A FEW OF OUR RECENT FRANCHISE & DISTRIBUTION CASES

Tag Restaurants v. Gauri (U.S. Dist. Ct., N.D. Ill.)

In August 2012, one of our client's licensees got lawyered up, claimed the trademark license agreement he signed was actually an unregistered franchise, and threatened to sue for damages, rescission, attorneys' fees and costs. We beat him to it, suing the licensee for trademark infringement and unfair competition, and then terminating his license agreement. The licensee requested that the court immediately set a settlement conference, where he agreed – less than three months after threatening our client – to make a substantial payment to our client and exit the system.

Access Today v. Kumon North America (U.S. Dist. Ct., D.N.J.)

A terminated franchisee sued Kumon for wrongful termination, asserting claims for breach of contract, breach of an implied covenant of good faith and fair dealing, tortious interference, violation of the New Jersey Consumer Fraud Act, unjust enrichment, and intentional infliction of emotional distress. The complaint sought actual damages of more than $500,000, punitive damages and attorneys' fees and costs. Less than six months later the franchise agreed to a settlement pursuant to which it dismissed all of its claims with prejudice and made a payment to Kumon.

Essential Pizza v. Papa John's Int'l (MN State Ct., U.S. Dist. Ct., W.D. Ky., KY State Ct., AAA)

A franchisee owning 82 Papa John's units sued Papa John's alleging fraud in connection with the franchisee's $12 million acquisition of its franchises. We moved to stay the Minnesota state court action, filed an action against the franchisee in Kentucky state court to compel arbitration, initiated an arbitration proceeding against the franchisee in Louisville, and, on behalf of an affiliate, filed a federal court action to collect on a note guaranteed by the franchisee's principals. The franchisee's parent promptly sought protection in bankruptcy where a settlement was reached under which the franchisee's claims were dismissed with prejudice, and Papa John's reacquired the franchisee's units on favorable terms.

The Quiznos Class Actions (U.S. Dist. Cts., D.N.J. D. Colo., N.D. Ill., W.D. Wis., E.D. Mich., C.D. Cal.)

From 2006 to 2010 when a national class action settlement was reached, we served as lead counsel for Quiznos and related parties in multiple class actions brought across the country challenging Quiznos' franchise sales practices and food, supplies and equipment distribution businesses. After we defeated plaintiffs' first attempt at class certification (in the *Bonanno* case in Denver) by persuading the Denver federal court that Quiznos' franchise agreement's class action bar provision should be enforced – the first published decision of its kind outside the context of arbitration, the remaining class actions imploded, culminating in a 2010 national class action settlement (approved in the *Siemer* case in Chicago).

FEC Holdings v. Incredible Pizza Franchise Group (U.S. Dist. Cts., S.D. Tex., W.D. Mo.)

A multi-unit franchise sued Incredible Pizza Franchise Group in federal court in Texas for $46 million, claiming fraud in the inducement, violations of the Texas Business Opportunity Act, the Texas Deceptive Practices Act, the Oklahoma Deceptive Trade Practices Act, the Oklahoma Consumer Protection Act, breach of contract and of an implied covenant of good faith and fair dealing, negligent misrepresentation, and, for good measure, violation of the Robinson-Patman Act. We moved to transfer the case to Missouri and then initiated a separate action in Missouri federal court. After the Texas court granted our motion to transfer the franchisee's action to Missouri, and the franchisee filed bankruptcy, the litigation settled with the franchisee dismissing its claims and making a substantial payment to Incredible Pizza Franchise Group.

CPR – Cell Phone Repair v. Nayrami, 2012 U.S. Dist. LEXIS 131438 (N.D. Ga. Sept. 13, 2012).

A franchisee sued our client in California state court alleging violations of the California franchise law, fraud and other claims. We moved to stay the California case, initiated an arbitration proceeding against the franchisee in Atlanta, and initiated a federal court action in Atlanta where we moved to compel the franchisee to arbitrate. The California state court granted our motion to stay and the Atlanta federal court granted our motion to compel arbitration, requiring that the franchisee pursue its claims, if at all, in arbitration in Atlanta.

