

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

PATRICK T. VU and ALISSA K. VU, husband
and wife and the marital community
composed thereof;

Plaintiffs,

v.

ALPENROSE DAIRY, INC., an Oregon
Corporation; BASKIN-ROBBINS
FRANCHISING, LLC, a Delaware Limited
Liability Company; ROD C. BIRKLAND and
JANE DOE BIRKLAND, husband and wife and
the marital community composed thereof;
and JOHN DOES 1-3 and JANE DOES 1-3,
husbands and wives and the marital
communities composed thereof;

Defendants.

NO.

**COMPLAINT FOR BREACH OF
CONTRACT; BAD FAITH;
VIOLATIONS OF THE
FRANCHISE ACT (RCW
19.100.180) AND VIOLATIONS
OF THE CONSUMER
PROTECTION ACT (RCW
19.86, ET SEQ.)**

COME NOW THE PLAINTIFFS, PATRICK T. VU and ALISSA K. VU, by and through their
attorney of record, and hereby allege as follows:

1. PARTIES, JURISDICTION AND VENUE

1.1 At all times relevant hereto, the plaintiffs Patrick T. Vu and Alissa K. Vu were (and
are) married residents of Snohomish County, Washington. The Vus currently own two
Baskin-Robbins ice cream store franchises in Snohomish County and one in King County.

**COMPLAINT FOR BREACH
OF CONTRACT, ETC. - 1**

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1.2 The defendant Alpenrose Dairy, Inc. ("Alpenrose") is an Oregon corporation and its headquarters are located at 6149 Shattuck Road, Portland, OR 97221. Alpenrose is a dairy company which supplies ice cream and other products to approximately 200 Baskin-Robbins franchise stores in the Pacific Northwest. Alpenrose is also an authorized representative of Baskin-Robbins Franchising LLC in the Pacific Northwest.

1.3 Baskin-Robbins Franchising, LLC ("Baskin-Robbins") is a Delaware corporation whose principal place of business is 130 Royall Street, Canton, Massachusetts, 02021. Baskin-Robbins authorized Alpenrose to act as its agent in the Pacific Northwest in franchising and supplying Baskin-Robbins ice cream stores. At all times relevant hereto, the defendant Alpenrose acted within the scope of its authority as an agent for Baskin-Robbins Franchising, LLC.

1.4 The defendants Rod C. Birkland and Jane Doe Birkland are husband and wife and, upon information and belief, reside in Portland, Oregon. Rod C. Birkland ("Birkland") is an Alpenrose manager and is or was Co-President of Alpenrose Dairy, Inc. at certain times relevant hereto. At all times relevant hereto, the defendant Birkland acted within the scope of his authority as an employee of Alpenrose.

1.5 The defendants John Doe #1 and Jane Doe # 1 are believed to be residents of King County, Washington. According to Rod Birkland, John and Jane Doe have entered into an oral or written agreement to purchase from Alpenrose the plaintiffs' Eastgate Baskin-Robbins franchise. The defendants have not revealed the identity of John and Jane Doe #1 to the plaintiffs, but the plaintiffs were advised that the transfer of its store and assets to the

1 Does # 1 was scheduled to occur on or about March 1. The defendants have apparently
2 accepted the offer.

3 1.6 The defendants John and Jane Doe #2 are husband and wife who have or will
4 enter into an agreement to purchase the plaintiffs' Mill Creek Baskin-Robbins franchise from
5 the defendants. The plaintiffs do not know the identity of Does #2.

6 1.7 The defendants John and Jane Doe #3 are husband and wife who have or will
7 enter into an agreement to purchase the plaintiffs' Mill Creek Baskin-Robbins franchise from
8 the defendants. The plaintiffs do not know the identity of Does #3.

9 1.8 All or most of the wrongful conduct described herein occurred in Snohomish
10 County.
11

12 2. FACTS SUPPORTING LIABILITY

13 2.1 Over the last several years, the plaintiffs entered into certain franchise and other
14 written and oral agreements with the defendants Baskin-Robbins, Alpenrose and Birkland.

