

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SYED AHMAD, MARTIN HAMMEL, HYN, INC.,
GREGORY KALOUSTIAN and JOSEPH VITRANO,

Plaintiffs,

- against -

7-ELEVEN, INC.,

Defendant.

Case No.: 2:16-cv-463

COMPLAINT

Plaintiffs, by and through their undersigned counsel, allege as follows:

THE PARTIES

1. Plaintiff Syed Ahmad (“Ahmad”) is an individual and a citizen and resident of the State of New York with a business address of 796 Broadway, Holbrook, New York 11741.

2. Plaintiff Martin Hammel (“Hammel”) is an individual and a citizen and resident of the State of New York with a business address of 1224 Old Nichols Road, Islandia, New York 11722.

3. Plaintiff Hyn, Inc. (“Hyn”) is a New York corporation with its principal place of business at 648 Middle Country Road, Selden, New York 11784. It is a citizen of the State of New York.

4. Plaintiff Gregory Kaloustian (“Kaloustian”) is an individual and a citizen and resident of the State of New York with a business address of 3000 North Ocean Avenue, Farmingville, New York 11738.

5. Plaintiff Joseph Vitrano (“Vitrano”) is an individual and a citizen and resident of the State of New York with a business address of 599 South Broadway, Hicksville, New York 11801.

6. Upon information and belief, defendant 7-Eleven, Inc. (“7-Eleven”) is a Texas corporation with its principal place of business at 1722 Routh Street, Suite 1000 Dallas, Texas 75201. It is a citizen of the State of Texas.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1) (diversity).

8. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) in that a substantial part of the events or omissions giving rise to the claims asserted in this Complaint occurred in this judicial district.

9. The amount in controversy, measured by the value of the object of the litigation, exceeds the sum of \$75,000 exclusive of interest and costs.

FACTS COMMON TO ALL COUNTS

10. Upon information and belief, 7-Eleven is the largest operator, franchisor and licensor of convenience stores in the world. It operates, franchises and licenses approximately 7,800 convenience stores in the United States, of which more than 6,400 are franchised.

11. Plaintiffs are franchisees of 7-Eleven pursuant to certain franchise agreements.

12. Ahmad entered into a 7-Eleven Store Franchise Agreement dated October 15, 2004 (the “Holbrook Franchise Agreement”), which agreement superseded a franchise

agreement dated December 2, 1996, pursuant to which, *inter alia*, 7-Eleven leased or subleased to Ahmad certain equipment and real property presently described as 7-Eleven Store No. 2423-11232 F located at 796 Broadway, Holbrook, New York 11741 (the “Holbrook Store”). Reference is made to the Holbrook Franchise Agreement, with various addenda and exhibits, for the full terms and provisions thereof.

13. Hammel entered into a 7-Eleven Store Franchise Agreement dated May 13, 2004 (the “Islandia Franchise Agreement”), which agreement superseded a franchise agreement dated November 9, 1993, pursuant to which, *inter alia*, 7-Eleven leased or subleased to Hammel certain equipment and real property presently described as 7-Eleven Store No. 2423-11214 A located at 1224 Old Nichols Road, Islandia, New York 11722 (the “Islandia Store”). Reference is made to the Islandia Franchise Agreement, with various addenda and exhibits, for the full terms and provisions thereof.

14. Yousaf Naseer and Firdous Naseer (collectively, “Naseer”) entered into a 7-Eleven Store Franchise Agreement dated May 12, 2004 (the “Selden Franchise Agreement”), which agreement superseded a franchise agreement dated May 23, 1990, pursuant to which, *inter alia*, 7-Eleven leased or subleased to Naseer certain equipment and real property presently described as 7-Eleven Store No. 2423-29746 B located at 648 Middle Country Road, Selden, New York 11784 (the “Selden Store”). The Selden Franchise Agreement was assigned from Naseer to Hyn on or about January 23, 2008. Reference is made to the Selden Franchise Agreement, with various addenda and exhibits, for the full terms and provisions thereof.

15. Kaloustian entered into a 7-Eleven Store Franchise Agreement dated March 15, 2004 (the “Patchogue Franchise Agreement”), which agreement superseded a franchise agreement dated February 24, 1997, pursuant to which, *inter alia*, 7-Eleven leased or subleased

to Kaloustian certain equipment and real property presently described as 7-Eleven Store No. 2423-11225 F located at 286 W Roe Boulevard, Patchogue, New York 11772 (the “Patchogue Store”). Reference is made to the Patchogue Franchise Agreement, with various addenda and exhibits, for the full terms and provisions thereof.