Allegra Network (Insty-Prints) v. Cormack, 2012 U.S. Dist. LEXIS 117014 (E.D. Mich. Aug. 20, 2012).

After this terminated Insty-Prints franchisee continued to operate at the same location as his former Insty-Prints franchise, we filed an action in federal court seeking injunctive relief to enforce his covenant against competition and other post-termination obligations, and commenced an arbitration proceeding to pursue Allegra's monetary and damages claims. The federal court granted our preliminary injunction motion in all respects. In the subsequent arbitration, the arbitrator ruled that Allegra's termination of the franchise agreement was proper based on the franchisee's breaches, and entered an award in Allegra's favor for substantial damages, including lost future royalties, attorneys' fees and arbitration costs.

Hampton v. Window World, 2012 U.S. Dist. LEXIS 71615 (N.D. Ill. May 23, 2012).

A Window World franchisee filed an action alleging violations of the Illinois Franchise Disclosure Act, breach of contract, fraud, civil conspiracy and breach of an implied covenant of good faith and fair dealing, and claiming hundreds of thousands of dollars in damages. We moved to dismiss the complaint, which the court granted in part, and filed a separate action against the franchisee for breach. Within four months the franchisee had voluntarily dismissed what remained of its complaint, and a default had been entered against him on the claims asserted in Window World's complaint.

Allegra Network (American Speedy) v. Bagnall, 2012 U.S. Dist. LEXIS 72995 (E.D. Mich. May 25, 2012).

We sued a terminated franchisee to recover damages and enforce her post-termination obligations. The franchisee filed bankruptcy staying the action. We successfully moved to lift the stay to pursue our injunctive claims. The franchisee then entered into a stipulated injunction order requiring, among other things that she transfer to Allegra the telephone number associated with her former franchise. When she failed to do so, we reopened the case and asked the court to hold her and her husband in contempt. After an evidentiary hearing, the court granted our motion, ordered that the franchisee secure the telephone number and assign it to Allegra, and awarded Allegra compensatory sanctions and attorneys' fees.

Tilted Kilt v. Helper, 2010 U.S. Dist. LEXIS 130709 and 2011 U.S. Dist. LEXIS 45923 (D. Ariz. Dec. 9, 2010 and Apr. 22, 2011).

Anticipating that a terminated California franchisee might file suit, we beat him to it and filed first in state court in Arizona. As expected, the franchisee removed the case to Arizona federal court and then moved to transfer it to California based on the California Franchise Relations Act's venue provision. But we had done our homework. Relying on a recent decision rendered in the Arizona federal court, we persuaded the court that – as a matter of federal law – the proper venue for a removed action was in the district to which the case was removed, and that the

federal venue statute trumped California state franchise law. The court denied the franchisee's transfer motion. Faced with an Arizona venue and a decimated case (the court also granted our motion to dismiss the franchisee's California Franchise Investment Law and California Unfair Competition Act claims), the former franchisee filed bankruptcy and the case was subsequently dismissed.

Palmetto Commercial v. Sears Home & Business Franchises, (AAA 2012).

A terminated franchisee sued Sears claiming wrongful termination and seeking nearly $800,000 in damages as well as attorneys' fees. After a hearing the arbitrator awarded the franchisee only $12,000, and even denied its request for attorneys' fees and costs.

SELECTED FRANCHISE & DISTRIBUTION CASES IN SUPREME AND APPELLATE COURTS

Jensen v. Quik International, 2004 Ill. LEXIS 1675 (Illinois Supreme Court)

The franchisee in this case sought to avoid his arbitration agreement by claiming that the franchise agreement containing the arbitration clause was void since the franchisor allegedly failed to comply with the Illinois Franchise Disclosure Act's registration and disclosure requirements. Under prevailing Illinois law at the time, compliance with those registration and disclosure requirements was deemed a condition precedent to the franchise agreement's – and therefore the arbitration agreement's – enforceability. We persuaded the Illinois Supreme Court to reject what was known as the *Barter Exchange* rule, and to harmonize Illinois law with federal law by requiring that claims challenging the validity or enforceability of an agreement containing an arbitration clause be arbitrated. In the wake of this ruling, a party to an agreement containing an arbitration clause may no longer circumvent his agreement to arbitrate simply by challenging the validity or enforceability of the agreement containing the arbitration clause. Under *Jensen*, that claim must be arbitrated.

