

**ADMINISTRATIVE PROCEEDING
BEFORE THE
SECURITIES COMMISSIONER OF MARYLAND**

In the Matter of: *

NY BAGEL ENTERPRISES, INC., *

SMS, INC., *

JOSEPH V. SMITH, * Case Number 2015-0156

DENNIS KENNETH MASON, *

Respondents. *

* * * * *

FINAL ORDER TO CEASE AND DESIST

WHEREAS, the Securities Division of the Office of the Attorney General of Maryland (the “Securities Division”) initiated an investigation into the franchise-related activities of New York Bagel Enterprises, Inc., SMS, Inc., Joseph V. Smith, and Dennis Kenneth Mason (collectively “Respondents”) under the authority granted under the Maryland Franchise Registration and Disclosure Law, MD. BUS. REG. CODE ANN. §§14-201 et seq. (2015 Repl. Vol.) (the “Maryland Franchise Law”); and

WHEREAS, as a result of that investigation, the Maryland Securities Commissioner (the “Commissioner”) found grounds to allege that Respondents violated the anti-fraud, registration, and disclosure provisions of the Maryland Franchise Law, in relation to the advertisement, offer to sell, and sale of New York Bagel Cafe & Deli franchises in Maryland; and

WHEREAS, on August 6, 2015, the Commissioner issued an Order to Show against Respondents, ordering them to show cause why a final order should not be entered for each of them to permanently cease and desist from violating the anti-fraud, registration, and disclosure provisions

of the Maryland Franchise Law;and

WHEREAS, the Order to Show Cause gave Respondents notice of the opportunity for a hearing in this matter, provided a Respondent submitted an answer within 15 days of service of the Order to Show Cause and further gave notice to Respondents that failure to file a written answer would be deemed a waiver of the right to a hearing and would result in the entry of a final order directing Respondents to cease and desist from violating the Maryland Franchise Law; and

WHEREAS, on August 6, 2015, a copy of the Order to Show Cause was served on the Commissioner, as agent for New York Bagel Enterprises, Inc.; and

WHEREAS, on August 19, 2015, a copy of the Order to Show Cause was served on Respondent SMS, Inc.; and

WHEREAS, on August 6, 2015, copies of the Order to Show Cause were sent by certified mail, return receipt requested, to the last known addresses of Respondents New York Bagel Enterprises, Inc., Joseph V. Smith, and Dennis Kenneth Mason, but each mailing was returned and marked “unclaimed” or “return to sender,” with no forwarding address; and

WHEREAS, on September 11, 2015, copies of the Order to Show Cause were sent to Respondents Joseph V. Smith and Dennis Kenneth Mason via e-mail to e-mail addresses that those Respondents used in 2015; and

WHEREAS, Respondents did not file an answer or request a hearing in response to the Order to Show Cause; and

WHEREAS, the Commissioner has determined that it is in the public interest to issue this Final Order to Cease and Desist;

NOW, THEREFORE, THE COMMISSIONER HEREBY FINDS AND ORDERS:

I. JURISDICTION

1. The Commissioner has jurisdiction in this proceeding and over Respondents pursuant to section 14-210 (a) of the Maryland Franchise Law.

II. FINDINGS OF FACT

A. Respondents

2. NY Bagel Enterprises, Inc. (“NY Bagel”) is a New Jersey Corporation with a principal business address of 301 Route 17 North, Suite 800, Rutherford, New Jersey 07070.

3. NY Bagel offers and sells franchises for retail stores using the name “New York Bagel Cafe & Deli,” which sell take-out bagels, coffees, sandwiches, and other food related items.

4. NY Bagel owns the trademark for the New York Bagel Cafe & Deli logo design and words, which NY Bagel registered with the U.S. Patent and Trademark Office in 2010.

5. SMS, Inc. (“SMS”) is a Delaware corporation with a principal business address of 1521 Concord Pike, Suite 301, Wilmington, Delaware 19803.

6. SMS also offers and sells New York Bagel Cafe & Deli franchises in the form of “license agreements.”

7. Joseph V. Smith (“Smith”) is the president of both NY Bagel and SMS. Smith’s last known business address is 301 Route 17 North, Rutherford, New Jersey 07070.

8. Dennis Kenneth Mason (“Mason”) is a franchise sales agent or broker for franchise offerings, including New York Bagel Cafe & Deli. Mason’s last known business address is P.O. Box 1085, Medford, NJ 08055.

