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Attorneys for Plaintiffs: CAPELLI ENTERPRISES, INC. a California Corporation, NAMEER JALEL, and ASEEL ISSA.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CAPELLI ENTERPRISES, INC., a California
Corporation, NAMEER JALEL, and ASEEL
ISSA,

Plaintiffs,

vs.

FANTASTIC SAMS SALONS
CORPORATION, a Delaware Corporation,
FANTASTIC SAMS FRANCHISE
CORPORATION, a Delaware Corporation,

Defendants.

Case No.

COMPLAINT

FOR DECLARATORY RELIEF

INTRODUCTION

1. This is an action seeking a declaratory judgment in a present dispute involving a franchise agreement. Plaintiffs, as franchisee and personal guarantors, seek declaratory relief that despite the current collection attempts by Defendants (franchisors) for violation of the

franchise agreement, Defendants are not entitled to any monies from Plaintiffs where: (1) Defendants are not entitled to the monies demanded where Plaintiffs no longer use or take any benefit from, or advantage of, Defendants' Marks; alternatively, (2) Defendants were in material breach first such that Plaintiffs have since been relieved of their duty to perform thereunder; and alternatively, (3) Defendants are not entitled to some, if not all, of the monies demanded by Defendants as such monies constitute an impermissible penalty.

2. Plaintiffs also seek a declaratory judgment, and if necessary, a temporary restraining order, preliminary and permanent injunction, all related to enforcement of the franchise agreement's arbitral exclusion clause which provides, in pertinent part, that the following shall be "excepted" from the arbitration provisions: "matters relating to the collection of monies owed to [Defendants] by [Plaintiffs]." This action seeking to enforce the exclusionary clause is expressly authorized by the arbitral provision providing, in pertinent part, "The parties further consent to the jurisdiction of any appropriate court to enforce the provisions of this [arbitral] section...."

JURISDICTION AND INTRA-DISTRICT ASSIGNMENT

3. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §§ 1332(a)(1). Specifically, Defendants seek collection of more than \$140,000.00 as established by their formal demand letter attached hereto and labeled **Exhibit A**, and incorporated herein, although not necessarily for the truth of the matters asserted therein.¹ Jurisdiction is also established under 28 U.S.C. §2201(a) to secure declaratory relief and under 28 U.S.C. §2202 to secure preliminary and injunctive relief.

¹ *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) ("In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation."); *Biotronik, Inc. v. Medtronic USA, Inc.*, 840 F.Supp.2d 1251, 1257 (D. Or. 2012) ("Where, as here, the lawsuit seeks a declaration of no liability, the value of the relief sought is measured by the value of the liability that would follow if liability were found to exist.")

FACTUAL PREDICATES

8. Franchisee and Franchisor entered into the Agreement, the salient terms of which include the following:

- a. The term of the Agreement is 10 years (“Term”).
- b. During the Term, Franchisee is required to pay a weekly license (or royalty) fee (“RAF”) as follows: \$358.99 during the first year of the Term, subject to cost of living increases as well as an additional \$5, both applied annually thereafter for the balance of the Term.
- c. During the Term, Franchisee is required to pay a weekly National Advertising Fee (“NAF”) of \$130.32, also subject to cost of living increases applied annually. A minimum of 85% of the NAF must be spent by Franchisor to for advertising to cover the area served by Franchisee.³
- d. Among its varied express obligations, Franchisor “shall maintain and enhance the reputation and trade demand of the Fantastic Sams System,” and further, “shall preserve and increase the goodwill inherent in the Marks.”
- e. “If for any reason other than fire, flood or other natural disaster, [Franchisee] closes the Salon Location and fails within 30 days to re-open at the same or a new location approved by [Franchisor] in writing, this Agreement shall terminate automatically, effective on the 31st day after closure, without further notice or action....”
- f. “[Franchisee’s] obligation to pay [Franchisor] Weekly Fees pursuant to the terms of this Agreement is absolute and unconditional, and will

³ In practice, Franchisee’s NAF has been applied and used to purchase local coupon mailers.

1 remain in full force and effect until the term of this Agreement has
 2 expired, or for so long as [Franchisee] uses any part or all of the Fantastic
 3 Sams System or the Marks, whichever period is longer, whether such use
 4 is authorized or not, ***except as otherwise provided in Section 12 of this***
 5 ***Agreement.***” [emphasis added]

6 g. At Section 12(d)(5) of the Agreement, it provides, “Upon termination
 7 [...] of this Agreement, in any manner, [Franchisee] agrees: Within five
 8 (5) days after the expiration or termination of this Agreement, to promptly
 9 pay [Franchisor] all sums then owing from [Franchisee] to [Franchisor],
 10 NAF or RAF, and to continue to pay all Weekly License and National
 11 Advertising Fees ***for so long as the Marks are used*** and for the entire
 12 period which, but for such termination, would have constituted the term
 13 of the Agreement. [emphasis added]

14 h. The binding arbitration provision is prefaced with the following
 15 exclusionary language: “Except for matters relating to the collection of
 16 monies owed to [Franchisor] by [Franchisee] and/or otherwise explicitly
 17 exempted herein, any controversy or claim arising out of or relating to this
 18 Agreement... shall be arbitrated....”

