

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR MIAMI-DADE COUNTY, FLORIDA

NIACCF, INC.,
a Florida corporation,

CASE NO: 12-02519 CA 25

Plaintiff,

v.

COLD STONE CREAMERY, INC.,
an Arizona corporation,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, NIACCF, INC., by and through undersigned counsel, sues Defendant, COLD STONE CREAMERY, INC., as follows:

INTRODUCTION

1. This action arises out of a dispute between the NIACCF, Inc., on behalf of its members, and Cold Stone Creamery, Inc. concerning Cold Stone Creamery, Inc.'s failure to provide information pertaining to, and properly account for, certain monies that Cold Stone Creamery, Inc. has received from third parties, which monies were designated to be utilized for the benefit of the Cold Stone Creamery franchisees.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter as the value of the amount in controversy exceeds the sum or value of Fifteen Thousand Dollars (\$15,000.00), exclusive of interest, costs and attorney's fees.

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3. Venue is proper in this Court as the Defendant engages in business in Miami-Dade County, Florida.

PARTIES

4. Plaintiff NIACCF, Inc. ("NIACCF") is a Florida corporation with its principal place of business in Miami-Dade County, Florida. NIACCF is an association of franchisees and area developers within the Cold Stone Creamery franchise system.

5. Defendant COLD STONE CREAMERY, INC. ("Cold Stone") is an Arizona corporation with its principal place of business in Scottsdale, Arizona. Cold Stone is the franchisor of the Cold Stone Creamery franchise system and is engaged in the business of developing, operating and/or franchising a system of businesses that offer and sell ice cream products throughout the United States, including Miami-Dade County, Florida. Upon information and belief, Cold Stone has filed the necessary Franchise Exemption Application with the Florida Department of Agriculture and Consumer Services in order to offer and sell Cold Stone franchises in Florida and has designated an agent for service in Florida.

6. In 2011, the NIACCF was formed for the purpose of uniting independently owned Cold Stone franchises and area developers and for educating and representing its members on issues affecting their Cold Stone franchise interests. In addition, the NIACCF was formed in order to articulate and advocate the needs, interests and goals of its members in the context of a constructive and cooperative relationship with their franchisor; foster and promote the interests of those individuals and entities who are current Cold Stone Creamery franchisees and Area Developers; unite such current franchisees and Area Developers in the Association to consider, agree and act in unison upon all matters affecting the activities and businesses of the members;

protect and enhance the economic investments of NIACCF, INC; cooperate for the improvement of the legal, business and financial conditions of the current franchisees and Area Developers in their respective markets, and, ultimately, the Cold Stone Creamery franchise system as a whole; and secure, preserve, analyze, disseminate and distribute accurate and reliable information for its members regarding matters affecting the current franchisees and Area Developers.

7. Membership in the NIACCF is open to all franchisees and area developers of Cold Stone, with the exception of those franchises owned by, or affiliated with, Cold Stone.

FACTUAL ALLEGATIONS

Standing

8. The NIACCF has standing to maintain this action. At least one of its members (indeed, all of its members) will suffer injury in fact by the real and immediate threatened harm from Cold Stone's actions in failing to provide information pertaining to, and properly account for, certain monies that Cold Stone Creamery, Inc. has received from third parties, which monies were designated to be utilized for the benefit of the Cold Stone Creamery franchisees. For example, and without limitation, Frank Caperino, Rudy Puig, Ed Reesman and Rena Schrein are among those members of the NIACCF, who are Cold Stone franchisees either in their individual capacity or through their ownership of an entity which operates the franchise, who will suffer injury as a result of Cold Stone's actions.

9. Further, the interests sought to be protected by this action are germane to the NIACCF's purpose.

10. The claim for relief involves an issue that is common to all members of the NIACCF – the nature and extent of Cold Stone's obligations to comply with their statements

regarding the use and accounting of the subject monies. These statements were uniform or materially uniform to the franchisees given that the statements were made in email blasts to franchisees or made in meetings to groups of franchisees.

11. The claim alleged by the NIACCF is for declaratory relief only and does not involve potentially differing claims for monetary compensation.

Flexible Marketing Program (“FMP”)

12. The franchisees of the Cold Stone franchise system, including the members of the NIACCF, purchase various products that are to be used in the operation of their franchised businesses from vendors and/or suppliers (collectively, “Vendors”) that are specified and approved by Cold Stone.

13. Cold Stone receives financial contributions and/or financial incentives from Vendors based upon purchases of products made by Cold Stone, Cold Stone’s affiliates and franchisees (the “Vendor Rebates”).

14. The basis of the Vendor Rebates varies, ranging from a fixed amount per volume purchased to a percentage of the aggregate purchase price.

15. As a result, Cold Stone established a Flexible Marketing Program (“FMP”), wherein the Vendor Rebates would be paid to Cold Stone and those funds would be used for marketing purposes.

16. The FMP was specifically designed to build the Cold Stone brand reputation and create consumer awareness in the marketplace.

17. Franchisees, including the members of the NIACCF, have requested that Cold Stone disclose relevant and material information regarding the FMP to its franchisees, including the members of the NIACCF, relating to, *inter alia*:

- a. what percentage or amount of the Vendor Rebates are earmarked for, and/or used by, the FMP and for what purpose are such funds being used;
- b. what percentage of the aggregate purchase price of the Vendor's products are retained for use by FMP and for what purpose are such funds being used;
- c. what percentage or amount of the Vendor Rebates that are earmarked for FMP use are actually utilized for marketing purposes; and
- d. whether, and to what extent, the prices of the products purchased from the Vendors by the franchisees are increased in order for the Vendor to offset its rebate payment to Cold Stone.

