

MINTZ & GOLD LLP

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News America Marketing In-Store Services, LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

NEWS AMERICA MARKETING
IN-STORE SERVICES, LLC,

Plaintiff,

v.

YVES ANIDJAR,
MIKE DEVLIN,
RICHARD REBH,
GEORGE REBH and
FLOORGRAPHICS, INC.,

Defendants.

CIVIL ACTION NO. _____

COMPLAINT IN A CIVIL ACTION

INTRODUCTION

Plaintiff, News America Marketing In-Store Services, LLC ("NAM"), by its attorneys, Mintz & Gold LLP, complains of the Defendants as follows:

PARTIES

1. NAM is a limited liability company organized under the laws of Delaware and has its principal place of business at 1211 Avenue of the Americas, New York, N.Y. 10036.
2. Upon information and belief, Defendant Yves Anidjar is a citizen of the State of New Jersey, with a residence in Union County.

3. Upon information and belief, Defendant Mike Devlin is a citizen of the State of Indiana.

4. Upon information and belief, Defendant Richard Rebh is a citizen of the Commonwealth of Virginia.

5. Upon information and belief, Defendant George Rebh is a citizen of the Commonwealth of Virginia.

6. Upon information and belief, Defendant Floorgraphics, Inc. ("Floorgraphics") is a corporation organized under the laws of the Commonwealth of Pennsylvania. Upon information and belief, Floorgraphics no longer is in business, but prior to the commencement of this action, it maintained a principal place of business in the State of New Jersey.

VENUE AND SUBJECT MATTER JURISDICTION

7. Venue is proper in this District because the parties consented to the exclusive jurisdiction of this Court in the Asset Purchase Agreement entered into as of March 10, 2009 between NAM, as Purchaser, and Floorgraphics, as Seller (the "Purchase Agreement") and in those certain Goodwill Purchase Agreements separately entered into between NAM and each of Defendants Yves Anidjar, Mike Devlin, Richard Rebh and George Rebh (collectively, the "Individual Sellers").

8. Venue is also proper in this District pursuant to 28 U.S.C. § 1391(a)(3) and (c). Defendant Anidjar is domiciled in Union County, New Jersey, and Floorgraphics maintained a principal place of business in the State of New Jersey.

9. Trial is proper in the vicinage of Newark pursuant to Local Rule 40.1 inasmuch as this location is more convenient for the litigants, counsel and witnesses.

10. The Court possesses subject matter jurisdiction of this dispute pursuant to

28 U.S.C. § 1332(a) because the parties are of diverse citizenship and the amount in controversy exceeds \$75,000.¹

SUBSTANTIVE ALLEGATIONS

11. This is an action for breach of contract and for fraud in connection with NAM's purchase of the assets of Floorgraphics and certain personal goodwill of the Individual Sellers.

12. Among other things, NAM provides in-store advertising, promotion and sales merchandising services for sellers of consumer product goods (such as Nabisco, Colgate-Palmolive and Kraft) in retail food and drug stores around the country.

13. NAM's services include the installation of pressure-sensitive floor decals, at-shelf coupon machines, at-shelf signage and ads in shopping carts.

14. At all times relevant to this action, Defendant Yves Anidjar was the Chief Financial Officer of Floorgraphics.

15. At all times relevant to this action, Defendant Mike Devlin was a vice president of Floorgraphics.

16. At all times relevant to this action, Defendant Richard Rebh was the Chief Executive Officer, Chairman of the Board of Directors and President of Floorgraphics.

17. At all times relevant to this action, Defendant George Rebh was the Executive Vice President, Secretary and Treasurer of Floorgraphics.

18. At all times relevant to this action, Floorgraphics has been a closely-held corporation of which the four Individual Sellers were the principal corporate officers.

¹ Heritage Media Services, LLC, a limited liability company organized under the laws of Delaware with its principal place of business in New York, is the sole member of NAM. Heritage Media, LLC, which is a limited liability company organized under the laws of Delaware with its principal place of business in New York, is the sole member of Heritage Media Services, LLC. News America Incorporated, which is a corporation organized under the laws of the State of Delaware with its principal place of business at 1211 Avenue of the Americas, New York, N.Y. 10036, is the sole member of Heritage Media, LLC.

