

**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. *

* * * * *

ORDER TO SHOW CAUSE

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”) has 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;

NOW, THEREFORE, the Commissioner hereby orders Respondents to show cause why a final order should not be entered ordering each of them to permanently cease and desist from violating the anti-fraud, registration, and disclosure provisions of the Maryland Franchise Law.

The Commissioner alleges the following as a basis for this Order:

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. STATEMENT OF FACTS

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.

COUNT ONE
AGAINST ALL RESPONDENTS
(Violation of Registration Provisions)

WHEREAS, section 14-228 of the Maryland Franchise Law makes it unlawful for any person to offer to sell, through advertisement or otherwise, or sell a franchise in Maryland or to a Maryland resident unless the offering has been registered with the Commissioner before the person offers to sell, through advertisement or otherwise, or sells the franchise in Maryland; and

WHEREAS, Respondents advertised, offered to sell franchises, and sold a franchise in Maryland without registering the offering with the Commissioner;

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondents show cause why they should not be ordered to permanently cease and desist from the offer and sale of franchises in Maryland in violation of the registration provisions of section 14-228 of the Maryland Franchise Law.

COUNT TWO
AGAINST RESPONDENTS SMITH, MASON, and SMS
(Violation of Disclosure Provisions)

WHEREAS, section 14-223 of the Maryland Franchise Law makes it unlawful for any person to offer to sell or sell a franchise in Maryland or to a Maryland resident without first giving a prospective franchisee a copy of the offering prospectus and a copy of each proposed agreement that relates to the sale of the franchise at the earlier of: (1) 14 calendar days before the execution by the prospective franchisee of any binding agreement with the franchisor; (2) 14 calendar days before payment of any consideration that relates to the franchise relationship; or (3) a reasonable request by a prospective franchisee to receive a copy of the offering prospectus; and

WHEREAS, under section 14-216 (a) and COMAR 02.02.08.04, the “offering prospectus” that a franchisor must give to a prospective franchisee is the Franchise Disclosure Document that is registered by the Securities Division and that contains 23 separate Items of disclosure; and

WHEREAS, Respondents Smith, Mason, and SMS offered to sell and sold a franchise in Maryland without giving a prospective Maryland franchisee the offering prospectus required under the Maryland Franchise Law at any time before the Maryland franchisee paid consideration or signed a binding contract related to the franchise;

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondents Smith, Mason, and SMS show cause why they should not be ordered to permanently cease and desist from the offer and sale of franchises in violation of the disclosure provisions of section 14-223 of the Maryland Franchise Law.

**COUNT THREE
AGAINST ALL RESPONDENTS**

(Misrepresentation in connection with the offer or sale of franchises)

WHEREAS, section 14-229 of the Maryland Franchise Law prohibits any person, in connection with the offer to sell or sale of a franchise, directly or indirectly, to employ a device, scheme or artifice to defraud; make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person; and

WHEREAS, in connection with the offer and sale of franchise, Respondents made material misrepresentations of fact and/or omissions of material fact about the New York Bagel Cafe & Deli franchise offering, including misrepresenting that Respondents were offering licenses rather than franchises and omitting material information about the New York Bagel Cafe & Deli franchise offering, including the financial condition of SMS, the relationship between NY Bagel and SMS, the ownership of the relevant trademarks, and the number of New York Bagel Cafe & Deli franchises that closed in the last three years;

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondents show cause why they should not be ordered to permanently cease and desist from the offer and sale of franchises in violation of the anti-fraud provisions of section 14-229 of the Maryland Franchise Law.

COUNT FOUR
AGAINST RESPONDENTS MASON and SMS
(Earnings Claims)

WHEREAS, section 14-229 of the Maryland Franchise Law and COMAR 02.02.08.16(D) prohibit any person, in connection with the offer to sell or sale of a franchise, directly or indirectly, to make any oral or written statements concerning the potential earnings from operation of a franchise (“Earnings Claim”) if that Earnings Claim has not been included in the franchisor’s FDD; and

WHEREAS, Respondents Mason and SMS made Earnings Claims about the New York Bagel Deli & Cafe franchise offering in the form of a projection of earnings that Mason told to a prospective Maryland franchisee, but Respondents did not make the required disclosures about that Earnings Claim, or any Earnings Claim, in an FDD or in any writing given to that prospective franchisee;

NOW THEREFORE, IT IS HEREBY ORDERED, that Respondents Mason and SMS show cause why a final order should not be issued against them directing them to permanently cease and desist from the offer and sale of franchises in violation of the Maryland Franchise Law.

COUNT FIVE
AGAINST RESPONDENTS NY BAGEL, SMITH, and SMS
(Advertising)

WHEREAS, section 14-225 of the Maryland Franchise Law and COMAR 02.02.08.16(D) make it unlawful for a person to publish an advertisement offering to sell a franchise subject to registration under the Maryland Franchise Law unless the person submits a copy of the advertisement to the Commissioner for review at least 7 business days before the first publication of the advertisement unless the Commissioner allows a later submission; and

WHEREAS, Respondents NY Bagel, Smith, and SMS placed advertisements on the Baltimore Craigslist website offering to sell a New York Bagel Deli & Cafe franchise, but Respondents did not submit a copy of that advertisement to the Commissioner before publication;

NOW THEREFORE, IT IS HEREBY ORDERED, that Respondents NY Bagel, Smith and SMS show cause why a final order should not be issued against them directing them to permanently cease and desist from the offer and sale of franchises in violation of the Maryland Franchise Law.

**REQUIREMENT OF ANSWER AND
NOTICE OF OPPORTUNITY FOR HEARING**

IT IS FURTHER ORDERED, pursuant to section 14-210 of the Maryland Franchise Law and COMAR 02.02.06.06, that Respondents shall file with the Commissioner a written Answer to this Order within fifteen days of service of the Order. The Answer shall admit or deny each factual allegation in the Order and shall set forth affirmative defenses, if any. A respondent without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state.

The Answer also shall indicate whether a respondent requests a hearing. A hearing will be scheduled in this matter if one is requested in writing. Failure by any respondent to file a written request for a hearing in this matter shall be deemed a waiver by that respondent of the right to such a hearing. Failure of any respondent to file an Answer, including a request for a hearing, shall result in entry of a final order directing Respondents to permanently cease and desist from violation of the Maryland Franchise Law.

SO ORDERED:

*Commissioner's signature is on file
with original document*

Dated: August 6, 2015

MELANIE SENTER LUBIN
SECURITIES COMMISSIONER