15 2.2 In June of 2002, the defendants sold the plaintiffs a Baskin-Robbins franchise
16 which authorized the plaintiffs to own and operate a retail ice cream store under the Baskin-
17 Robbins name, which was located at 23632 Highway 99, Suite 1, Edmonds, Washington
18 98026. Certain agreements were also entered into by the parties relative to the purchase
19 and sale of the franchise.
20

21 2.3 When the plaintiffs purchased the franchise, they were expressly told that they
22 could expect to sell the franchise for approximately 60% of its annual sales---when and if
23 they chose to sell the franchise. This same representation was made by the defendants for
24 each and every other franchise location they sold to the plaintiffs.
25

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1 2.4 After 2002, the plaintiffs purchased additional franchises from the defendants to
2 operate Baskin-Robbins stores in other locations including Mukilteo, Eastgate, Mill
3 Creek/Bothell, Lake Forest Park, and Arlington.

4 2.5 Each franchise was accompanied by several oral and written agreements, including
5 a leasehold, franchise agreement, and related contracts. The terms of the agreements
6 controlled the relationship between the plaintiffs and the defendants, including the terms
7 under which the defendants could declare the plaintiffs in default. Such terms included
8 specific requirements of written notices by the defendants to the plaintiffs in the event of an
9 alleged default and other occurrences.
10

11 2.6 Since approximately late 2008, Baskin-Robbins' revenues from their franchise
12 operations have declined substantially as a result of the recession, along with most other
13 premium and luxury retail brands. The decline in ice cream sales have been more
14 pronounced in the Pacific Northwest than in southern parts of the United States because of
15 the wet, colder climate. Most franchisees have struggled financially over the last five years
16 or more.
17

18 2.7 The plaintiffs now only have three franchises: Eastgate in King County, and Mill
19 Creek and Arlington/Smokey Point in Snohomish County. The Arlington/Smokey Point store
20 is managed and operated by one of the plaintiffs' former employees.

21 2.8 The recession magnified several problems with the Baskin-Robbins brand which
22 make it difficult for franchisees to stay in business. For example, the defendants refuse to
23 permit franchisees to update the appearance of their stores. Perhaps more than any other
24 franchise system in the U.S., Baskin-Robbins franchises in the Pacific Northwest stores are
25

1 remarkably similar to Baskin-Robbins stores in the 1970s. This stale quality in the brand
2 image makes it difficult for franchisees to attract customers, particularly in the rapidly
3 changing and very competitive food/dessert retail business.

4 2.9 In addition to the stale company image, the Baskin-Robbins menu and product line
5 is also stale and limited primarily to frozen desserts. The plaintiffs and other franchisees
6 have repeatedly asked the defendants to expand their menu and product line, particularly in
7 the winter months when ice cream sales virtually disappear in the Pacific Northwest. All or
8 most of the franchisees in the Pacific Northwest are not permitted to offer coffee or other
9 hot-beverage products, which sell very well in the winter months. This change would very
10 likely improve sales substantially for Baskin-Robbins franchisees.

12 2.10 In many cases, franchisees (including the plaintiffs) have made the decision to
13 leave the business. In years past, such franchisees have interested qualified buyers who
14 have been interested in purchasing a Baskin-Robbins franchise. When the plaintiffs secured
15 a qualified buyer for one of their franchises, the defendants unreasonably withheld their
16 approval for the sale. Instead, the defendants strive to locate their own buyers so that they
17 do not have to share the purchase proceeds with their franchisees. This has happened to the
18 plaintiffs.

20 2.11 The investment, sweat equity, and goodwill built into franchise locations by
21 franchisees is often their greatest single asset and the defendants know this. The
22 franchisees cannot afford to lose their equity in their franchises. Typically franchisees must
23 recover at least some portion of their equity in a sale of their franchise to a third party, if
24 they wish to avoid bankruptcy.
25

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1 2.12 The defendants further exacerbated the hardship suffered by their franchisees by
2 creating a scheme which kept many franchisees in perpetual debt to the defendants, at least
3 in the Pacific Northwest. When winter sales of premium ice cream and other frozen
4 desserts declined substantially, franchisees were unable to pay their bills. The defendants
5 were happy to defer payment on the ice cream bills by their franchisees, and extend credit to
6 them----charging 18% interest at the same time. This was an unusually high interest rate,
7 especially during the recession when the prime interest rate was at historic lows. However, it
8 ensured that the defendants would make money year-round, even when ice cream sales and
9 the economy declined.
10