19. NAM acquired the floor advertising, shelf advertising, at-shelf coupon, shelf-delivered recipes and rebates, and cart advertising business of Floorgraphics pursuant to the Purchase Agreement, the Goodwill Purchase Agreements and several other ancillary transactional documents, including, among other documents, an Escrow Agreement among and between NAM, Floorgraphics and Citibank, N.A. (the "Escrow Agreement").

20. The most important assets that NAM acquired under the Purchase Agreement are advertising contracts between Floorgraphics and various supermarket chains pursuant to which Floorgraphics had provided in-store floor advertising and other services (the "Seller Contracts").

21. The total consideration that NAM paid at closing in connection with its acquisition of the Floorgraphics business was \$29,500,000.

22. A preliminary allocation of the \$29,500,000 purchase price, which was prepared by Floorgraphics and was subject to post-closing review and adjustment by an independent appraiser, anticipated an apportionment of the proceeds after the closing among and between Floorgraphics and the Individual Sellers.

23. The Individual Sellers were aware of the terms of the transaction, including but not limited to the terms of the Purchase Agreement.

24. The preliminary allocation identified by Floorgraphics for the Seller Contracts and the other assets that were to be conveyed to NAM under the Purchase Agreement was \$13,000,000.

25. Under the four Goodwill Purchase Agreements, the preliminary allocation for the personal goodwill of the Individual Sellers relating to the Seller Contracts was as follows: Yves Anidjar, \$1,200,000; Mike Devlin, \$1,200,000; Richard Rebh, \$4,800,000; and George Rebh, \$4,800,000, for a total preliminary allocation of \$12,000,000.

26. In sections 4.3, 4.4 and 4.9 of the Purchase Agreement, Floorgraphics represented and warranted that the Seller Contracts were valid and transferable.

27. Pursuant to Section 3.2(e) of the Purchase Agreement, defendant Richard Rebh executed and delivered at the closing an Officer's Certificate in which he certified that the representations and warranties of Floorgraphics in the Purchase Agreement were true and correct, when in fact they were not true.

28. Floorgraphics agreed that the representations and warranties regarding the validity and transferability of the Seller Contracts would survive the closing of the transaction by eighteen months.

29. The negotiation of the transaction was conducted on a tight schedule, as the result of which NAM had no more than two days within which to perform due diligence before closing.

30. Since the circumstances and timing of the transaction did not permit NAM to conduct the same sort of diligence that it would ordinarily have performed in an asset purchase transaction, Section 7.4(e) of the Purchase Agreement provides that:

(e) The right of an Indemnified Party to indemnification or to assert or recover any Losses claim shall not be affected by any investigation conducted with respect to, or any Knowledge acquired (or capable of being acquired) at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy of or compliance with, any of the representations, warranties, covenants, or agreements set forth in this Agreement.

31. The inclusion of Section 7.4(e) in the Purchase Agreement placed Floorgraphics on notice that NAM was relying exclusively upon the representations and warranties of the seller, Floorgraphics, including the representations and warranties regarding the validity and transferability of the Seller Contracts.

32. Upon information and belief, at the time that Floorgraphics executed the Purchase Agreement, it knew that some of the Seller Contracts could not be assigned to NAM and, in the

case of certain other Seller Contracts and/or stores associated with such contracts, those contracts or stores simply did not exist, but Floorgraphics did not reveal those facts to NAM.

33. Upon information and belief, the Individual Sellers knew or had reason to know at the same time that some of the Seller Contracts could not be assigned to NAM and, in the case of certain other Seller Contracts and/or stores associated with such contracts, those contracts or stores simply did not exist, but did not reveal those facts to NAM.

34. Upon information and belief, Defendant Richard Rebh's certification as to the truth of the representations and warranties regarding the validity and transferability of the Seller Contracts was false when made and he knew that his certification was false when he made it, or he made the certification recklessly without regard to whether it was true or false.

35. The details of each Individual Seller's participation in the fraud otherwise lie within the Defendants' exclusive control, inasmuch as NAM did not deal with the Individual Sellers directly in the conduct of its acquisition of Floorgraphics' business.

36. Rather, NAM's contact with Floorgraphics during the transaction was conducted principally through the Defendants' transaction counsel, the law firm of Boies, Schiller & Flexner LLP.

