UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

Association of Independent BR Franchise Owners, Plaintiff, v. Baskin-Robbins Franchising, LLC Defendant.	Case No. 1:16-CV-10963-WGY No Jury Demand

PLAINTIFF ASSOCIATION OF INDEPENDENT BR FRANCHISE OWNERS MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff Association of Independent Baskin-Robbins Franchise Owners ("AIBRFO" or "Plaintiff") hereby submits its Memorandum of Law in Support of its Motion for Summary Judgment on its claim for Declaratory Relief.

I. INTRODUCTION

Baskin-Robbins Franchisees pay to Defendant Baskin-Robbins Franchising, LLC ("Baskin-Robbins") an add-on fee called the "Commercial Factor Fee" when Baskin-Robbins Franchisees purchase ice cream tubs and certain other products from a designated supplier, Dean Foods. The Commercial Factor Fee works as follows. Baskin-Robbins sets the Commercial Factor Fee for certain products that franchisees must purchase from supplier Dean Foods; for example, Baskin-Robbins sets the Commercial Factor Fee at $1.26 per tub. When Baskin-Robbins franchisees purchase those products for which there is a commercial factor fee (such as a tub of ice cream), the franchisees pay the add-on Commercial Factor Fee. The Commercial Factor Fee then passes through Dean Foods to Baskin-Robbins.

There is a lot of money involved. For example, from December 26, 2014 to December 25,

2015 (Baskin-Robbins' fiscal year), it appears that the Baskin-Robbins franchisees paid $10,599,785 in Commercial Factor Fees. That comes to an average of about $7,310 per stand-alone Baskin-Robbins franchise in just one fiscal year.

As demonstrated below, the subject matter of fees that Franchisees have to pay to Baskin-Robbins are set out in plain detail in the Baskin-Robbins Franchise Agreements at issue, which are the Franchise Agreements for years 2000 to the present. Those fees range from Continuing Franchise Fees (Baskin-Robbins' terminology for royalty fees) to Transfer Fees, but nowhere in the Franchise Agreements is there any mention of a Commercial Factor Fee.

As a result, Baskin-Robbins attempt to impose the Commercial Factor Fee runs counter to one of the most basic principles of contract law, which is enunciated in a case involving Baskin-Robbins itself: Because the Current Franchise Agreement is a fully integrated agreement including on the subject matter of the fees that must be paid by the Franchisees, and because the Current Franchise Agreement makes no reference to the Commercial Factor Fee, as a matter of law the payment of Commercial Factor Fees is not a contractual duty under the Franchise Agreements at issue in this case. *Baskin-Robbins, Inc. v. S & N Prinja, Inc.*, *infra*.

II. STATEMENT OF UNDISPUTED MATERAIL FACTS

Prior to 1998, Baskin-Robbins operated on a margin model where Baskin-Robbins made most of its profit from the sale of products. (Plaintiff's Separate Statement of Undisputed Facts filed concurrently with this Memorandum of Law ("PSOF"), ¶ 1. Under that prior model, Baskin-Robbins charged a "Continuing Franchise Fee" (Baskin-Robbins' terminology for royalty fees) of 0.5% making most of its money through the sale of ice cream to its franchisees. PSOF, ¶ 2.

Beginning in 1998, Baskin-Robbins shifted its model. Beginning in 1998, Baskin-Robbins began offering a royalty conversion program whereby franchisees pay a higher Continuing Franchise Fee of 5.9% and a higher advertising fee of 5.0%, but Baskin-Robbins would charge a

lower amount for ice cream products. PSOF, ¶ 3. In addition, franchisees would now purchase their ice cream and other products from Dean Foods (a national dairy), not from a Baskin-Robbins affiliate. PSOF, ¶ 4.

In or about 2000, most of the existing Franchisees entered into a "Franchise Royalty Conversion Offer." A copy of the Franchise Royalty Conversion Offer is attached to the AIBRFO's Separate Statement of Undisputed Material Facts as Exhibit 2. That Royalty Conversion Offer provided, among other things, that the converting franchisees would now pay an add-on fee that Baskin-Robbins entitled the "Commercial Factor." PSOF, ¶ 5.

There remains a small percentage, if any, of Baskin-Robbins franchisees that still operate under a pre-2000 franchise agreement and the royalty Conversion Offer. PSOF, ¶ 6. By way of clarification, the AIBRFO is not seeking declaratory relief as to the pre-2000 Baskin-Robbins franchise agreements.

