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NO. 09-11990

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**BRWA AZIZ AND RAWAZ
KHOSHNAW
Plaintiff,**

v.

**WINGS N' THINGS OF AMERICA,
INC.
Defendant.**

§ IN THE DISTRICT COURT
§
§ **M-298th**
§ **JUDICIAL DISTRICT**
§
§
§ OF DALLAS COUNTY, TEXAS

**PLAINTIFFS' ORIGINAL PETITION AND REQUEST FOR TEMPORARY
RESTRAINING ORDER AND TEMPORARY INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES BRWA AZIZ AND RAWAZ KHOSHNAW, hereinafter called Plaintiffs, complaining of and about WINGS N' THINGS OF AMERICA, INC., hereinafter called Defendants, and for cause of action shows unto the Court the following:

DISCOVERY CONTROL PLAN LEVEL

- 1. Plaintiffs intends that discovery be conducted under Discovery Level 2.

PARTIES AND SERVICE

- 2. Plaintiff, BRWA AZIZ, is an Individual whose address is Erbil, Kurdistan, Iraq and Plaintiff Rawaz Khoshnaw is an individual whose address is 303 East 83rd Street, Apt. 28F, New York, New York 10028.

- 3. Wings N' Things of America, Inc. is a domestic corporation whose usual place of business is 10553 Olympic Drive, Suite 101A, Dallas, Texas 75220. Service may be had on its Registered Agent Christopher Spillman at 10505 Shady Trail, Suite 900, Dallas, Texas 75220.

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JURISDICTION AND VENUE

4. The subject matter in controversy is within the jurisdictional limits of this court.
5. This court has jurisdiction over the parties because Defendant is a Texas corporation.
7. Venue in Dallas County is proper in this cause.

FACTS

8. Plaintiff AZIZ is a businessman residing in Erbil, Kurdistan, Iraq. He is a Dentist and a lecturer at the College of Dentistry, and also owns a company that deals in opening various franchises in Erbil, Kurdistan, Iraq, including being the Master Franchisee in Iraq for a Canadian company, Juice Zone. Plaintiff Khoshnaw is assigned to the Iraqi Mission in New York.

9. On or about July 2008 the Plaintiff Aziz contacted Wings N' Things of America, Inc. (hereinafter "Wings") about purchasing a franchise from them in order to establish a restaurant in Erbil, Kurdistan, Iraq. Defendant welcomed Dr. Aziz with open arms and after many emails and telephone conversations between the parties, Wings agreed to sell Plaintiffs a franchise for its customary fees. (See a copy of the parties' franchise agreement attached hereto and incorporated herein for all purposes and marked as **Exhibit A**)

10. On or about 31 July 2008, Plaintiff Aziz sent by SWIFT wire transfer to Wings the sum of \$35,000.00 for the complete payment for the Wings franchise.

11. As part of the franchise agreement, Plaintiffs were required to place a Purchase Order with Wings for the procurement of all supplies necessary in order to open Plaintiffs' restaurant.

12. The initial Purchase Order, Invoice No. Iraq-0001-A, in the sum of \$115,170.10, was placed by Plaintiff Aziz for the benefit of Wings and is dated August 22, 2008 and revised on August 27, 2008. (See a copy of Plaintiff's Purchase Order attached hereto and incorporated herein for all purposes and marked as **Exhibit B**)

13. On or about 12 September 2008, Plaintiff Aziz paid by SWIFT wire transfer to Wings the sum of \$86,400.00 representing the 75.00% payment of the Purchase Order placed by Plaintiff Aziz with Wings, as per the terms of the Purchase Order.

14. On or about 18 December 2008, Plaintiff Aziz paid by SWIFT wire transfer to Wings the sum of \$40,220.00 representing the balance due on the Purchase Order plus other ancillary expenses that had accumulated on behalf of Wings during the previous four months.

