE**  
**BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING**

78. Plaintiff readopts and realleges the preceding paragraphs and incorporates them into this count.

79. On or about January 29, 2007 Hathaway purchased a distribution route and entered into a Consignment Agreement with Pepperidge Farm.

80. This Agreement came with an implied duty of good faith and fair dealing by and between the parties that prohibits them from engaging in any activity or conduct which would prevent the other party from receiving the benefits of the contract.

81. Pepperidge Farm breached this duty as discussed herein, including, without limitation, by falsely representing the profitability of the Territory, by preventing him from performing, by confiscating portions of his Territory, by falsifying bases to terminate the Agreement, and by forcing him to terminate the Agreement.

82. As a direct and proximate cause of Pepperidge Farm's breach, Hathaway has incurred significant financial damages.

**COUNT FOUR**  
**INTERFERENCE WITH ADVANTAGEOUS/CONTRACTUAL RELATIONS**

83. The Plaintiff readopts and realleges the preceding paragraphs, and incorporates them into this count.

84. On or about January 29, 2007 Hathaway entered into a purchase and sale

agreement and acquired a distribution route and exclusive territorial rights to distribute Pepperidge Farm products.

85. At all times relevant hereto, Pepperidge Farm was aware of this agreement, contract, and/or acquisition of the distributorship.

86. Pepperidge Farm has interfered with this agreement by unilaterally confiscating Hathaway's acquired Territory and forcing him to lose the Territory.

87. This interference was intentional, malicious, and without lawful justification, and Pepperidge Farm acted out of an improper motive and employed improper means.

88. As a direct and proximate cause of this conduct, Hathaway has incurred significant financial damages.

**COUNT FIVE**  
**UNJUST ENRICHMENT**

89. The Plaintiff readopts and realleges the preceding paragraphs and incorporates them into this count.

90. The value of the confiscated Territory taken by Pepperidge Farm constitutes a benefit that Pepperidge Farm aggressively sought and voluntarily accepted.

91. The amounts Plaintiff paid for the privilege of working for Pepperidge Farm constitutes a benefit that Pepperidge Farm aggressively sought and voluntarily accepted.

92. Retention of these benefits would violate fundamental principles of justice, equity and good conscience.

**COUNT SIX**  
**UNFAIR AND DECEPTIVE BUSINESS PRACTICES**  
**G. L. C. 93A, §§ 1, et seq.**

93. The Plaintiff readopts and realleges the preceding paragraphs and incorporates them into this count.

94. At all relevant times Pepperidge Farm and Hathaway were both engaged in commerce for purposes of G. L. c. 93A.

95. Pepperidge Farm has engaged in unfair and deceptive business practices as discussed herein, including, without limitation, by falsely representing the profitability of the Territory, by preventing Hathaway from performing, by confiscating portions of his Territory, by falsifying bases to terminate the Agreement, and by forcing him to terminate the Agreement.

96. Pepperidge Farm has further committed an unfair and deceptive business practice by confiscating his valuable asset (i.e., the distributorship), without compensation, and for the sole purpose of terminating what should have been classified as an employment relationship.

97. All other conduct complained of herein constitutes per se violations of Chapter 93A.

98. Pepperidge Farm has committed the unfair and deceptive business practices intentionally and knowingly, and Hathaway has suffered significant financial damages as a result.

**COUNT SEVEN**  
**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

99. The Plaintiff readopts and realleges the preceding paragraphs and incorporates them into this count.

100. As a direct and proximate result of Pepperidge Farm's intentional conduct, Hathaway suffered, and continues to suffer, severe emotional distress and anguish.

**V. PRAYER FOR RELIEF**

WHEREFORE, Hathaway respectfully requests the Court grant the following relief:

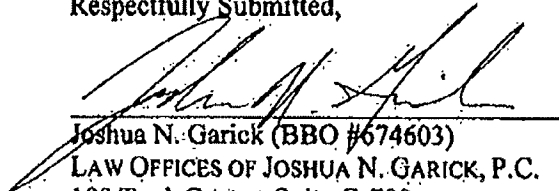
- i. Enter judgment in his favor and against the defendant on all Counts;
- ii. Award damages to plaintiff in an amount determined by the Court;

- iii. Award reasonable attorneys' fees and costs incurred by the plaintiff; and
- iv. Grant such other and further relief as the Court deems proper.

**VI. JURY DEMAND**

Hathaway demands a trial by jury on all counts so triable.

Respectfully Submitted,



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Dated: October 8, 2014