B. The NY Bagel Cafe & Deli Franchise Offering

9. NY Bagel was registered to offer and sell franchises under the Maryland Franchise Law for a one year period, from January 30, 2012 through January 30, 2013.

10. According to the Franchise Disclosure Document (“FDD”) that NY Bagel filed with the Securities Division as part of its franchise registration application, NY Bagel has offered and sold franchises in the U.S. since 2007 and had, as of November 2011, 13 franchised outlets open and an additional 21 franchise agreements signed but the franchise was not yet opened.

11. The franchise registration application that NY Bagel filed in Maryland identified two individuals who would solicit, offer, or sell franchises for the franchisor in Maryland: Dennis Kenneth Mason and Joseph V. Smith.

12. NY Bagel has not been registered to offer or sell franchises in Maryland at any time after January 30, 2013.

C. The NY Bagel Franchise Advertising in Maryland

13. Between March and May 2015, Respondent Smith caused to be posted on a Baltimore Craigslist advertising website several advertisements stating that “NY Bagel Cafe & Deli, a 20 year old leading bagel Franchisor, is now offering for a limited time only an exceptional Special Spring 2015 program within the state of MD.”

14. The Baltimore Craigslist advertisements that Smith placed stated further:

With positive same store sales growth and 96% brand awareness, NY Bagel is poised to add a 1000 [sic] new restaurants in the next 10 years. Be the next NY Bagel franchisee to build a drive-thru, dine-in, in your market! Our Franchise Fee is a reduced onetime fee of \$17,500 and all monies required for the build-out, equipment, furniture & fixtures, inventory, lease & security deposits, working capital is 100% financed... For full details Call: Mr Dennis (888) 550-8020.

15. On April 24, 2015, the Securities Division sent a letter (“Franchise Warning Letter”) by certified mail, return receipt requested to NY Bagel advising the franchisor and Smith that NY Bagel was not registered to offer or sell franchises in Maryland. The Securities Division requested information and documentation regarding NY Bagel’s sales activities in Maryland.

16. The Franchise Warning Letter addressed to NY Bagel's principal business address was returned as "return to sender, not deliverable."

17. The Securities Division sent a second copy of the Franchise Warning Letter to NY Bagel at a company-owned NY Bagel & Deli located in Newburgh, NY. The return receipt shows that the second copy of the Franchise Warning Letter was delivered to that address on April 27, 2015.

18. The Securities Division received no response to the Franchise Warning Letter.

D. Sale of Unregistered Franchise in Ocean City, Maryland

19. In March 2015 "Mike H," a Maryland resident, purchased an independently operated cafe located in Ocean City, Maryland.

20. At about the same time Mike H purchased his cafe, he saw an advertisement on Craigslist to purchase a franchise for a New York Bagel Cafe & Deli.

21. Mike H called the number listed in the Craigslist advertisement and spoke to Dennis Mason.

22. Mason told Mike H that by purchasing a New York Bagel Cafe & Deli, his cafe could earn \$1,500 per day.

23. In April 2015, Mason, identifying himself as being from the "Franchise Dept." sent Mike H an e-mail with a copy of a 3 page application that needed to be completed to be considered for ownership of a New York Bagel Cafe & Deli.

24. On or about April 19, 2015, Mason met with Mike H in Middletown, New Jersey to discuss the purchase of a New York Bagel Cafe & Deli.

25. On or about April 19, 2015, Mason gave Mike H a proposed "License Agreement" and an addendum. Mason advised Mike H that "The Addendum is a collection of approved changes

that were made for other signed Licensees. Under FTC Rule, we are required to offer you any and all changes that were ever made to the License Agreement.”

26. On April 23, 2015, Mike H entered into a “License Agreement” with SMS (the “SMS License Agreement”) granting him the right to operate a retail store under the name New York Bagel Cafe & Deli.

27. As required under the SMS License Agreement, Mike H paid SMS an initial fee of \$17,500, and agreed to pay ongoing royalties of \$500 per month.

28. Smith signed the SMS License Agreement as president of SMS.

29. Mason witnessed Smith’s signature on the SMS License Agreement.

30. The SMS License Agreement granted Mike H the right to use certain trade names, service marks, trademarks, and logos, including the mark “New York Bagel Cafe & Deli.”

