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COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA
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.

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TRANSCRIPT OF PROCEEDINGS BEFORE

THE HONORABLE MICHAEL D. THOMAS,

HEARING EXAMINER

January 11, 2017

10:00 a.m. - 10:19 a.m.

Richmond, Virginia

CERTIFIED ORIGINAL

REPORTED BY: SCOTT D. GREGG, RPR

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APPEARANCES:

Honorable Michael D. Thomas, Hearing Examiner,
Presiding

Donnie L. Kidd, Jr., Esquire,
Counsel to the Commission

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P R O C E E D I N G S

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2 THE CLERK: Today's docket consists of
3 Case Number SEC-2016-00046, State Corporation
4 Commission vs. New York Bagel, Incorporated, Joseph V.
5 Smith and Dennis Kenneth Mason, also known as Keith
6 Samuels. The Honorable Michael D. Thomas, Hearing
7 Examiner, presiding.

8 THE HEARING EXAMINER: Good morning.

9 MR. KIDD: Good morning, Your Honor.

10 THE HEARING EXAMINER: Mr. Kidd, on
11 behalf of the Division of securities and retail
12 franchising, are you prepared to proceed this morning?

13 MR. KIDD: Yes, sir, I am.

14 THE HEARING EXAMINER: All right, sir.
15 If you would pass the proof of notice or proof of
16 service of the rule to show cause.

17 MR. KIDD: Yes, Your Honor. In fact,
18 actually what we have done this morning is we have
19 provided a trial binder for the Court, including Your
20 Honor. The service documents and the attempted
21 service on our three defendants are all included
22 behind tabs one through four. Additionally, we have
23 the original service copies here this morning; the
24 bailiff has those. I can walk through the service
25 documents, if Your Honor would like?

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1 THE HEARING EXAMINER: Yes, sir, please
2 do.

3 MR. KIDD: All right. I will do that.

4 Your Honor, really there are two service
5 issues in this case or methods of service. The
6 Division contends here that the defendants received
7 both actual notice -- or were afforded actual notice
8 of the rule to show cause and the hearing this morning
9 through attempted service of process as well as had
10 constructive notice through statutory service on the
11 clerk of the Commission.

12 Regarding the attempted service and
13 actual notice, the Division had attempted to serve the
14 defendants at their last known addresses. Those
15 addresses had been obtained either from corporate
16 information in New Jersey where the defendant New York
17 Bagel Enterprises, Inc. is incorporated, as well as
18 from the defendants' website and other information
19 that was obtained during the investigation.

20 To walk through each of the defendants
21 regarding the company New York Bagel Enterprises, the
22 service documents had been provided in the binder
23 behind tabs one and two.

24 Originally, the Division had attempted
25 service on the Company at its registered office and

1 its registered agent Joseph Smith, who is also a
2 defendant in this case, at its offices in New Jersey.
3 That service was returned as undeliverable and unable
4 to forward. Those documents appear behind tab one.
5 And I'd ask the bailiff if she could provide Your
6 Honor with the certified mailings that were provided
7 to the Company at its offices in New Jersey.

8 THE HEARING EXAMINER: All right, sir.
9 And these correspond to the documents behind tab one
10 in the trial binder?

11 MR. KIDD: Yes, they do, Your Honor.

12 THE HEARING EXAMINER: All right.

13 MR. KIDD: Now, as part of that returned
14 service that was returned to the clerk, there was an
15 additional address for the Company that was provided
16 in Stillwater, Oklahoma. So a second attempt at
17 service was made at that address in Oklahoma. The
18 result, however, was the same. In fact, the return of
19 service indicated that that address was also returned
20 as undeliverable and unable to forward. Those
21 documents would be behind tab two in the binder.

22 THE HEARING EXAMINER: All right, sir.
23 Before we get too far, the documents behind tab one in
24 the binder will be marked Exhibit No. 1 collectively
25 and accepted into the record.

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1 (Exhibit No. 1 was marked and admitted
2 into evidence.)

3 MR. KIDD: Thank you.

4 THE HEARING EXAMINER: Let me do this so
5 that we -- and the documents behind tab two will be
6 marked Exhibit No. 2. And those are collectively the
7 certified mail return receipts behind tab two in the
8 binder, but will be marked collectively as Exhibit
9 No. 2 and accepted into the record.

10 (Exhibit No. 2 was marked and admitted
11 into evidence.)