11 2.13 The total ice cream bill for franchisees quickly rose often to six figures or more.
12 This happened to the plaintiffs. The defendants then used these ice cream bills to induce
13 their own franchisees to act in conformity with the wished of the defendants, whether or not
14 they conformed with the contractual agreements between the parties. It also permitted the
15 defendants to avoid nearly all written notices required of them in their communications with
16 franchisees, including default notices.
17

18 2.14 The defendants also regularly threatened their franchisees with the filing of IRS
19 forms 1099 for the amount of unpaid ice cream debt, if the franchisees resisted the directives
20 of the defendants. The defendants manipulated the ice cream debt owed by their own
21 franchisees to the extent that the franchisees became fearful of asserting their own rights
22 under various agreements with the defendants. This permitted the defendants to commit
23 repeated breaches of their franchise agreements with their franchisees without fear or
24 consequence. This happened to the plaintiffs.
25

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1 2.15 For years, the defendants have known that experienced business persons will not
2 invest in dated Baskin-Robbins franchises which offer little in terms of growth potential and
3 opportunity. The defendants therefore chose to focus their sale efforts on minority and
4 immigrant groups who are extremely hard-working, but often less familiar with American
5 business practices and American law. Such minority and immigrant groups are also less
6 familiar with more attractive American business and financial opportunities, including other
7 franchises. As a result, the defendants sell many franchises to Asian immigrants, like the
8 plaintiffs, or members of other minority groups—who they freely and openly disparage
9 behind the backs of their franchisees.
10

11 2.16 The defendants also know that minorities frequently do not have ready access to
12 lawyers, accountants, other business professionals, particularly when they become members
13 of the "working poor" class after they buy a Baskin-Robbins franchise. They are therefore
14 particularly vulnerable to over-reaching by the defendants, especially in legal matters, and
15 often they flagrantly violate or breach their contractual obligations. This happened to the
16 plaintiffs repeatedly in their twelve (12) year relationship with the defendants.
17

18 2.17 In some situations, the defendants will take over a lease for a retail store for a
19 franchisee, under the pretext of helping them. When the defendants find a buyer, they will
20 enter into an agreement to sell the franchise without the knowledge or consent of the
21 franchisee. The defendants then force the franchisee out of the retail location, by
22 threatening default on the ice cream debt that is owed, and take their franchisee's sweat
23 equity and good will for their own uses. This happened to the plaintiffs.
24
25

1 2.18 Baskin-Robbins is part of the Dunkin' Brands companies that went public in July
2 of 2011. Since then, Dunkin' Brands CEO Nigel Travis has publicly asserted in the company's
3 2012 Annual Report to shareholders: "We have an intense focus on driving franchisee
4 profitability, which drives strong returns for both franchisees and shareholders." Although
5 the CEOs wish to increase profits has been true of shareholders, it has not been true of
6 franchisees. In fact, the added profits for shareholders have occurred only at the expense of
7 franchisees.
8

9 2.19 Although the Dunkin' Donuts brand has grown since the company went public, the
10 number of Baskin-Robbins franchises has continued to shrink in the U.S. The number of
11 Baskin-Robbins stores in the U.S. has steadily decreased each year since 2008. The
12 company has not launched any initiatives or improvements that might slow or reverse this
13 trend. The franchisees, like the plaintiffs, have been forced to shoulder all or most of the
14 financial declines during the recession, and not the company or its shareholders. Ironically,
15 the historic low prime interest rates caused by the recession have made large, overdue ice
16 cream bills extremely profitable for the defendants.
17

18 2.20 Over the last several months, the plaintiffs have been actively engaged in
19 negotiations with the defendants to amicably resolve their disputes and transfer the
20 ownership of their stores to new franchisees with the least disruption to the franchise brand
21 and business. The plaintiffs made every effort to do so without litigation over a period of
22 several months. Suddenly, and without warning, the defendants retained counsel who began
23 an aggressive campaign of demands in an effort to intimidate the plaintiffs into submission.
24 This is yet another example of bad faith.
25

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1 2.21 On or about February 24, 2014, the plaintiffs' attorney provided the defendants
2 with a copy of a complaint, which included John and Jane Doe #1 as defendants. The
3 complaint was neither filed nor served. The plaintiffs did so in an effort to avoid further
4 losses by the sale of their Eastgate franchise store to another new franchisee by the
5 defendants and encourage the defendants to resume negotiations to resolve their disputes
6 without the necessity of litigation. The defendants ignored the plaintiffs' complaint and
7 stopped all ice cream deliveries to the plaintiffs' three franchise locations. This will effectively
8 kill off the plaintiffs' three remaining franchises if they do not have product to sell.
9