19 i. “In the event it becomes necessary for either party to institute any action
 20 or proceeding to secure or protect such party’s rights under this
 21 Agreement, the successful party shall be entitled to recover in any
 22 judgment its attorneys’ fees, together with court costs, and any and all
 23 filing fees and litigation expenses.”

24
 25 9. In or about April, 2016, Franchisee closed its Fantastic Sams salon business. The
 26 business was continuously losing money. Franchisee has not relocated or re-opened their salon
 27
 28

1 business, nor does Franchisee intend to do so. Franchisee has not used Franchisor's marks since
2 closing the business.

3
4 10. Notably, the majority of Fantastic Sams salon franchisees in the bay area have
5 closed their businesses since Plaintiffs entered into the Agreement. Further, Franchisor has
6 failed to perform its mandatory obligations under paragraph 8(d) hereinabove.

7
8 11. In addition to the May 25, 2016 written demand to collect monies purportedly
9 owed by Franchisee under the Agreement, Franchisor, through its counsel, has continued its
10 efforts to collect monies from Franchisee, up to and including on June 1, 2016, wherein the
11 General Counsel and Secretary for Dessange Group – North America, an entity claiming to act
12 on behalf of Franchisor, threatened imminent litigation.

13
14 **INCORPORATION OF PRELIMINARY ALLEGATIONS**

15 12. Unless the context clearly indicates otherwise, the allegations set forth in
16 paragraphs 1 through 11 shall be deemed to be incorporated herein by reference, as though fully
17 set forth at length, in each and every cause of action set forth in this complaint.

18
19 **COUNT ONE**

20 **[Action For Declaratory Relief]**

21 **PARTIES**

22 13. All Plaintiffs bring this claim against all Defendants.
23

24 **ACTUAL CONTROVERSY**

25 14. Pursuant to 28 U.S.C §2201(a), the instant claim for declaratory relief is
26 authorized because an actual controversy relating to the legal rights and duties of the respective
27 parties herein exists. The instant controversy is of a character that admits of specific and
28

conclusive relief by a judgment within the field of judicial determination, as distinguished from an advisory opinion. The instant controversy is ripe and the Plaintiffs have standing to pursue the relief requested herein.

REQUEST FOR DECLARATORY DECREE

15. Plaintiffs respectfully request a full and final adjudication and decree establishing that no monies are owed Defendants under the Agreement even though Plaintiffs have closed, without relocating, their franchise business before the expiration of the Term, based upon the following independent and alternative reasons:

a. Plaintiffs are not liable to Defendants for any Weekly License or National Advertising Fees based upon the unambiguous language in Section 12(d)(5) of the Agreement, read in conjunction with the other Agreement terms set forth hereinabove;

b. Assuming, *arguendo*, any ambiguity in Section 12(d)(5) of the Agreement, and its related terms as set forth hereinabove, such ambiguity must be construed against the drafter, which in this case, is the Franchisor, and as such, Plaintiffs are not liable to Defendants for any Weekly License or National Advertising Fees;

c. Alternatively, Plaintiffs are not liable to Defendants for any Weekly License or National Advertising Fees as Defendants have long before breached the Agreement first, to wit, those mandatory covenants set forth in paragraph 8(d) hereinabove;

d. Alternatively, Plaintiffs are not liable to Defendants for any Weekly License or National Advertising Fees as such measure of damages constitute an impermissible penalty, especially where the Agreement mandates numerous post-obligations by Franchisee, including, but certainly not limited to: (i) “to refrain, for a period of two (2) years from the effective date of [...] termination of the Agreement, from directly or indirectly participating as an owner, partner, member, director, officer, employee, consultant, lender or agent, or serve in any other capacity in any business engaged in the sale or rental of products or services the same as or similar to those of the Fantastic Sams System, within a five (5) mile radius of the Fantastic

1 Sams Salon operated pursuant to this Agreement;” and (ii) To refrain from directly or indirectly
2 participating as an owner, partner, member, director, officer, employee, consultant, lender or
3 agent, or serve any other capacity in any business engaged in the sale or rental of products or
4 services the same as or similar to those of the Fantastic Sams System, within a two and one-half
5 (2 ½) mile radius of any Fantastic Sams Salon, for the greater of (a) the remainder of the
6 unexpired term of this Agreement had this Agreement not been terminated, or (b) a period of
7 two (2) years from the actual date of expiration or termination.

8
9 16. Plaintiffs further and respectfully request a full and final adjudication and decree
10 establishing that the claims herein fall within the broad exclusionary clause of the arbitration
11 provision contained within the Agreement.

12
13 **PRAYER**

14 WHEREFORE, the Plaintiffs pray judgment as against Defendants as follows:

- 15
16 1. For declaratory relief, decree and judgment as requested herein;
17 2. For a temporary restraining order, preliminary and permanent injunction,
18 restraining and enjoining Defendants from instituting or maintaining an arbitral proceeding
19 concerning the claims herein pursued by Plaintiffs;
20 3. As against all Defendants, for an award of reasonable attorney’s fees;
21 4. As against all Defendants, for costs of suit;
22 5. For such other and further relief as the Court deems just and proper.

23
24 Dated: June 16, 2016

GATES EISENHART DAWSON

25
26 By 

27 MARC A. EISENHART
28 Attorney for Plaintiffs