Mollinger-Wilson v. Quiznos, 122 Fed. Appx. 917 (Tenth Circuit Court of Appeals)

In the district court, a former area developer established that Quiznos had breached a termination agreement but was awarded nominal damages of only $969. The former area developer appealed the award of nominal damages. The Court of Appeals for the Tenth Circuit agreed with the former area developer that the district court's award of nominal damages in the amount of $969 was error. "[N]ominal damages," the Court of Appeals stated, "are $1 – not more, not less," and it remanded the case for entry of judgment in the amount of $1.

KKW Enterprises v. Gloria Jean's Gourmet Coffees, 184 F.3d 42 (First Circuit Court of Appeals)

A Gloria Jean's franchisee sued Gloria Jean's in Rhode Island state court, asserting numerous statutory and common law claims, including fraud. We removed the case to federal court where we moved to stay the litigation pending arbitration. The district court granted the motion as to the franchisee's common law claims, but not as to its statutory claims. It also ruled that any arbitration must take place in Rhode Island. We promptly appealed and the First Circuit Court of Appeals reversed, ordering that the litigation be stayed pending arbitration in accordance with the arbitration agreement's terms, including its Chicago venue provision.

CHENG COHEN

A FEW OF OUR RECENT FRANCHISE & DISTRIBUTION CASES

Valley Products v. Landmark, 128 F.3d 398 (Sixth Circuit Court of Appeals)

We represented the franchisor of numerous hotels brands in antitrust litigation brought by several excluded suppliers of logoed guest amenities. We filed a motion to dismiss arguing that the suppliers lacked antitrust standing. After an extensive hearing on the suppliers' preliminary injunction motion, the court invited argument on our motion to dismiss, which it then granted. On appeal, the Sixth Circuit Court of Appeals affirmed the district court's grant of our motion to dismiss, agreeing with us that the suppliers lacked antitrust standing to assert the tying and monopolization claims pleaded in their complaint.

Just Pants v. Wagner, aka "The Dead Arbitrator Case", 617 N.E.2d 246 (Illinois Appellate Court)

After the arbitration hearing on a franchisee's claims against franchisor Just Pants, the arbitrator prepared his written ruling in Just Pant's favor and transmitted it by mail to the American Arbitration Association tribunal administrator. Using a paper clip, the arbitrator attached to the written ruling a handwritten note asking that the administrator prepare a final arbitration award based on the written ruling for the arbitrator's signature. After placing the note and ruling in the mail, but before signing the final arbitration award prepared by the administrator, the arbitrator dropped dead. When the AAA refused to issue an award, Just Pants sued for a declaratory judgment that it was entitled to a final award and for confirmation of the award. The Illinois Appellate Court ruled that handwritten note attached to the written ruling constituted the arbitrator's signature authenticating his ruling, and that Just Pants was therefore entitled to judgment in its favor on the award.

SELECTED FRANCHISE & DISTRIBUTION CASES IN LOWER COURTS AND ARBITRATION

John's Incredible Pizza Company v. Incredible Pizza Company (U.S. Dist. Ct., C.D. Cal.)

We parachuted in to try this trademark infringement case on behalf of the defendant franchisor. We tried Phase I to a jury, which found knowing infringement but awarded plaintiff none of the corrective advertising it sought and only nominal infringement damages. We tried Phase II to the court, which denied in their entirety plaintiff's remaining claims for injunctive relief and attorneys' fees.