18. On several occasions, Cold Stone agreed to provide its franchisees with the requested information. Cold Stone's agreement to provide the requested information was shared with the franchisees in a uniform manner, such as in meetings to groups of franchisees.

19. Cold Stone, however, has now refused to provide the requested information to its franchisees, including the NIACCF.

20. Indeed, even after repeated requests from the NIACCF and the franchisee members of the National Advisory Board a/k/a Cold Stone Creamery Franchisee National Advisory Board (the "NAB"), Cold Stone has now refused to disclose this data to the franchisee community.

Gift Card Breakage

21. Like many retailers, Cold Stone offers gift cards for sale to its customers.

22. “Breakage” is an industry term used to indicate gift card value that has been sold but never redeemed. Revenue from breakage is almost entirely profit, since companies need not provide any goods or services for unredeemed gift cards.

23. Cold Stone franchisees, including the members of the NIACCF, have requested that Cold Stone provide a detailed accounting of the amount of gift card breakage that exists (including any interest accrued thereon) as well as whether any revenue generated from the sale of gift cards that remains unredeemed has been retained by Cold Stone and/or utilized by Cold Stone for any purpose.

24. On several occasions, Cold Stone agreed to provide its franchisees with the requested information. Cold Stone’s agreement to provide the requested information was shared with the franchisees in a uniform manner, such as in meetings to groups of franchisees.

25. Cold Stone, however, has never provided the requested information.

26. Despite the repeated requests to Cold Stone for disclosure of such information pertaining to gift card breakage, Cold Stone has now refused to provide such information.

27. Over the last few years, third-party networks have emerged to become the fastest growing gift card distribution channel, accounting for approximately 10% of gift card sales in the U.S. and bringing retailers’ gift cards into the aisles and checkout counters of other retailers. Such networks generate billions of dollars in sales on an annual basis.

28. When Cold Stone implemented its third-party gift card program (the “Third-Party Program”), it represented to the franchisees, including members of the NIACCF, that the interest earned from gift card breakage would be used to offset the costs of the third-party program incurred by the franchisees.

29. However, Cold Stone has not reimbursed the franchisees, including members of the NIACCF, for the costs incurred in participating in the third-party program, which is imposed upon them by Cold Stone.

30. NIACCF has retained the undersigned law firm and has agreed to pay it a reasonable fee for its services.

31. All conditions precedent to the filing of this action have either occurred or been waived.

CAUSES OF ACTION

Count I – Declaratory Judgment

32. NIACCF incorporates by reference the allegations set forth in paragraphs 1 through 31, *supra*, as if fully set forth herein.

33. Certain disputes have arisen between the NIACCF, on behalf of franchisees, and Cold Stone.

34. These disputes include whether Cold Stone is obligated to disclose information regarding the FMP to the Cold Stone franchisees, including the members of the NIACCF, relating to, *inter alia*:

- a. what percentage or amount of the Vendor Rebates are earmarked for, and/or used by, the FMP and for what purpose are such funds being used;
- b. what percentage of the aggregate purchase price of the Vendor's products are retained for use by FMP and for what purpose are such funds being used;
- c. what percentage or amount of the Vendor Rebates that are earmarked for FMP use are actually utilized for marketing purposes; and
- d. whether, and to what extent, the prices of the products purchased from the Vendors by the franchisees are increased in order for the Vendor to offset its rebate payment to Cold Stone.

35. Another dispute involves whether Cold Stone is required to provide a detailed accounting of the amount of gift card breakage that exists (including any interest accrued thereon) as well as whether any revenue generated from the sale of gift cards that remains unredeemed has been retained and/or utilized by Cold Stone for any purpose.

36. Finally, a dispute exists regarding whether the interest earned from gift card breakage is required to be used by Cold Stone to offset the costs of the third-party program incurred by the franchisees.

37. The allegations referenced above demonstrate that there is a bona fide, actual, present practical need for the declaration being requested by the NIACCF.

38. The requested declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts.

39. The privileges and/or rights of the NIACCF, through its members, is dependent upon the facts or the law applicable to the facts.

40. There exists an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law.

WHEREFORE, Plaintiff, NIACCF, INC., respectfully requests that this Court enter judgment in its favor and against Cold Stone as follows:

a. For a judicial declaration that Cold Stone is obligated to disclose the requested information regarding the FMP including to the franchisees, including the members of the NIACCF, relating to, *inter alia*:

a. what percentage or amount of the Vendor Rebates are earmarked for, and/or used by, the FMP and for what purpose are such funds being used;

- b. what percentage of the aggregate purchase price of the Vendor's products are retained for use by FMP and for what purpose are such funds being used;
- c. what percentage or amount of the Vendor Rebates that are earmarked for FMP use are actually utilized for marketing purposes; and
- d. whether, and to what extent, the prices of the products purchased from the Vendors by the franchisees are increased in order for the Vendor to offset its rebate payment to Cold Stone.

b. For a judicial declaration that Cold Stone is required to provide a detailed accounting of the amount of gift card breakage that exists (including any interest accrued thereon) as well as whether any revenue generated from the sale of gift cards that remains unredeemed has been retained and/or utilized by Cold Stone for any purpose.

c. For a judicial declaration that the interest earned from gift card breakage is required to be used by Cold Stone to offset the costs of the third-party program incurred by the franchisees.

d. For an award entitling the NIACCF to its costs.

e. For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff, NIACCF, INC., hereby demands a trial by jury on all matters properly triable by jury under the laws of the United States and the State of Florida.

Respectfully submitted,

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