Current Franchise Agreement

Starting in and around 2000 through part of 2017, new and renewing franchisees have entered into a standard form of franchise agreement. PSOF, ¶ 7.

To distinguish the franchise agreements from 2000 to 2017, this summary judgment motion refers to those franchise agreements as the "Current Franchise Agreement." As a point of clarification, the AIBRFO seeks declaratory relief as to the Current Franchise Agreement. In addition, for purposes of this summary judgment motion, all Baskin-Robbins franchisees that entered into the Current Franchise Agreement are referred to herein as the "Franchisees."

While there are slight variations from year-to-year, all of the Current Franchise Agreements set forth the categories of fees that have to be paid by the Franchisee. PSOF, ¶ 8. For example, the 2000 Franchise Agreement sets forth the following fees that must be paid by the Franchisee: Initial Franchise Fee; Grand Opening Fee; Continuing Franchise Fee; Continuing Advertising Fee; Transfer Fee; and Late Fees. PSOF, ¶ 8(a). As further example, the 2015 Franchise Agreement sets forth the following fees that must be paid by the Franchisee: Initial Franchise Fee; Initial Training Fee; Marketing Start-Up Fee; Continuing Franchise Fee; Continuing Training Fee;

Continuing Advertising Fee; Training Programs or Systems Fee; Additional Advertising Fee; Late Fees; Transfer Fee; and Fixed Documentation Fee. PSOF, ¶ 8(p).

The phrase "Commercial Factor" or "Commercial Factor Fee" is not stated in any of the Current Franchise Agreements. PSOF, ¶ 9. Thus, it is undisputed that the Current Franchise Agreement makes no reference to payment of a Commercial Factor Fee. PSOF, ¶ 10.

Commercial Factor Fees

When a Franchisee purchases certain products, Dean Foods collects on behalf of Baskin-Robbins Commercial Factor Fees. PSOF, ¶ 11. A list of products and Commercial Factor Fees for 2016 is attached as Exhibit 21 to Plaintiff's Separate Statement of Undisputed Facts. For example, in 2016, for each tub of ice-cream that a Franchisee purchased from Baskin-Robbins, the Franchisee paid a Commercial Factor Fee of $1.26 per tub.[1] PSOF, ¶ 12. As a further example, for each case of Pastry Pride Non-Dairy Whip Topping, the Franchisee paid a Commercial Factor Fee of $6.52 per case of Pastry Pride Non-Dairy Whip Topping. PSOF, ¶ 13.

Baskin-Robbins determines the Commercial Factor Fee for products specified by Baskin-Robbins. PSOF, ¶ 14. Dean Foods then collects the Commercial Factor Fee on behalf of Baskin-Robbins. PSOF, ¶ 15.

The Commercial Factor merely consists of a fee that Baskin-Robbins adds on to the cost of certain products that is collected through Dean Foods. PSOF, ¶ 16. For example, Exhibit II of the Royalty Conversion Offer states that the wholesale price of a product consists of two component parts: (1) All of the costs that actually go into the product (for example, manufacturing costs, acquisition costs, distribution costs and administrative costs); and (2) the "Commercial Factor." PSOF, ¶ 16.

[1] The following is some background that may be helpful to the Court. To order product, the Franchisee goes onto a designated Dean Foods' website and orders particular product for the Franchisee's Store. For example, the Franchisee may order four tubs of ice cream at X dollars. The cost for the tub of ice cream and other products on the Dean Food's website is stated as one amount – there is no separate charge shown for the added-on Commercial Factor Fee. After the order is placed, the product is delivered along with an invoice. The invoice shows just one amount; the invoice does not delineate the added-on Commercial Factor Fee.

Consequence for Failure to Pay the Commercial Factor Fee

If a Franchisee fails to pay the Commercial Factor Fee, Baskin-Robbins position is that the Franchisee is in breach of its obligations under the Current Franchise Agreement because ultimately Dean Foods would not sell the Franchisee required products and, in turn, the Franchisee could not offer for sale to the public required products. PSOF, ¶ 17

Integration/Merger Clauses

Each of the Current Franchise Agreements contains an integration and merger clause, which also includes a clause that provides that the Franchise Agreement may only be modified by a writing signed by the parties. PSOF, ¶ 18. For example, the 2000 Franchise Agreement contains the following integration and merger clause:

> This Agreement and the documents referred to herein shall be the entire, full and complete agreement between FRANCHISOR and FRANCHISEE concerning the subject matter hereof, and supersedes all prior agreements, no other representation having induced FRANCHISEE to execute this Agreement; and there is no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein, which are of any force or effect with reference to this Agreement or otherwise. No amendment, change or variance from this Agreement shall be binding on either party unless executed in writing.