16. Kaloustian entered into a 7-Eleven Store Franchise Agreement dated May 19, 2005 (the “Farmingville Franchise Agreement”), pursuant to which, *inter alia*, 7-Eleven leased or subleased to Kaloustian certain equipment and real property presently described as 7-Eleven Store No. 2423-24427 B located at 3000 North Ocean Avenue, Farmingville, New York 11738 (the “Farmingville Store”). Reference is made to the Farmingville Franchise Agreement, with various addenda and exhibits, for the full terms and provisions thereof.

17. Vitrano entered into a 7-Eleven Store Franchise Agreement dated May 11, 2004 (the “Hicksville Franchise Agreement”), which agreement superseded a franchise agreement dated June 20, 1985, pursuant to which, *inter alia*, 7-Eleven leased or subleased to Vitrano certain equipment and real property presently described as 7-Eleven Store No. 2422-26249 A located at 599 South Broadway, Hicksville, New York 11801 (the “Hicksville Store”). Reference is made to the Hicksville Franchise Agreement, with various addenda and exhibits, for the full terms and provisions thereof.

18. Plaintiffs Ahmad, Hammel, Hyn, Kaloustian and Vitrano are sometimes hereinafter collectively referred to as the “Plaintiffs” or the “Franchisees.”

19. The Holbrook Store, the Islandia Store, the Selden Store, the Patchogue Store, the Farmingville Store and the Hicksville Store are sometimes hereinafter collectively referred to as the “Stores” or the “Premises.”

20. The Holbrook Franchise Agreement, the Islandia Franchise Agreement, the Selden Franchise Agreement, the Patchogue Franchise Agreement, the Farmingville Franchise Agreement and the Hicksville Franchise Agreement are sometimes collectively referred to as the “Franchise Agreements.”

21. Pursuant to the Franchise Agreements, 7-Eleven selected and leased the locations for the Stores and prepared them for operation, including providing all necessary equipment. 7-Eleven subleased the Stores and leased the equipment to the Franchisees, and gave them licenses to use the 7-Eleven trademarks, trade dress and system of operations. The Franchisees have not acquired direct leaseholds of the Stores, which belong to 7-Eleven.

22. Pursuant to the Franchise Agreements, 7-Eleven receives a percentage of the “gross profit” (net sales less cost of goods sold) derived from the operation of the Stores, which percentage is designated in the Franchise Agreements as the “7-Eleven Charge.” From 7-Eleven’s share, it pays the rent for the Stores (for which it holds the leases) and also pays for utilities, real estate taxes and other on-going services such as bookkeeping, payroll preparation, training and promotion of the business.

23. Pursuant to the Franchise Agreements, the Franchisees receive the net income derived from the Stores’ operations. The net income is the amount remaining after deducing both “operating expenses” (such as payroll, insurance, and maintenance of the equipment and Premises) and the 7-Eleven Charge from the gross profit.

24. The 7-Eleven Charge in the Franchise Agreements is fifty (50) percent, meaning that 7-Eleven receives fifty (50) percent of the gross profits derived from the operation of the Stores.

25. Additional relevant provisions of the Franchise Agreements state as follows;¹

- **9. Term:** Unless sooner terminated as provided in Paragraph 26, the Term of this Agreement will end at the earlier of (i) fifteen (15) years from the Effective Date or (ii) the expiration of our master lease, if any, for the Store premises (subject to your Transfer or Refund rights, if any, as set forth in Paragraph 26(e)).
- **24. Renewal of Franchise:** On the Expiration Date of this Agreement, you may, at your option, renew your rights under this Agreement for one (1) term equal to the number of years of the initial term provided for in our then-current Store Franchise Agreement ...
- **26 (e) (1) (a):** In addition to the other grounds for termination set forth in this Agreement, this Agreement will terminate before the Expiration Date: (a) thirty (30) days before the loss of our Leasehold Rights.
- **26 (e) (4) (iv):** You will not have the right to a Transfer or Refund if... (iv) our Leasehold Rights expire and are not renewed or otherwise extended, or if our Leasehold Rights are terminated, as a result of your or your employees' acts or omissions.
- **31 (g). Complete Agreement:** This Agreement and the Exhibits, Amendments, and Addenda to this Agreement ...contain the entire, full and complete agreement between us and you concerning the Store.
- **Exhibit A:** The present term of the master lease expires on the _____. We have no obligation to renew or exercise any option to extend the master lease. If the master lease is not renewed, the Term of this Agreement will expire 30 days before the expiration of the master lease.
- **Exhibit E:** "Expiration Date" means the earlier of the date which is fifteen (15) years from the Effective Date or the expiration of the current term of the lease or the master lease on the real estate.
- **Exhibit E:** "Lease" means our lease to you of the Store and adjoining property as described in Exhibit A, and, separately, the 7-Eleven Equipment ...
- **Exhibit E:** "Leasehold Rights" means our rights to possession of the Store under any pre-existing or subsequent lease of the Store, whether pursuant to the current term of a lease, an option we exercise, or our re-negotiation of the lease. We have no obligation to exercise any options or other contractual rights, or otherwise enter into any agreement for the purpose of retaining Leasehold Rights. (Emphasis added.)

