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BLOGS

Advertising

Franchise Dispute Over Advertising Fund Not Subject to Dismissal

A federal court in Indiana declined to dismiss a breach of contract claim concerning the collection of advertising and marketing funds by the franchisor of a members-only buying club franchise. In *Arcangelo, Inc. v. DirectBuy, Inc.*, 2013 U.S. Dist. LEXIS 164941 (N.D. Ind. Nov. 20, 2013), the district court concluded that the language of the franchise agreement was not sufficiently unambiguous to resolve the fee dispute as a matter of law. Arcangelo had filed suit claiming that DirectBuy charged excessive fees for advertising and marketing under the franchise agreement, which explicitly capped the amount of franchisee contributions to a marketing fund at three percent of gross new membership sales. Two separate provisions in the franchise agreement addressed DirectBuy's marketing efforts, one titled "Marketing and Advertising," and the other "Marketing Materials." DirectBuy contended that the "Marketing Materials" section addressed costs associated with the placement of advertising, whereas the "Marketing and Advertising" section provided for the creation and development of the marketing fund that is the subject of the three percent cap.

The court was not persuaded by DirectBuy's argument and found too much overlap in the language of each section to allow an unambiguous interpretation of how the franchise agreement applied to the specific charges disputed. The parties disagreed about whether certain fees were properly subject to the cap on marketing fund contributions or better characterized as "sales leads" that fell under a separate advertising category. The court concluded that more factual background was required concerning the history of the marketing fund, the practices and methods for DirectBuy's assessment of fees to franchisees generally, and its history with Arcangelo in this case. Because the lawsuit was primarily a dispute over the proper interpretation of the parties' franchise agreement, the court dismissed other tort claims alleged by Arcangelo, but found that the contract claim could not be resolved on a motion to dismiss and could proceed.

Related People

Maissa Frank

Partner

Washington, D.C.

202.295.2209

maissa.frank@lathropgpm.com