PSOF, ¶ 18(a). As a further example, the 2015 Franchise Agreement contains the following integration and merger clause:

> This Agreement and the documents referred to herein shall be the entire, full and complete agreement between you and us concerning the subject matter of this Agreement, which supersedes all prior agreements. Nothing in this Section, however, is intended to disclaim the representations we made in the franchise disclosure document that we furnished to you.[2] This Agreement is made in the Commonwealth of Massachusetts, USA, and shall be interpreted, construed and governed by the laws of the Commonwealth of Massachusetts. * * * This Agreement may only be modified by the parties in writing.

PSOF, ¶ 18(a).

[2] This is now standard language that must be included pursuant to the FTC Franchise Rule.

III. ARGUMENT

A. Legal Standard for Motion for Summary Judgment

With all due respect to the Court, the AIBFFO believes that the Court is familiar with the standards for a motion for summary judgment and that they are not repeated here.

B. Under Massachusetts Law, Where an Unambiguous Contract Plainly Does Not State a Contractual Duty, It is Not in the Agreement

Courts in the first instance determine if an agreement is ambiguous, and the construction of an unambiguous contract is a question of law. *Boston Edison Co. v. F.E.R.C.*, 866 F.2d 361, 365 (1st Cir. 1988) (citations omitted) ("*Boston Edison Co.*"). Massachusetts applies a common sense manner of interpreting a contract: "So long as the words of an agreement are plain and free from ambiguity, they must be construed in their ordinary and usual sense." *Boston Edison Co., supra*, 866 F.2d at 365. The general rule is that "[t]he interpretation of an integrated agreement is directed to the meaning of the terms of the writings in the light of the circumstances of the transaction." *Boston Edison Co. v. F.E.R.C.*, 866 F.2d at 365 (citations omitted) (quotations omitted). However, "[i]t is only when the written agreement, as applied to the subject matter, is in some material respect uncertain or equivocal in meaning that all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not of contradicting or changing its terms." *Id*. at 365 (citations omitted) (quotations omitted).

The determination of whether contract language is ambiguous involves application of the following rules:

> Contract language is ambiguous "only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." *Citation Ins. Co. v. Gomez*, 426 Mass. 378, 381, 688 N.E.2d 951 (1988). See *Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989) (ambiguity exists where terms are "inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and obligations undertaken"). However, "an ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other. *Lumbermens Mut.*

Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 466, 645 N.E.2d 1165 (1995).

Southern Union Co. v. Dept. of Public Utilities, 458 Mass. 812, 941 N.E.2d 633 (2011).

Most importantly for this case, where a fully integrated agreement makes no reference to a contractual duty, no such contractual duty exists. *Baskin-Robbins, Inc. v. S & N Prinja, Inc.*, 78 F.Supp.2d 226, 232-33 (S.D.N.Y. 1999) (discussed below).

C. Under Contract Law, There is No Contractual Duty by the Franchisees to Pay Commercial Factor Fees

In this instance, the Current Franchise Agreement's provisions related to the subject matter of the categories of fees that are to be paid by the Franchisees are certain and unequivocal, and those categories of fees plainly do not include the Commercial Factor Fee. The category of fees to be paid by the Franchisees are plainly expressed on the Contract Data Page of the Current Franchise Agreement, as well as other provisions of the Current Franchise Agreement. In turn, it is obvious and plain that the Commercial Factor Fee is not one of the fees that is included in the Current Franchise Agreement; in fact, there is not even mention of the "Commercial Factor Fee" in the Current Franchise Agreement. Accordingly, under basic rules of contract law, the Commercial Factor Fee is simply not a fee that is provided for in the Current Franchise Agreement.