¹ Two of the provisions excerpted here have blank spaces. In each Franchise Agreement, these blanks are filled in with the different master lease expiration dates that are specific to that Store.

- **Lease Expiration Date Acknowledgement:** As a prospective franchisee (“you”), we informed you that the term of the 7-Eleven Store Franchise Agreement (the “Agreement”) which you will execute if you are approved as a 7-Eleven Franchisee, will expire on the earlier of 15 years from the Effective Date, or, if the property is or becomes leased, the expiration of our leasehold rights. Exhibit A to the Agreement will specify that the current term of the lease covering the Store will expire on _____. We have no obligation to renew or exercise any options to extend our leasehold rights, and we expressly deny any warranties or representations regarding whether our leasehold rights will be renewed, or that any options to extend our leasehold rights will be exercised. If our leasehold rights in and to the Store expire before 15 years from the Effective Date, you may have certain rights under the Agreement. (Emphasis added.)

26. The Franchisees were all members of a class action suit against Southland Corporation (now 7-Eleven) filed in the Superior Court for Alameda County, California, ASC No. 722272-6 OH, titled *7-Eleven Owners For Fair Franchising, et al. v. The Southland Corporation, et al.* (the “7-Eleven OFFF Suit”). In connection with the settlement of the 7-Eleven OFFF Suit in or about 1998, it was agreed that then-existing 7-Eleven franchisees would be offered, *inter alia*, the option to sign a new form of franchise agreement with a term “of at least ten years.” There was no provision whereby the new form of franchise agreement could be terminated prior to the end of the term.

27. In connection therewith, in or about 2004, the Franchisees were offered and entered into the Holbrook Franchise Agreement, the Islandia Franchise Agreement, the Selden Franchise Agreement, the Patchogue Franchise Agreement and the Hicksville Franchise Agreement, which agreements superseded the Franchisees’ then-current franchise agreements, and contained a fifteen year term. (The Farmingville Franchise Agreement, though the same version of agreement as the ones above entered into in 2004, was not entered into until 2005).

28. 7-Eleven has since advised the Franchisees that their respective Franchise Agreements would end early (and prior to the end of their fifteen year term), contending that the

Franchise Agreements would expire and terminate on the date when 7-Eleven's master lease of the Premises for that Store expired.

29. Although the master leases for the Stores have or will expire, 7-Eleven has or will enter into new lease agreements for the exact same Store Premises. 7-Eleven has or will not lose its leasehold rights; it is retaining its rights to possession of the Store Premises. There has or will be no interruption of the Franchisees' occupancy or operation of the Store Premises.

30. 7-Eleven is taking the position that the foregoing is a cause for termination. It is offering renewal under paragraph 24 of the Franchise Agreements to the Franchisees, which would require the Franchisees to execute a new form of 7-Eleven franchise agreement.

31. Upon information and belief, 7-Eleven's new form of franchise agreement contains, *inter alia*, an increased 7-Eleven Charge (whereby an amount believed to be between fifty-one (51) and fifty-five (55) percent of the gross profits derived from the operation of the Stores would go 7-Eleven, rather than fifty (50) percent).

32. Upon information and belief, this translates to an increase in the 7-Eleven Charge ranging from approximately \$15,000 to \$70,000 annually among each of the Franchisees (through 2019 for the Holbrook Store, the Islandia Store, the Selden Store, the Patchogue Store and the Hicksville Store, and annually through 2020 for the Farmingville Store). In sum, the increased 7-Eleven Charge will substantially raise costs to the Franchisees by entitling 7-Eleven to a greater percentage of gross profits from the Stores than it currently receives under the Franchise Agreements.

33. The Franchisees and 7-Eleven entered into a form of Extension Agreement on or about November 2, 2015, as modified on or about December 16, 2015, extending the terms of the

Franchise Agreements to a date following resolution of the instant action (if in 7-Eleven's favor) or to the end of the fifteen year term (if in the Franchisees' favor).

FIRST CAUSE OF ACTION
(Declaratory Judgment)

34. The allegations of paragraphs 1 through 33 are hereby incorporated by reference.

35. 7-Eleven drafted the Franchise Agreements. 7-Eleven is bound to honor the terms of the Franchise Agreements, including but not limited to the termination provisions.