12 MR. KIDD: Thank you, Your Honor. Now,
13 regarding service on the individual defendant, Joseph
14 Smith, who as I mentioned earlier is the registered
15 agent for the Company as well as the Company's
16 president and chief executive officer, service was
17 attempted at his last known address in New York. The
18 service documents for Mr. Smith are located behind tab
19 number three in the binder.

20 For Mr. Smith, the clerk's office had
21 received a return of service on October 20th,
22 indicating that that service had been unclaimed and
23 unable to forward; however, approximately two weeks
24 later, the clerk's office also received a proof of
25 service in the form of a certified mail receipt that

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1 had a stamped signature. That stamped signature was
2 of an individual that is neither named in this case
3 and is unknown to us, but, nevertheless, a proof of
4 receipt was returned.

5 THE HEARING EXAMINER: All right, sir.
6 The documents behind tab three will be marked
7 collectively Exhibit No. 3 and accepted into the
8 record.

9 (Exhibit No. 3 was marked and admitted
10 into evidence.)

11 MR. KIDD: Finally, Your Honor, regarding
12 our last defendant, Dennis Mason, who is also an
13 employee of New York Bagel as a franchise broker,
14 those documents for Mr. Mason and the attempted
15 service on him are behind tab number four in the
16 binder. Service on Mr. Mason was returned as refused
17 and the unaccepted in early October.

18 THE HEARING EXAMINER: All right. The
19 documents behind tab four in the trial binder will be
20 collectively marked Exhibit No. 4 and accepted into
21 the record.

22 (Exhibit No. 4 was marked and admitted
23 into evidence.)

24 MR. KIDD: In addition to the attempted
25 service that was made on each of the defendants, as I

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1 mentioned earlier, the Division in this case also
2 contends that the defendants had notice, constructive
3 notice, of the rule to show cause pursuant to the
4 Retail Franchising Act and specifically Section
5 13.1-566. Pursuant to that provision, in any non
6 resident non franchisor who offers or sells a
7 franchise to be located in Virginia is deemed to have
8 appointed the clerk of the Commission as statutory
9 agent for service of process.

10 As noted in the rule to show cause, the
11 rule was served upon the clerk under that provision,
12 the Retail Franchising Act, pursuant to Section
13 12.1-19.1 of the Code of Virginia authorizing of
14 service upon the clerk.

15 THE HEARING EXAMINER: All right, sir.
16 Just so the record is complete, is there anyone
17 presented to representing New York Bagel Enterprises,
18 Inc. in the courtroom?

19 Going once.

20 Going twice.

21 Three times.

22 We're all done. Let the record reflect
23 that there's no one present today representing
24 New York Bagel Enterprises, Inc. after having been
25 provided notice of today's hearing.

1 Mr. Joseph V. Smith, are you present in
2 the courtroom today?

3 Going once.

4 Going twice.

5 Three times.

6 We're all done. Let the record reflect
7 that Mr. Joseph V. Smith is not present in the
8 courtroom today.

9 Is Dennis Kenneth Mason, also known as
10 Keith Samuels -- are you present in the courtroom
11 today?

12 Going once.

13 Going twice.

14 Three times.

15 All done. Let the record reflect that
16 Dennis Kenneth Mason, also known as Keith Samuels, is
17 not present in the courtroom today after having
18 received notice of today's proceeding.

19 All right. Mr. Kidd, any opening
20 statements or any further administrative matters to
21 come before the Commission today?

22 MR. KIDD: One matter before I address
23 the substantive case of the Division, Your Honor, and
24 that is that given the defendants' failure to either
25 answer the rule to show cause or to appear for the

1 hearing this morning, the defendants -- I'm sorry --
2 the Division would move for default judgment in this
3 case.

4 As part of that request, the Division
5 would ask that the Commission be deemed -- or to find
6 that the defendants have been deemed to admit
7 substantive liability as well as all the allegations
8 in the rule to show cause.

9 In addition to that, the Division would
10 ask that the Commission find that the defendants be
11 deemed to have waived all objections to the
12 admissibility of any evidence that's accepted or
13 introduced here this morning.

14 THE HEARING EXAMINER: All right, sir.
15 I'll take your motion for default judgment under
16 advisement.

17 MR. KIDD: Before addressing the evidence
18 in this case and in offering that into the record,
19 Your Honor, if I may, I'd like to provide a very brief
20 summary of the case.

21 THE HEARING EXAMINER: Please do.

22 MR. KIDD: This case concerns New York
23 Bagel's offer and sale of franchises to be located in
24 Virginia between 2013 and 2015. New York Bagel is a
25 New Jersey company that offers franchises to set up

1 stores or restaurants offering bagels and deli items.
2 The Company has various franchising locations in a
3 number of states, and in this case had attempted to
4 actually register as franchise of Virginia in 2011.
5 That application for registration, however, was denied
6 in August of 2012 after they failed to provide
7 information requested by the Division as part of the
8 registration process.