10 2.22 On March 17, 2014, the defendants filed their own complaint against the plaintiffs
11 in U.S. District Court. However, the defendants failed to include as parties any future
12 purchasers of the plaintiffs' franchises, and especially John and Jane Does #1. In fact, the
13 defendants wish to proceed with the sales of all three of the plaintiffs' franchise stores
14 unimpeded, without regard to their contractual agreements with the plaintiffs, without regard
15 to the law, and without liability to the plaintiffs, which the federal suit would accomplish.
16 John and Jane Does #1-3 are therefore indispensable parties to any litigation involving the
17 disposition of the plaintiffs' franchise interests.
18

19 2.23 The filing of the federal lawsuit is also a violation of the franchise agreement
20 between the parties, which requires a mediation of all disputes before suit is filed. The
21 defendants have breached the franchise agreement by filing suit without first participating in
22 such a mediation. This is additional evidence of bad faith by the defendants.
23

24 2.24 The plaintiffs spent their life savings to buy multiple franchises from the
25 defendants; they grew the customer base for each of their stores; they frequently worked

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1 seven (7) days a week in their stores; they spent additional monies to improve their stores;
2 and the plaintiffs earned a nominal return on their investment, at least until the recession.

3 2.25 The plaintiffs can no longer afford to try to save the sinking ship that their
4 franchises have become and they must leave the business if they are to survive financially.
5 However, the plaintiffs can do so only if they are able to recover all or most of the equity
6 they have invested in their franchises. This is possible with an improving economy and the
7 return of luxury and premium retail brands, like Baskin-Robbins.
8

9 2.26 If the federal suit is permitted to proceed, the plaintiffs are fearful that the
10 defendants will do again what they did with the plaintiff's Lake Forest Park franchise. The
11 plaintiffs purchased the Lake Forest Park store in 2003 for approximately \$112,000. In 2012,
12 the Lake Forest Park franchise had been in financial decline since at least 2008 as a result of
13 the recession. A frozen yogurt store then rented space a few doors away, which offered
14 frozen dessert products at substantially lower prices than Baskin-Robbins products and
15 declining sales in the plaintiffs' store then fell even more.
16

17 2.27 The defendants did not offer any practical advice to the plaintiffs about the
18 wrongful conduct of the landlord in renting space to competing businesses next to each
19 other. Instead, the defendants silently watched the plaintiffs' Baskin-Robbins store fall
20 further into decline.

21 2.28 The defendants then went to work to sell the store to another unwitting
22 franchisee, so it could retain the full proceeds from the sale of the store. The defendants
23 intimidated the plaintiffs by repeatedly demanding approximately \$50,000 in ice cream debt
24
25

1 and accusing them repeatedly of violating the terms of the franchise agreement and
2 threatening default----just as they are doing now.

3 2.29 The defendants threatened the plaintiffs and told them if they did not surrender
4 their entire investment and interest in the Lake Forest Park store, they would be subject to
5 suit. The defendants, and particularly Rod Birkland, violated the terms of the franchise
6 agreement by forcing the plaintiffs to give up their franchise and property without due
7 process, without compensation, without the required written notices of a claimed default, and
8 without regard to requirements for other written communications between the parties.
9

10 2.30 When the plaintiffs handed over the keys to the Lake Forest Park store to the
11 defendants, they forced them to sign a document under duress which the plaintiffs did not
12 have an opportunity to read first. The plaintiffs and their counsel have since made repeated
13 demands for a copy of the document, which the defendants have refused to provide.
14

15 2.31 The plaintiffs were terrified of being sued by the defendants and did as the
16 defendants demanded----they handed over the keys to their franchise to the defendants and
17 signed the document they were told to sign. The plaintiffs lost their total equity and
18 investment in the Lake Forest store---estimated at over \$150,000----including certain
19 equipment and an existing inventory. The entire proceeds from the sale of the store was
20 taken by the defendants alone.