37. However, as the sellers of the goodwill and as the officers of Floorgraphics who were most familiar with the company's clients and the terms of the Seller Contracts, the Individual Sellers were uniquely positioned to know whether the Seller Contracts and the corresponding goodwill actually could be conveyed to NAM.

38. Shortly after it closed the transaction with Floorgraphics, NAM discovered that the representations as to the validity and/or transferability of the Seller Contracts were false because some of the Seller Contracts could not be assigned by Floorgraphics to NAM.

39. In addition, subsequent to the closing, NAM discovered that some of the contracts listed in the Schedules to the Purchase Agreement did not actually exist.

40. Inasmuch as Floorgraphics failed to convey some of the Seller Contracts as promised in the Purchase Agreement, the Individual Sellers failed to convey their personal goodwill relating to the corresponding portion of the Floorgraphics business.

41. Pursuant to Section 7.2 of the Purchase Agreement, Floorgraphics undertook to indemnify NAM for Losses resulting or arising from, among other things, the breach of representations, warranties and covenants in the Purchase Agreement.

42. The Purchase Agreement defines “Losses” as “actual losses, Liabilities, obligations, damages (including consequential damages), lost profits, or diminutions in value, fees and expenses, including legal fees and expenses.”

43. To secure the obligation of Floorgraphics to indemnify NAM, pursuant to the Escrow Agreement and Section 2.2 of the Purchase Agreement NAM deposited \$1,750,000 of the purchase price in an escrow account with Citibank, N.A., as Escrow Agent (“Citibank”).

44. The Purchase Agreement requires a party seeking indemnification (in this case, NAM) to “send written notice to [Floorgraphics] describing in reasonable detail the nature of such claim and the amount of Losses or [NAM’s] estimate of the amount of Losses attributable to such claim.”

45. While the Purchase Agreement generally limits the sums recoverable by NAM for a breach of Floorgraphics’ representations and warranties to the sum of \$1,750,000 (the “cap”), it creates an exception for cases of fraud or intentional breach, in which event there is no contractual cap on damages.

46. Specifically, Section 7.4(g) of the Purchase Agreement recites that:

(g) Except with respect to any claim based upon fraud or intentional breach, following the Closing Date, and except for the remedies available pursuant to Section 8.10, the sole and exclusive remedy for any breach or inaccuracy, or alleged breach or inaccuracy, of any representation or warranty or breach of any covenant or other agreement in this Agreement shall be indemnification in accordance with this Article VII.

47. By letter dated October 9, 2009, which is incorporated by reference in this Complaint, NAM sent Floorgraphics the notice of its claim for indemnification as required by the Purchase Agreement, particularly identifying the Seller Contracts regarding which Floorgraphics had breached its representations in Sections 4.3, 4.4 and 4.9 of the Purchase Agreement and specifying the corresponding amount of Losses that NAM estimated to be attributable to those Seller Contracts (the "Indemnification Notice").

48. In the Indemnification Notice, NAM estimated its Losses, as defined in the Purchase Agreement, to be \$11,952,231.

49. Pursuant to the Escrow Agreement, NAM concurrently sent a separate letter to each of Floorgraphics and Citibank, claiming \$11,952,231 and demanding payment from the sums remaining in the escrow account.

50. By letter dated October 26, 2009, Floorgraphics objected to the Indemnification Notice and insisted that it, not NAM, was entitled to all of the sums deposited in the escrow fund.

51. Floorgraphics did not pay the claimed Losses to NAM or otherwise resolve the claims set forth in the Indemnification Notice within 30 days of delivery.

**AS AND FOR A FIRST CAUSE OF ACTION
(For Breach of Contract – Against Floorgraphics)**

52. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

53. The Purchase Agreement is a valid and enforceable contract between NAM and Floorgraphics, adequately supported by consideration.

54. NAM paid the consideration due to Floorgraphics under the Purchase Agreement.

55. Floorgraphics has breached its warranties in the Purchase Agreement in respect of the Seller Contracts because, among other things, Floorgraphics needed, and did not obtain, the consent of third parties to assign some of the Seller Contracts that it promised to convey to NAM and because some of the Seller Contracts and/or stores associated with such contracts did not exist.

56. Accordingly, NAM seeks an award of money damages in the full amount of the Losses recoverable under Article VII of the Purchase Agreement and incurred as the direct result of Floorgraphics' breach of its representations and warranties, including but not limited to the costs and attorney's fees of this action.