31. Under the SMS License Agreement, SMS agreed to, among other things: loan Mike H a copy of an operations manual; provide specifications for fixtures, equipment, and signage to operate a New York Bagel Cafe & Deli; provide specifications for designated sources; help with pre-opening advertising; assist with opening; and provide ongoing assistance regarding the management and operation of the business.

32. Under the SMS License Agreement, Mike H agreed to operate the New York Bagel Cafe & Deli business in conformity with the SMS’s standards and specifications.

33. Smith sent Mike H a copy of the New York Cafe & Deli logo to use and a copy of a standard menu with proposed pricing.

34. Smith also provided Mike H with a copy of a New York Bagel Cafe & Deli operations manual.

35. The SMS License Agreement, in fact, is nearly identical to the form of NY Bagel

franchise agreement captioned “ EXHIBIT 6 TO NEW YORK BAGEL ENTERPRISES, INC. FRANCHISE DISCLOSURE DOCUMENT” that NY Bagel filed with the Securities Division in 2012, except that the SMS License Agreement substitutes the word “license” for “franchise” in most places, and the SMS License Agreement contains different provisions for the amount of royalties and advertising contributions that Mike H must pay SMS.

36. In some sections, the SMS License Agreement refers to SMS as “franchisor.” The SMS License Agreement is even captioned, similar to the NY Bagel franchise agreement, “EXHIBIT 6... to LICENSE DISCLOSURE DOCUMENT.”

37. Smith traveled to Ocean City, Maryland on June 30, 2015 to help Mike H with his grand opening. Smith brought with him someone whom Smith said worked at a company-owned New York Bagel Cafe & Deli.

38. Mike H opened his New York Bagel Cafe & Deli on July 1, 2015.

39. The SMS License Agreement that Mike H signed to operate a New York Bagel Cafe & Deli constitutes a franchise under the Maryland Franchise Law.

40. SMS has never been registered to offer to sell or sell franchises in Maryland.

III. CONCLUSIONS OF LAW

The Commissioner concludes that:

41. Respondents NY Bagel, SMS, Smith, and Mason violated section 14-228 of the Maryland Franchise Law by advertising, offering and selling in Maryland a franchise as defined under section 14-201 of the Maryland Franchise Law without registering the franchise with the Commissioner as required under the Maryland Franchise Law.

42. Respondents Smith, Mason and SMS violated section 14-223 of the Maryland

Franchise Law by offering and selling in Maryland a franchise without giving the prospective franchisee a copy of the offering prospectus required under the Maryland Franchise Law.

43. Respondents NY Bagel, SMS, Smith, and Mason violated section 14-229 of the Maryland Franchise Law by making material misrepresentations of fact and/or omissions of material fact about the New York Bagel Cafe & Deli franchise offering.

44. Respondents Mason and SMS violated 14-229 of the Maryland Franchise Law and COMAR 02.02.08.16(D) by making oral or written statements concerning the potential earnings from operation of a New York Bagel Cafe & Deli franchise without making the required disclosures about those potential earnings in the offering prospectus given to a prospective franchisee.

45. Respondents NY Bagel, Smith, and SMS violated section 14-225 of the Maryland Franchise Law and COMAR 02.02.08.16(D) placing advertisements offering to sell a New York Bagel Cafe & Deli franchise without submitting a copy of that advertisement to the Commissioner before publication.

IV. SANCTION

NOW, THEREFORE, the Commissioner finds it to be in the public interest to issue this Final Order to Cease and Desist, and HEREBY ORDERS THAT:

46. Respondents permanently cease and desist from violations of the Maryland Franchise Law.

V. JURISDICTION RETAINED

47. Jurisdiction is retained by the Commissioner for the purpose of enabling any party to this Order to apply for such further orders and directions as may be necessary or appropriate for the construction or enforcement of this Order.

VII. NOTICE OF RIGHT TO APPEAL

48. Pursuant to the Code of Maryland Regulations, COMAR 02.02.06.24, each Respondent has the right to file an appeal of this Order with the circuit court of Maryland. Any appeal must be filed within 30 days from the date this Order is mailed by the Division.

IT IS SO ORDERED:

**Commissioner's Signature
on file w/Original Document**

Dated : October 8, 2015

MELANIE SENTER LUBIN
SECURITIES COMMISSIONER