15. Upon payment as detailed in paragraph 7 above, Plaintiffs owed Wings no further monies for either the purchase of the franchise or for the Purchase Order.

16. Upon complete satisfaction of the debt paid by Plaintiffs for the merchandise included in the Purchase Order, Wings was obligated to arrange shipping of Plaintiffs' merchandise, and to ship same, to Plaintiffs.

17. While waiting for the merchandise to arrive, Plaintiffs had, by the terms of the franchise agreement and through collaboration with and approval by Wings, leased space in Erbil, Kurdistan, Iraq costing them the sum of \$7,000.00 per month in which to house their restaurant and did spend approximately \$180,000.00 in preparation of said leased space for the opening of his Wings franchise.

18. From December 2008 forward, notwithstanding numerous requests and demands by Plaintiffs to ship his merchandise as required under the Purchase Order and franchise agreement, and notwithstanding numerous written and verbal confirmations that Plaintiffs' property was in Wings' warehouse and was ready to be shipped to Plaintiffs, and notwithstanding the numerous promises by Wings to ship Plaintiffs' merchandise to them, Plaintiffs have neither received the merchandise ordered and paid for nor have they received a refund of their monies paid to Wings in good faith, and they have continued to have the obligation to maintain their lease in Erbil, Kurdistan, Iraq.

PLAINTIFFS' CLAIM FOR UNJUST ENRICHMENT

19. Wings has failed to provide to Plaintiffs the merchandise duly purchased by Plaintiffs from Wings per the terms of their franchise agreement. Wings' denial of the merchandise duly purchased by Plaintiffs constitutes an inequitable and unjust enrichment of Wings at Plaintiffs' expense.

20. Based upon the face of the parties' franchise agreement and the Purchase Order placed by Plaintiffs from Wings, total damages may exceed \$150,000.00 (One Hundred Fifty Thousand Dollars). Plaintiffs are entitled to recover these damages from Wings.

PLAINTIFFS' CLAIM FOR MONEY HAD AND RECEIVED

21. In the alternative, Wings is liable to Plaintiffs under a cause of action for money had and received. Wings, through the use of fraud, obtained possession of Plaintiffs' funds. Those funds rightfully belong to Plaintiffs, and Wings has been unjustly enriched by their appropriation of them and Plaintiffs have been unjustly deprived of their livelihood.

22. The principles of law and equity applied to this matter define and imply a contract binding Wings to pay to Plaintiffs all sums necessary to rectify the unjust enrichment. Wings is justly indebted to Plaintiffs in that amount, and he now sues for it.

PLAINTIFFS' CLAIM FOR COMMON-LAW FRAUD

23. Alternatively, Wings is liable to Plaintiffs under the cause of action of Common-Law Fraud. Plaintiffs, in good faith, entered into an agreement with Wings and subsequently purchased and paid for a franchise and the necessary accessories in order to open a restaurant in Erbil, Kurdistan, Iraq from Wings, while Wings, who represented to Plaintiffs that he would perform under the terms of the franchise agreement and Purchase Order, had no intention, in fact, of providing the goods and services that Plaintiffs had bargained and paid for.

24. Wings' representation to Plaintiffs was material, as Plaintiffs relied upon said representation when determining whether to purchase a franchise from Wings and whether to lease and prepare a space in which to open the franchise being purchased.

25. Wing's representation to Plaintiffs was false, as Wings had no intention of performing under its contracts and commitments.

26. Wings made the false representation to Plaintiffs that he would receive the goods and services that Plaintiffs had bargained for in the parties' franchise agreement and Purchase Order knowing it was false.

27. Defendant intended for Plaintiffs to rely on the false representation.

28. Plaintiffs relied on Wings' false representation when determining whether to purchase a franchise from Wings and whether to spend an additional \$180,000.00 preparing a storefront to be used for housing the restaurant pursuant to the franchise agreement.