57. To the extent that the Losses exceed the cap on indemnification provided for in the Purchase Agreement, NAM further seeks an award of the actual and consequential damages arising from Floorgraphics' fraudulent and/or intentional breach of the Purchase Agreement.

58. NAM's damages are not limited by the contractual cap on indemnification in Article VII of the Purchase Agreement because they arise out of a fraud and/or intentional conduct.

AS AND FOR A SECOND CAUSE OF ACTION
(For Fraud – Against Floorgraphics)

59. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

60. Floorgraphics defrauded NAM by causing NAM to enter into the Purchase Agreement and the Goodwill Purchase Agreements while falsely representing the existence or transferability of the Seller Contracts.

61. Upon information and belief, Floorgraphics knew these representations to be false when made, or made the representations recklessly without regard to whether they were true or false, and knew that NAM was relying upon these representations.

62. NAM entered into the Purchase Agreement and the Goodwill Purchase Agreements in justifiable reliance upon Floorgraphics' representations regarding the validity and assignability of the Seller Contracts.

63. Floorgraphics made the foregoing misrepresentations as an inducement for NAM to acquire the Seller Contracts from Floorgraphics and corresponding goodwill from the Individual Sellers.

64. By reason of Floorgraphics' fraud, NAM has been damaged in an amount to be determined upon the trial of this matter.

AS AND FOR A THIRD CAUSE OF ACTION
(For Fraud – Against Defendant Richard Rebh)

65. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

66. Defendant Richard Rebh defrauded NAM by causing NAM to enter into the Purchase Agreement and the Goodwill Purchase Agreements while falsely representing the

existence or transferability of the Seller Contracts.

67. Defendant Richard Rebh executed and delivered at the closing an Officer's Certificate in which he falsely certified that the representations and warranties of Floorgraphics in the Purchase Agreement regarding the validity and transferability of the Seller Contracts were true and correct.

68. Upon information and belief, Defendant Richard Rebh knew this certification as to the truth of the representations and warranties in the Purchase Agreement to be false when made, or made the certification recklessly without regard to whether they were true or false, and was aware that NAM was relying upon his certification.

69. NAM entered into the Purchase Agreement and the Goodwill Purchase Agreements in justifiable reliance upon Defendant Richard Rebh's certification.

70. Defendant Richard Rebh delivered his certification as to the truth of the representations and warranties in the Purchase Agreement as an inducement for NAM to acquire the Seller Contracts from Floorgraphics and corresponding goodwill from the Individual Sellers.

71. By reason of Defendant Richard Rebh's fraud, NAM has been damaged in an amount to be determined upon the trial of this matter.

**AS AND FOR A FOURTH CAUSE OF ACTION
(For Fraud – Against Defendants Yves Anidjar, Mike Devlin,
Richard Rebh and George Rebh,)**

72. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

73. The Individual Sellers each participated in the sale of the Floorgraphics business, assisted in the preparation of the transactional documents and received payments directly from NAM for goodwill that they asserted was personal to each of them.

74. Upon information and belief, the Individual Sellers knew the representations

contained within the Purchase Agreement relating to the validity and transferability of the Seller Contracts to be false when made, or were reckless as to the truth of those representations, and that NAM was relying on them.

75. NAM entered into the Purchase Agreement and the Goodwill Purchase Agreements in justifiable reliance upon Floorgraphics' representations regarding the validity and assignability of the Seller Contracts.

76. By reason of the Individual Sellers' fraud, NAM has been damaged in an amount to be determined upon the trial of this matter.

AS AND FOR A FIFTH CAUSE OF ACTION
(For Breach of Contract – Against Defendant Yves Anidjar)

77. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

78. NAM has performed all of its obligations under the Goodwill Purchase Agreement between Defendant Yves Anidjar and NAM.

79. Upon information and belief, according to the preliminary allocation prepared by Floorgraphics, Defendant Yves Anidjar received \$1,200,000 of the total purchase price in connection with the Goodwill Purchase Agreement between NAM and Yves Anidjar.

80. Defendant Yves Anidjar has breached his covenant to convey some or all of his personal goodwill because the corresponding Seller Contracts were not conveyed as promised.