36. 7-Eleven has or will enter into new master leases for the exact same Store Premises under materially identical terms.

37. 7-Eleven has or will not lose its leasehold rights; its leasehold rights will continue for so long as there is a subsequent master lease for the Store Premises.

38. By virtue of the foregoing, there has or will not be an event triggering early termination of the Franchise Agreements.

39. The Franchisees have performed all conditions, covenants and promises required to be performed on their part in accordance with the terms and conditions of the Franchise Agreements.

40. 7-Eleven is failing to abide by the terms of the Franchise Agreements and this constitutes an anticipatory breach of contract.

41. There is a covenant of good faith and fair dealing implied in all contracts, including the Franchise Agreements. By virtue of 7-Eleven's actions as set forth above, 7-Eleven is breaching the implied covenant of good faith and fair dealing implied in the Franchise Agreements.

42. 7-Eleven, with improper motive or intent, is failing to act in good faith in performing its contractual obligations under the Franchise Agreements. 7-Eleven's actions will have the effect of destroying or injuring the Franchisees' ability to achieve their reasonably expected benefits under the Franchise Agreements.

43. 7-Eleven's actions are violative of the terms of the class action settlement of the 7-Eleven OFFF Suit.

44. Those provisions of the Franchise Agreements – that purport to terminate the Franchise Agreements if the master lease for a particular Store Premises expires before the end of the fifteen year term where leasehold rights have not been lost – are unconscionable.

45. An actual, existing and justiciable controversy has arisen and exists between the Franchisees, on the one hand, and 7-Eleven, on the other, as to whether 7-Eleven has a valid basis to effectively terminate the Franchise Agreements before the end of the fifteen year term where leasehold rights have not been lost, and require the Franchisees to execute a new and less favorable form of franchise agreement in order to remain 7-Eleven franchisees.

46. The Franchisees have no adequate remedy at law.

47. By reason of the foregoing, the Franchisees are entitled to a declaration that 7-Eleven may not properly terminate the Franchise Agreements if the master lease for a particular Store Premises expires before the end of the fifteen year term where leasehold rights have not been lost.

SECOND CAUSE OF ACTION
(Permanent Injunction)

48. The allegations of paragraphs 1 through 47 are hereby incorporated by reference.

49. Upon a declaration that 7-Eleven may not properly terminate the Franchise Agreements if the master lease for a particular Store Premises expires before the end of the

fifteen year term where leasehold rights have not been lost, 7-Eleven should be required to abide by its obligations. It should be enjoined from improperly terminating the Franchise Agreements and should be enjoined from requiring the Franchisees to enter into its new form of franchise agreement with the increased 7-Eleven Charge in order to keep operating their respective Stores.

50. 7-Eleven is currently engaged in activity which, if allowed to continue, will result in a breach of the Franchise Agreements.

51. The Franchisees have been and will continue to be irreparably harmed by 7-Eleven's conduct.

52. The Franchisees have no adequate remedy at law.

53. By reason of the foregoing, the Franchises are entitled to a permanent injunction barring 7-Eleven from improperly terminating the Franchise Agreements if the master lease for a particular Store Premises expires before the end of the fifteen year term where leasehold rights have not been lost, and from requiring the Franchisees to enter into its new form of franchise agreement with the increased 7-Eleven Charge in order to keep operating their respective Stores.

PRAYER FOR RELIEF

WHEREFORE, the Franchisees demand judgment against 7-Eleven as follows:

(a) On the first cause of action, a declaration that: (i) 7-Eleven may not properly terminate the Franchise Agreements if the master lease for a particular Store Premises expires before the end of the fifteen year term where leasehold rights have not been lost; (ii) 7-Eleven's attempted termination of the Franchise Agreements prior to end of their fifteen year terms was invalid, improper and ineffective; and (iii) the Franchisees are entitled to continue in possession of the Stores, together with the equipment and merchandise inventory therein under their current Franchise Agreements, until the end of their fifteen year terms;

(b) On the second cause of action, a permanent injunction barring 7-Eleven from improperly terminating the Franchise Agreements if the master lease for a particular Store Premises expires before the end of the fifteen year term where leasehold rights have not been lost, and from requiring the Franchisees to enter into its new form of franchise agreement with the increased 7-Eleven Charge in order to keep operating their respective Stores;

(c) granting the Franchisees all reasonable costs, attorneys' fees and all other costs and fees relating to the controversy, claims, or dispute; and

(d) granting the Franchisees such other and further relief as this Court shall deem just.

JURY DEMAND

The Franchisees hereby demand a trial by jury of all issues so triable.

Dated: New York, New York
January 28, 2016

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