Braman v. Quiznos, 2008 U.S. Dist. LEXIS 97929 (U.S. Dist. Ct., N.D. Ohio)

Several franchisees sued Quiznos in federal court in Ohio, alleging fraud in the inducement of their franchise agreements. We moved to dismiss the case based on the Denver forum selection clause contained in those franchise agreements. The court granted our motion and transferred the case to federal court in Denver where Quiznos was headquartered.

Byrider Franchising v. Edwards, 2009 U.S. Dist. LEXIS 99197 (U.S. Dist. Ct., M.D. Fla.)

In this action, the federal court confirmed an arbitration award in favor of Byrider Franchising and against a former franchisee. The confirmed award, which the federal court reduced to a judgment, included $57,000 in compensatory damages, pre- and post-judgment interest, attorneys' fees, and nearly $300,000 in lost future royalties.

CHENG COHEN

A FEW OF OUR RECENT FRANCHISE & DISTRIBUTION CASES

Brown Dog v. Quiznos, 2005 U.S. Dist. LEXIS 36311 (U.S. Dist. Ct., W.D. Wis.)

A former area developer filed suit after Quiznos terminated its agreement for failure to meet a development quota. We won partial summary judgment on most of the area developer's claims, and went to trial on the remaining claim that the termination violated the Wisconsin Fair Dealership Law. After trial on the merits, the court entered judgment in Quiznos' favor.

Quizno's Master v. Kadriu, 2005 U.S. Dist. LEXIS 7626 (U.S. Dist. Ct., N.D. Ill.)

We brought an action to enjoin a terminated franchisee's use of Quiznos' names and marks and to enforce her post-termination obligations under her franchise agreement. The franchisee counterclaimed, seeking rescission and punitive damages for Quiznos' alleged fraud. The court granted our motion for preliminary injunction enjoining the franchisee's use of Quiznos' names and marks, and granted our motion to stay the franchisee's counterclaims pending arbitration.

CKH v. Quiznos, 2005 U.S. Dist. LEXIS 42347 (U.S. Dist. Ct., D. Colo.)

Multiple Phoenix area franchisees sued Quiznos alleging breaches of contract, the implied covenant of good faith and fair dealing, and fiduciary duties, fraud, tortious interference with present and prospective business advantage, estoppel, unjust enrichment, and violation of the Colorado Consumer Protection Act. The Court granted our motion to dismiss as to all but one claim (for misuse of an advertising fund), and granted our separate motion for summary judgment based on a release executed by certain of the plaintiffs.

Domino's Pizza v. Scheunert, 1998 U.S. Dist. LEXIS 10161 (U.S. Dist. Ct., W.D.N.C.)

We filed an action in federal court to enforce a former franchisee's post-termination obligations and to enjoin its continued use of Domino's Pizza's names and marks. The franchisee filed a separate suit in North Carolina state court and secured an *ex parte* temporary restraining order enjoining Domino's Pizza's termination of its franchises. We removed the state court action, had the TRO vacated, secured a preliminary injunction against the franchisee's use of Domino's Pizza's names and marks and to enjoin its compliance with its post-termination obligations, and then obtained summary judgment in Domino's Pizza's favor and against the franchisee on all claims and counterclaims.

Hatipoglu v. Domino's Pizza (U.S. Dist. Ct., D.S.C.)

This lawsuit arose out of a test marketing program involving the sale of personal size Domino's Pizza pizzas at selected Burger King stores. Certain participating Burger King stores were adjacent to franchised Domino's Pizza units. Three Domino's Pizza franchisees sued Domino's Pizza claiming that the marketing program encroached on their units. We won summary judgment in Domino's Pizza's favor. The court ruled that Domino's Pizza was entitled to sell pizzas out of second story of the franchisees' own locations if it so chose. (I left my appendix in Columbia, South Carolina during this case).

Mitelhaus v. Quiznos (AAA)

After Quiznos terminated for cause its area developer for the Los Angeles area, the area developer initiated an arbitration proceeding claiming wrongful termination and millions of dollars in damages and attorneys' fees. After extensive hearing, we secured an award in Quiznos' favor on the termination claims.