81. As the proximate result of Defendant Yves Anidjar's failure to convey personal goodwill, NAM has been damaged in an amount to be determined upon the trial of this matter.

AS AND FOR A SIXTH CAUSE OF ACTION
(For Breach of Contract – Against Defendant Mike Devlin)

82. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

83. NAM has performed all of its obligations under the Goodwill Purchase Agreement between Defendant Mike Devlin and NAM.

84. Upon information and belief, according to the preliminary allocation prepared by Floorgraphics, Defendant Mike Devlin received \$1,200,000 of the total purchase price in connection with the Goodwill Purchase Agreement between NAM and Mike Devlin.

85. Defendant Mike Devlin has breached his covenant to convey some or all of his personal goodwill because the corresponding Seller Contracts were not conveyed as promised.

86. As the proximate result of Defendant Mike Devlin's failure to convey his personal goodwill, NAM has been damaged in an amount to be determined upon the trial of this matter.

AS AND FOR A SEVENTH CAUSE OF ACTION
(For Breach of Contract – Against Defendant Richard Rebh)

87. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

88. NAM has performed all of its obligations under the Goodwill Purchase Agreement between Defendant Richard Rebh and NAM.

89. Upon information and belief, according to the preliminary allocation prepared by Floorgraphics, Defendant Richard Rebh received \$4,800,000 of the total purchase price in connection with the Goodwill Purchase Agreement between NAM and Richard Rebh.

90. Defendant Richard Rebh has breached his covenant to convey some or all of his personal goodwill because the corresponding Seller Contracts were not conveyed as promised.

91. As the proximate result of Defendant Richard Rebh's failure to convey his

personal goodwill, NAM has been damaged in an amount to be determined upon the trial of this matter.

**AS AND FOR A EIGHTH CAUSE OF ACTION
(For Breach of Contract – Against Defendant George Rebh)**

92. Plaintiff repeats and realleges the allegations contained above, as if fully set forth herein.

93. NAM has performed all of its obligations under the Goodwill Purchase Agreement between Defendant George Rebh and NAM.

94. Upon information and belief, according to the preliminary allocation prepared by Floorgraphics, Defendant George Rebh received \$4,800,000 of the total purchase price in connection with the Goodwill Purchase Agreement between NAM and George Rebh.

95. Defendant George Rebh has breached his covenant to convey some or all of his personal goodwill because the corresponding Seller Contracts were not conveyed as promised.

96. As the proximate result of Defendant George Rebh's failure to convey his personal goodwill, NAM has been damaged in an amount to be determined upon the trial of this matter.

WHEREFORE Plaintiff seeks judgment against the Defendants as follows:

1. On the First Cause of Action, an award of damages arising from the Losses that NAM incurred by reason of Floorgraphics' breach of the Purchase Agreement, in an amount to be proven upon the trial of this matter but believed to be at least \$11,952,231.
2. On the Second, Third and Fourth Causes of Action, compensatory damages in an amount to be proven upon the trial of this matter.
3. On the Fifth Cause of Action, an award of damages arising from the Losses

incurred by reason of Defendant Anidjar's breach of his Goodwill Purchase Agreement with NAM, in an amount to be determined upon the trial of this matter.

4. On the Sixth Cause of Action, an award of damages arising from the Losses incurred by reason of Defendant Devlin's breach of his Goodwill Purchase Agreement with NAM, in an amount to be determined upon the trial of this matter.
5. On the Seventh Cause of Action, an award of damages arising from the Losses incurred by reason of Defendant Richard Rebh's breach of his Goodwill Purchase Agreement with NAM, in an amount to be determined upon the trial of this matter.
6. On the Eighth Cause of Action, an award of damages arising from the Losses incurred by reason of Defendant George Rebh's breach of his Goodwill Purchase Agreement with NAM, in an amount to be determined upon the trial of this matter.
7. An order directing that Citibank release to NAM all sums on deposit in the escrow fund.
8. An award of prejudgment interest and the costs and expenses of this action, including attorney's fees, and such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 1, 2009

MINTZ & GOLD LLP

s/ Steven G. Mintz
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CERTIFICATION PURSUANT TO LOCAL RULE 11.2

I, Steven Glen Mintz, hereby certify that the matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

Dated: December 1, 2009

MINTZ & GOLD LLP

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