29. Wings' false representation directly and proximately caused injury to Plaintiffs, which resulted in the following damages:

- a. The money paid to Wings for the purchase of the franchise in the sum of \$35,000.00;
- b. The money paid to Wings due under the Purchase Order in the sum of \$115,170.10;
- c. The money paid to Wings for ancillary expenses in the sum of \$14,449.90;
- d. The money spent by Plaintiffs for leasing and preparation of the storefront necessary for housing Plaintiffs' proposed restaurant to be opened in Erbil, Kurdistan, Iraq pursuant to his purchasing of the franchise from Wings; and,
- e. Exemplary damages, pursuant to §41.003(a)(1) of the Texas Civil Practice & Remedies Code.

30. Plaintiffs seek unliquidated damages within the jurisdictional limits of this Court.

PLAINTIFFS' CLAIM FOR BREACH OF FIDUCIARY DUTY

31. Plaintiffs have a fiduciary relationship with defendant. Wings breached defendant's fiduciary duty to Plaintiffs by the fact that it accepted payment of over \$150,000.00 of Plaintiffs' money and did not safeguard said money and did not perform under the terms of the parties' agreements.

32. Wings' breach of fiduciary duty injured Plaintiffs by denying him the use of his money paid to Wings, by causing him to lose the opportunity to open the business that he had purchased and therefore lost not only his investment but also his profits from the projected business, and by said injuries, Plaintiffs suffered the following damages:

- a. The loss of the money paid to Wings for the purchase of the franchise in the sum of \$35,000.00;
- b. The loss of the money paid to Wings due under the Purchase Order in the sum of \$115,170.10;
- c. The loss of the money paid to Wings for ancillary expenses in the sum of \$14,449.90; and,
- d. The loss of the money spent by Plaintiffs for leasing and preparation of the storefront necessary for housing Plaintiffs' proposed restaurant to be opened in Erbil, Kurdistan, Iraq pursuant to his purchasing of the franchise from Wings.

33. Wings' breach of fiduciary duty benefited Wings by allowing it to convert Plaintiffs' money paid to Wings as detailed above, and by allowing Wings to sell another franchise in the same location.

34. Wings' breach of fiduciary duty injured Plaintiffs by allowing Wings to convert Plaintiffs' funds and benefited Wings by allowing it to become unjustly enriched which resulted in the following damages:

- a. The money paid to Wings for the purchase of the franchise in the sum of \$35,000.00;
- b. The money paid to Wings due under the Purchase Order in the sum of \$115,170.10;
- c. The money paid to Wings for ancillary expenses in the sum of \$14,449.90;
- d. The money spent by Plaintiffs for leasing and preparation of the storefront necessary for housing Plaintiffs' proposed restaurant to be opened in Erbil, Kurdistan, Iraq pursuant to his purchasing of the franchise from Wings; and,

e. Exemplary damages, pursuant to §41.003(a)(1) of the Texas Civil Practice & Remedies Code.

PLAINTIFFS' CLAIM FOR CONVERSION

35. Plaintiffs owned, possessed, or had the right of immediate possession of the specific and identifiable funds associated with monies sent to and paid to Wings for the purchase of a franchise agreement and ancillary material being procured from Wings for the establishment of a restaurant in Erbil, Kurdistan, Iraq. Wings converted specific and identifiable funds associated with Plaintiffs' purchase of a franchise agreement and ancillary material being procured from Wings for the establishment of a restaurant in Erbil, Kurdistan, Iraq for its own use and this conversion was improper under Texas law;

36. As a direct and proximate result of this conversion, Plaintiffs have sustained actual damages within the jurisdictional limitations of this Court.

37. Wings' actions in converting specific and identifiable funds associated with Plaintiffs' purchase of a franchise agreement and ancillary material being procured from Wings for the establishment of a restaurant in Erbil, Kurdistan, Iraq were fraudulent and malicious and wrongfully exercised dominion or control over these funds ; and

38. Plaintiffs suffered injury and is seeking exemplary damages under the Texas Civil Practices and Remedies Code.

PLAINTIFFS' CLAIM UNDER THE TEXAS THEFT LIABILITY ACT

39. Plaintiffs bring this action under the Texas Theft Liability Act for an unlawful appropriation of property under Texas Penal Code section 31.03.

