

Crumbs' Bankruptcy Buyer Puts End To Brand Licensing Row

By Andrew Scurria

Law360, New York (February 11, 2015, 4:33 PM ET) -- The joint venture that scooped up Crumbs Bake Shop Inc. out of Chapter 11 has dropped an appeal claiming that a group of trademark licensees lost their rights to use the Crumbs name in the transaction, according to court papers Tuesday announcing a settlement.

Under the proposed deal, the company that now runs the Crumbs operation will kick in \$40,000 for creditors of the bankruptcy estate to put to bed a lingering dispute over which entity owned certain royalties under intellectual property contracts with six trademark licensees.

Crumbs filed for bankruptcy in July and sold its assets three months later in a \$6.5 million credit bid to Lemonis Fischer Acquisition Co. LLC, a joint venture between television investment guru Marcus Lemonis and Fischer Enterprises LLC, the owner of the ice cream chain Dippin' Dots.

In October, two months after approving the sale, U.S. Bankruptcy Judge Michael B. Kaplan allowed Crumbs licensees to retain their rights to use the brand name and rejected the buyer's contention that those rights were extinguished in the sale.

Critically, Judge Kaplan found that Crumbs' trademark licensees were entitled to the protections of U.S. Bankruptcy Code Section 365(n), which says that debtors must continue providing access to licensed intellectual property after bankruptcy if their licensees request it.

Under long-standing precedent, trademark licensees are vulnerable to having their deals severed in a licensor's bankruptcy because Section 365(n) does not explicitly list trademarks as a type of protected intellectual property. Section 365(n) names licensees of trade secrets, inventions, patents and works of authorship as being eligible to retain their rights post-bankruptcy.

Judge Kaplan, however, followed recent opinions from the Third and Seventh circuits and found that trademarks could be treated as intellectual property under Section 365(n), notwithstanding their omission from the statute.

"Congress intended the bankruptcy courts to exercise their equitable powers to decide, on a case by case basis, whether trademark licensees may retain the rights listed under Section 365(n)," the judge wrote.

The judge likewise held that the debtor's estate would collect future royalties since the licenses were excluded from the bankruptcy sale. Lemonis Fischer subsequently appealed.

The joint venture's attorney, Mitchell J. Malzberg of Mitnick & Malzberg PC, said in a letter to U.S. District Judge Joel A. Pisano that "once and if the settlement is approved, the settlement provides that the appeal will be dismissed."

Crumbs is asking to seek approval of the deal from Judge Kaplan at a March 9 hearing.

Lemonis Fischer settled another post-sale dispute in October, when it put up \$85,000 for Crumbs' unsecured creditors to resolve allegations that the joint venture lent money it knew Crumbs couldn't repay, to buy Crumbs' assets at a discount.

The creditors alleged that the venture lent Crumbs \$5 million in January in exchange for a lien on assets when Crumbs was already overleveraged, part of what they called a "loan to own" strategy.

Lemonis Fischer's credit bid included around \$5.5 million in prepetition senior secured debt plus roughly \$1 million in debtor-in-possession financing that kept Crumbs alive through the reorganization.

Crumbs, based in New York and best known for its oversize gourmet cupcakes, shut down its 49 stores across 10 states and the District of Columbia on July 7 then quickly filed for Chapter 11, saying that declining sales and an unsustainable retail expansion strategy had left it without sufficient liquidity to continue operating.

The company listed \$20 million in assets against \$19 million in liabilities and converted its bankruptcy to a Chapter 7 liquidation after the sale.

Lemonis Fischer is represented by Mitchell J. Malzberg of Mitnick & Malzberg PC.

Crumbs is represented by David M. Bass and Michael D. Sirota of Cole Schotz PC.

The appeal is In re: Crumbs Bake Shop Inc. et al., case number 3:14-cv-07577, in the U.S. District Court for the District of New Jersey. The bankruptcy is In re: Crumbs Bake Shop Inc. et al., case number 2:14-bk-24287, in the U.S. Bankruptcy Court for the District of New Jersey.

--Editing by Edrienne Su.