21 2.32 The defendants are now attempting to repeat the same deceptive and unfair
22 process with the plaintiffs Baskin-Robbins franchise at Eastgate in King County. While
23 engaged in negotiations with the plaintiffs for an acceptable transfer of the interests to new
24 franchisees, buyers or owners, the defendants secretly planned to eject the plaintiffs on or
25

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1 before March 1, 2014, after selling their franchise to yet another unwitting buyer: John and
2 Jane Doe #1. The plaintiffs also believe that the defendants have arranged, or are in the
3 process of arranging, for the sale of the Arlington/Smokey Point and Mill Creek stores to John
4 and Jane Does #2-3.

5 2.33 The plaintiffs have filed this action to hold the defendants responsible for their
6 wrongful described above; to recover all damages they have sustained to date; and to void
7 their existing relationship with the defendants.
8

9 3. CAUSES OF ACTION

10 Based on all of the foregoing, the plaintiffs assert the following causes of action
11 against the defendants:

12 A. BREACH OF CONTRACT

13 The defendants breached many of their contractual obligations to the plaintiffs relating
14 to each of the plaintiffs' franchise operations. Breach of contract is actionable if a contract
15 imposes a duty, the duty is breached, and the breach proximately causes damage to the
16 claimant. The conduct of the defendants satisfies the prima facie elements of a cause of
17 action for breach of contract. The defendants jointly and severally breached oral and written
18 contracts, all as described above, and the plaintiffs were damaged thereby.
19

20 B. MISREPRESENTATION

21 The defendants have made various negligent and intentional representations and
22 promises to the plaintiffs to induce them to act or not act in ways beneficial to the
23 defendants. For example, the defendants repeatedly promised they would not file IRS forms
24 1099 against the plaintiffs for the past due ice cream debt. Now that the defendants have
25

1 found a buyer for the Eastgate franchise, and are actively marketing the plaintiffs' Mill Creek
2 and Arlington/Smokey Point franchises, they have threatened to file such IRS 1099s if they
3 plaintiffs do not vacate the store immediately. The defendants knew that their
4 representations to the plaintiffs were false; they intended for the plaintiffs to rely on their
5 misrepresentations; and the plaintiffs did so to their detriment. Such misconduct on the part
6 of the defendants satisfies the *prima facie* elements of misrepresentation.

7 **C. VIOLATIONS OF WASHINGTON'S FRANCHISE ACT**

8
9 By virtue of all of the foregoing, the defendants have violated one or more provisions of
10 Washington's Franchise Act including, but not limited, to those codified in RCW 19.100.180.

11 **D. BAD FAITH**

12 Inherent in every contract, there exists an implied duty on the part of both parties, for
13 good faith and fair dealing. Besides the prohibition on bad faith conduct contained in the
14 Franchise Act cited *supra*, the defendants have also acted in bad faith under all agreements
15 with the plaintiffs.

16 **E. CONVERSION**

17
18 The tort of conversion occurs when, without lawful justification, one willfully interferes
19 with, and thereby deprives another of their property rights and interests. The defendants
20 unlawfully converted the plaintiffs' property interests in the Lake Forest Park franchise for
21 their own use and benefit, and then sold such property to another franchisee for their own
22 personal gain. Without relief from the court, the defendants will do the same with the
23 plaintiffs' three remaining franchises. This constitutes the unlawful tort of conversion.
24
25

F. VIOLATIONS OF WASHINGTON'S CONSUMER PROTECTION ACT

The Washington Consumer Protection Act (CPA), codified as RCW 19.81, makes it unlawful to commit any act of deception or unfairness in trade or commerce. The Act has been enforced in business-to-business transactions. Further, a violation of RCW 19.100.180 constitutes a *per se* violation of the Consumer Protection Act. The defendants have violated the CPA by virtue of all of the foregoing.

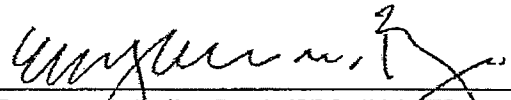
4. PRAYER FOR RELIEF

The plaintiffs pray for judgment against the Defendants for:

- a. Past and future special damages;
- b. Property damage and loss of use;
- c. Interest calculated at the maximum amount allowable by law, including prejudgment interest;
- d. Treble damages under the CPA;
- e. Attorney's fees and costs;
- f. Any and all other relief deemed just and equitable at the time of trial.

DATED at Edmonds, Washington, this 24th day of March, 2014.

LAW OFFICES OF EUGENE N. BOLIN, JR., P.S.


Eugene N. Bolin, Jr., WSBA #11450
Attorney for Plaintiffs