9 As a result, New York Bagel has never
10 been registered in Virginia as a franchise, has never
11 been authorized to offer and sell franchises here; in
12 fact, the Company itself has not been authorized to
13 conduct business in Virginia as a foreign corporation.

14 This particular investigation began after
15 the Division received a complaint in 2015 that
16 New York Bagel was offering franchises for sale in
17 Virginia online. As a result of that investigation,
18 they found that despite the denial of the franchise
19 registration application in 2012, shortly less than a
20 year after that occurred, New York Bagel began
21 advertising Virginia franchises for sale online in the
22 state anyway.

23 Now, although the defendants did not
24 participate in the investigation in any way, the
25 Division was able to identify three franchisees who

1 had purchased New York Bagel franchises that were to
2 be located in Fairfax, Virginia, between 2013 and
3 2015. None of these franchisees had any prior
4 franchise experience; none ever had any prior
5 restaurant experience. They did have a similar
6 experience, however, in dealing with the Company and
7 the two individuals that had been named as defendants.

8 All of the individuals that had purchased
9 New York Bagel franchises contacted the Company after
10 viewing the online ads and then proceeded to negotiate
11 the offer and the sale of the franchise with Mr. Smith
12 and Mr. Mason. All of them signed agreements agreeing
13 to purchase a franchise and pay the initial fees
14 ranging anywhere from approximately \$15,000 to almost
15 \$30,000.

16 Additionally, they all received
17 disclosure documents from the defendants concerning
18 their purchase. And in addition to that had signed
19 agreements that were also signed by either Mr. Smith
20 or Mr. Mason concerning that purchase.

21 Now, as I mentioned, New York Bagel has
22 franchises in other states and attempted to register
23 here in Virginia. But as part of these particular
24 transactions, one of the things that the Division
25 discovered was that a lot of the documents appeared to

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1 characterize the sales as licensing agreements.
2 Licensing agreements and licensing arrangement are not
3 regulated by the Division of securities and retail
4 franchising, whereas franchises are.

5 On further inspection of those documents,
6 however, the Division was able to determine that, in
7 fact, these were franchise sales and it appeared that
8 simply the names of the documents had been altered to
9 say licensing as opposed to franchise documents on
10 both the agreements as well as the disclosures.

11 In addition to unregistered franchise
12 sales, the Division discovered a number of other
13 problems; one, the disclosures that I just mentioned
14 typically in a franchise sale disclosures are required
15 to be provided. Those disclosures, however, have to
16 be cleared by the Division as part of the registration
17 process in advance. The disclosures here, of course,
18 had never been cleared by the Division, yet,
19 nevertheless, were provided to the franchisees who
20 purchased the New York Bagel businesses.

21 Additionally and finally, Your Honor, the
22 Division discovered a number of misrepresentations or
23 failures to provide the franchisees with information
24 concerning the business. Those misrepresentations or
25 failures to provide information included things such

1 as failing to inform the franchisees about the number
2 of New York Bagel franchise closures and the years
3 preceding these purchases; failures -- or actually not
4 just a failure, but a statement that the Company had
5 no history of litigation, when, in fact, there had
6 been at least four lawsuits filed by former
7 franchisees of New York Bagel against the Company; and
8 finally, statements that were made to the franchisees
9 regarding promises of training and support that
10 ultimately were never provided to those franchisees.

11 Now, as part of the case this morning,
12 we've prepared an affidavit including a number of
13 attachments by the primary investigator on the case,
14 Mr. Barry Braun. Mr. Braun is also here and available
15 to testify as well if Your Honor would like to hear
16 from him.

17 THE HEARING EXAMINER: All right, sir. I
18 think with the defendants not present today, I'll just
19 proceed to move his affidavit and supporting
20 attachments to that affidavit into the record.

21 MR. KIDD: Okay.

22 THE HEARING EXAMINER: That will be
23 sufficient.

24 MR. KIDD: Okay. At this time, Your
25 Honor, we'd ask that the affidavit that is behind tab

1 five in the binder as well as the attached documents
2 to that affidavit which are lettered A through N be
3 marked for identification as trial Exhibit No. 5 and
4 admitted into the record.