In that regard, this case goes to a basic principle in contract law: Because the Current Franchise Agreement is a fully integrated agreement including on the subject matter of the fees that must be paid by the Franchisees, and because the Current Franchise Agreement makes no reference to the Commercial Factor Fee, as a matter of law the payment of Commercial Factor Fees is not part of the Current Franchise Agreement. *Baskin-Robbins, Inc. v. S & N Prinja, Inc.*, *supra*, 78 F.Supp.2d at 232-33. In *Baskin-Robbins, Inc. v. S & N Prinja, Inc.*, *supra*, the franchisee's counterclaims included a claim that Baskin-Robbins breached a policy allowing a franchisee to relocate. *Id*. at 232. Noting that the Baskin-Robbins Franchise Agreement at issue contained an integration clause, the Court stated that "[t]he Agreement makes no reference to any

such corporate policy; therefore, as a matter of law, it is not part of the Agreement." *Id*. at 233. The court further held that since there was an absence of a contractual duty as to relocation, the franchisee's relocation breach counterclaim should be dismissed: "In the absence of a showing by Defendants of a duty – contractual or otherwise – on the part of Baskin-Robbins to assent to their relocation, this claim is dismissed as well." *Id*. Similarly, in *Brock v. Baskin-Robbins, U.S.A, Co.*, 2003 WL 21309428 at * 4 (E.D.Tex. January 17, 2003), Baskin-Robbins franchisees claimed that they were promised that their Baskin-Robbins franchises would be perpetual. Among other reasons, the *Brock* Court dismissed the franchisees' promissory estoppel claim upon Baskin-Robbins assertion of the merger/integration clause holding that "[t]he general rule is that where a merger clause is included in the written contract, alleged collateral promises will not be enforced, through fraud or otherwise." *Id.* at *5.

Thus, the basis for Declaratory Relief is simple and based on undisputed facts: The Franchisees have no contractual duty to pay the Commercial Factor Fee, and the Franchisees will not breach the Current Franchisee Fee by not paying the Commercial Factor Fee.

D. Ambiguity is Not Created by the Entirely Inapplicable Provisions of the Current Franchise Agreement Cited by Baskin-Robbins

The AIBRFO anticipates that Baskin-Robbins will assert that provisions providing that the Franchisees must purchase products from a designated supplier somehow give Baskin-Robbins the additional contractual right to charge a Commercial Factor Fee. Baskin-Robbins' assertion is erroneous. Baskin-Robbins claims that Section 5.1.5.1 of the 2000 Agreement (which is not in any subsequent Agreements) and Sections 7.0.4 and 7.0.5 (which are in subsequent Current Franchise Agreements) somehow bear on Baskin-Robbins' alleged contractual right to impose a "Commercial Factor" on its Franchisees. *E.g.*, Docket No. 17 at pp. 3-4, 11-12. However, those provisions have nothing to do with the imposition of fees.

Those provisions merely provide that the Franchisees must purchase products from

approved suppliers, with Section 5.1.5.1 also stating that the Franchisor or its designee may change the price of products. That the Franchisees have to purchase product from approved suppliers has nothing to do with whether the approved supplier may collect a Commercial Factor Fee (or any other fee) on behalf of Baskin-Robbins. Nor does Section 5.1.5.1's clause providing that Baskin-Robbins or its designee may change the price of products have anything to do with whether the "designee" may also collect a Commercial Factor Fee (or any other fee) on behalf of Baskin-Robbins. These are simply inapplicable provisions that have nothing to do with the categories of fees that are contractual obligations under the Current Franchise Agreement. Thus, what Baskin-Robbins attempts to do is create ambiguity by citing inapplicable provisions that do not address the contractual right that is raised by the Declaratory Relief claim.

IV. CONCLUSION

For the foregoing reasons, the AIBRFO's Motion for Summary Judgment should be granted with the Court finding that: (1) Under the Current Franchise Agreement, Baskin-Robbins has not contractual right to charge, and the Franchisees have no contractual duty to pay, the Commercial Factor Fee; and (2) it is not a breach of the Current Franchise Agreement for Franchisees to cease paying the Commercial Factor Fee.

RESPECTFULLY SUBMITTED this 3rd day of April, 2017 by and through counsel.

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CERTIFICATE OF SERVICE

I, Peter N. Greenfeld, hereby certify that, on April 3, 2017, the foregoing document was served electronically on all counsel of record via the Court's ECF filing system.

/s/ Peter N. Greenfeld