

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 10, 2017

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2017 MAR 10 P 3:52

COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

v.

CASE NO. SEC-2016-00046

NEW YORK BAGEL ENTERPRISES, INC.,
JOSEPH V. SMITH,
and
DENNIS KENNETH MASON a/k/a KEITH SAMUELS,
Defendants

JUDGMENT ORDER

On September 30, 2016, the State Corporation Commission ("Commission") entered a Rule to Show Cause ("Rule") at the request of the Division of Securities and Retail Franchising ("Division") alleging that New York Bagel Enterprises, Inc. ("New York Bagel"), Joseph V. Smith ("Smith"), and Dennis Kenneth Mason a/k/a Keith Samuels ("Mason") (collectively, "Defendants") violated certain provisions of the Virginia Retail Franchising Act, § 13.1-557 *et seq.* of the Code of Virginia ("Act"). Specifically, the Rule alleged the Defendants on three occasions violated: (i) § 13.1-560 of the Act by offering and/or selling unregistered franchises in the Commonwealth of Virginia ("Virginia"); (ii) § 13.1-563 (2) of the Act by making false statements or material omissions to franchisees in connection with the offer or sale of a franchise; and (iii) § 13.1-563 (4) of the Act by failing to provide franchisees a disclosure document that had been cleared by the Division. The Division requested restitution, civil penalties, and costs of investigation, and an injunction barring the Defendants from further violations of the Act and from future franchise sales in Virginia.

The Rule, among other things, assigned the matter to a Hearing Examiner and scheduled an evidentiary hearing for January 11, 2017. Additionally, the Rule ordered the Defendants to

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file a responsive pleading with the Clerk of the Commission on or before November 4, 2016, in which the Defendants were required to expressly admit or deny the allegations in the Rule and present any affirmative defenses that the Defendants intended to assert. The Rule also advised the Defendants they could be found in default if they failed to either timely file a responsive pleading or other appropriate pleading, or if the Defendants filed such pleading and failed to appear at the hearing.

Following service of the Rule upon them, the Defendants filed no answer or other responsive pleading to the Rule, or otherwise communicated with the Division.

The hearing on the Rule was convened on January 11, 2017. The Division appeared by its counsel, Donnie L. Kidd, Esquire. The Defendants failed to appear. The Division moved for a default judgment, which was taken under advisement. Pursuant to the Rule and after accepting evidence regarding service, the Hearing Examiner accepted into the record the affidavit of the Division's investigator, Barry Braun, and the attachments supporting his affidavit.

On January 26, 2017, the Hearing Examiner issued his report ("Report") which thoroughly summarized the factual and procedural history of this case, as well as the evidence and arguments presented at the hearing. In his Report, among other things, the Hearing Examiner found that the Division established, by clear and convincing evidence, that the Defendants violated: (i) § 13.1-560 of the Act on three occasions by selling New York Bagel franchises to three Virginia residents after the Division denied New York Bagel's franchise registration application in August 2012; (ii) § 13.1-563 (2) of the Act on three occasions by making untrue statements of material fact or omitting material facts from disclosure documents in the offer and sale of a franchise to three Virginia residents; and (iii) violated § 13.1-563 (4) of the Act on three occasions by offering and selling three franchises to Virginia residents without

providing those persons with a disclosure document that had been registered with and cleared by the Division.

Based on these findings, the Hearing Examiner recommended, among other things, that: (i) the Commission adopt the findings contained in the Report; and (ii) the Division's motion for judgment by default should be granted.

The Report allowed the parties 21 days to provide comments. Neither the Defendants nor the Division filed comments.

NOW THE COMMISSION, upon consideration of the Rule, the record, the Hearing Examiner's Report, and the applicable statutes, is of the opinion and finds that the Hearing Examiner's overall findings and recommendations are reasonable and should be adopted, except that the Defendants shall first be afforded an opportunity to provide restitution to the three Virginia franchisees pursuant to § 13.1-570 of the Act before assessing a penalty against them.

Accordingly, IT IS ORDERED THAT:

(1) The Division's motion for judgment by default is hereby GRANTED.

(2) New York Bagel is hereby PENALIZED, pursuant to § 13.1-570 of the Act, the following sums:

(a) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-560 of the Act;

(b) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-563 (2) of the Act; and

(c) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-563 (4) of the Act.

(3) Smith is hereby PENALIZED, pursuant to § 13.1-570 of the Act, the following sums:

(a) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-560 of the Act;

(b) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-563 (2) of the Act; and

(c) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-563 (4) of the Act.

(4) Mason is hereby PENALIZED, pursuant to § 13.1-570 of the Act, the following sums:

(a) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-560 of the Act;

(b) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-563 (2) of the Act; and

(c) Seventy-five Thousand Dollars (\$75,000) for three (3) violations of § 13.1-563 (4) of the Act.

(5) The Defendants are hereby DIRECTED, pursuant to § 13.1-570 of the Act, to rescind the franchises sold to the Virginia residents and to make restitution in the amounts paid by such Virginia franchisees. If the Defendants rescind the franchises, pay restitution to the Virginia franchisees, and submit to the Division proof of rescinding the franchises and paying restitution to the Virginia franchises within ninety (90) days of entry of this Order, the penalties assessed against the Defendants in Ordering Paragraphs (2) through (4) shall be waived.

(6) The Defendants are hereby DIRECTED, jointly and severally, pursuant to § 13.1-567 of the Act, to pay the sum of Twenty Thousand Eight Hundred Ninety-nine Dollars and Thirty-three Cents (\$20,899.33) for the costs of the Division's investigation.

(7) New York Bagel is hereby PERMANENTLY ENJOINED from registering or participating as a franchise in Virginia.

(8) The Defendants are hereby PERMANENTLY ENJOINED from any future violations of the Act.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED to: New York Bagel Enterprises, Inc., 301 Route 17 North, #800, Rutherford, New Jersey 07070; New York Bagel Enterprises, Inc., 115 East 8th Street, Stillwater, Oklahoma 74074; Joseph V. Smith, 30 North Plank Road, Newburgh, New York 12550; and Dennis Kenneth Mason, 1285 County Road 519, Frenchtown, New Jersey 08825; and the Commission's Office of General Counsel and Division of Securities and Retail Franchising.