5 THE HEARING EXAMINER: All right, sir.
6 The affidavit of Barry Braun, senior investigator with
7 the enforcement section of the division of securities
8 and retail franchising, and the attachments thereto
9 which have been marked as attachment -- or Exhibit A
10 through N will be marked collectively as Exhibit No. 5
11 and accepted into the record.

12 (Exhibit No. 5 was marked and admitted
13 into evidence.)

14 MR. KIDD: Thank you, Your Honor. And
15 the last point in closing is behind tab number six; we
16 have also included -- I have prepared a violation
17 chart which lays out the violations --

18 THE HEARING EXAMINER: Mr. Kidd, I'm
19 looking in my binder and that is missing.

20 MR. KIDD: That is missing. I know we
21 have additional copies, and I apologize for that, Your
22 Honor.

23 THE HEARING EXAMINER: I have it now.

24 MR. KIDD: Thank you. That document lays
25 out the violations that are alleged by the Division in

1 this case as well as the Division's request to relief
2 based on those violations. I will note at this point
3 that the violation -- although as you will note in
4 reviewing the record, although the rule to show cause
5 and Mr. Braun's affidavit refer to three franchisees
6 that had purchased franchises to be located in
7 Virginia, the violation chart only includes two of
8 those franchisees. The reason for that was out of an
9 abundance of caution, during the investigation
10 process, the third franchisee had agreed to speak with
11 Mr. Braun concerning the investigation and his
12 purchase of a New York Bagel franchise. However at
13 the time he was attempting to operate and open his
14 particular franchise and was concerned about
15 retaliation by New York Bagel, and so was very
16 hesitant to provide documents.

17 The documents that are attached to
18 Mr. Braun's affidavit, therefore, concern the other
19 two franchisees whom he spoke with and who did provide
20 documents. So, again, as a conservative approach, we
21 have concluded for purposes of violation of relief
22 only those two franchisees. However, I would note,
23 Your Honor, that since this is in a default posture
24 and all allegations have been deemed admitted, the
25 Division would also take the position that in this

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1 particular context, that third franchisee may be
2 included if the Commission believes that the evidence
3 is competent based on those admissions through default
4 if that is granted, that that particular franchisee
5 could also be included, although he is not part of the
6 violation chart that is behind tab number six.

7 With that, Your Honor, unless there are
8 any further questions, I'd ask that that document be
9 marked as purposes of identification as trial Exhibit
10 No. 6 and admitted and then we would rest the case.

11 THE HEARING EXAMINER: All right, sir.
12 The documents behind tab number six in the Division's
13 trial notebook consisting of three pages will be
14 marked Exhibit No. 6 and accepted into the record.

15 (Exhibit No. 6 was marked and admitted
16 into evidence.)

17 MR. KIDD: Thank you, Your Honor. We
18 have nothing further unless there are questions from
19 the Court.

20 THE HEARING EXAMINER: No, sir, no
21 questions from the bench.

22 I will note for the record for the last
23 time, are there any of the defendants present in the
24 courtroom today?

25 Hearing none, I'll note that the

1 defendants are not present. They are in default not
2 having appeared before the Commission today in the
3 proceeding entitled, Commonwealth of Virginia ex rel.
4 State Corporation Commission vs. New York Bagel
5 Enterprises, Inc., Joseph V. Smith and Dennis Kenneth
6 Mason, also known as Keith Samuels, Case Number
7 SEC-2016-00046. Defendants are in default.

8 All right. Mr. Kidd, I'll close the
9 record in this proceeding and I'll take the matter
10 under advisement.

11 I'll also note that I have the Division's
12 motion for default judgment under advisement as well.

13 MR. KIDD: Thank you, Your Honor.

14 THE HEARING EXAMINER: Is there anything
15 further to come before the Commission today?

16 MR. KIDD: No, Your Honor.

17 THE HEARING EXAMINER: Hearing none, the
18 Commission adjourns for the day. Thank you very much.

19 MR. KIDD: Thank you.

20 (The proceedings adjourned at 10:19 a.m.)
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COURT REPORTER'S CERTIFICATE

I, Scott D. Gregg, Registered Professional Reporter, certify that I recorded verbatim by stenotype the proceedings in the captioned cause before the Honorable Michael D. Thomas, Hearing Examiner, of the State Corporation Commission, Richmond, Virginia, on the 11th day of January, 2017.

I further certify that to the best of my knowledge and belief, the foregoing transcript constitutes a true and correct transcript of the said proceedings.

Given under my hand this 11th day of January, 2017, at Norfolk, Virginia.

Scott D. Gregg

Scott D. Gregg, RPR

Notary Public

Notary Registration No. 215323