40. Plaintiffs are entitled to possession of all monies paid to Wings, more specifically in the

sum of \$161,620.00.

41. Having violated Section 31.03 of the Texas Penal Code, Wings is subject to civil liability under the Texas Theft Liability Act, codified in Chapter 134 of the Texas Civil Practice and Remedies Code.

42. Wings' improper appropriation of the property was the actual and proximate cause of damages to Plaintiffs in an amount within the jurisdictional limitations of this court. Additionally, Plaintiffs are entitled to recover the sum of \$1,000.00 as additional damages from defendants under the Texas Theft Liability Act.

43. Because the actions of Wings in appropriating the property were fraudulent and malicious, Plaintiffs seeks exemplary damages, and is entitled to recover them under the Texas Civil Practice and Remedies Code.

44. Pursuant to Section 134.005(b) of the Texas Civil Practice and Remedies Code, Plaintiffs are entitled to recover from Wings reasonable and necessary attorney's fees and costs of court.

PLAINTIFFS' CLAIM UNDER BREACH OF CONTRACT

45. On July 28, 2008, Plaintiffs and Defendant executed a valid and enforceable written contract. Plaintiffs attach a copy of the contract as **Exhibit "A"** and incorporates it by reference. The contract provides that Plaintiffs would 1) pay a sum certain for the franchise, 2) pay for equipment to run the franchise and 3) pay for the merchandise to set up and run a franchise and that defendant would 1) sell a franchise to Plaintiffs , 2) would sell and ship the equipment and merchandise to Plaintiffs to set up and run a franchise.

46. Plaintiffs fully performed Plaintiffs' contractual obligations.

47. Defendant breached the contract by continuously failing and refusing to ship the equipment and merchandise purchased on or about August 22, 2008 and revised on August 27, 2008 in the purchase order attached herein as **Exhibit "B"**.

48. Defendant's breach caused injury to Plaintiffs, which resulted in the following damages: Plaintiffs leased space in Erbil, Kurdistan, Iraq costing them the sum of \$7,000.00 per month in which to house their restaurant and did spend approximately \$180,000.00 in preparation of said leased space for the opening of his Wings franchise. Plaintiffs have neither received the merchandise ordered and paid for nor have they received a refund of their monies paid to Wings in good faith, and they have continued to have the obligation to maintain their lease in Erbil, Kurdistan, Iraq.

49. Plaintiffs seek unliquidated damages within the jurisdictional limits of this court.

50. All conditions precedent to Plaintiffs claim for relief have been performed or have occurred.

FACTS AND CONDITIONS FOR REQUEST FOR TEMPORARY RESTRAINING

ORDER

51. The defendant has threatened irreparable harm to the Plaintiffs' business interests and rights by wrongfully withholding and continuously and systematically failing to ship the items purchased on September 12, 2008 and December 18, 2008 respectively. All the while making written promises that the equipment and items would

ship on a date certain or that the equipment and items had in fact shipped knowing full well that was not true.

52. Further, Wings has stated in writing that the items have been specifically configured electrically for use in Erbil, Kurdistan, Iraq. Plaintiffs are at a distinct disadvantage as these items are essential for a Wings franchise to operate and Plaintiffs would be in breach of his franchise agreement if he tried to go into the open market and purchase the items he has already paid Wings to deliver to him.

53. Wings' conduct is wrongful because Wings is withholding Plaintiffs' Equipment and items found in the purchase order revised and dated August 27, 2008. One of the last communications received from Wings in writing by Plaintiffs were that the items had shipped on May 8, 2009 yet Wings was unable or unwilling to provide to Plaintiffs with a bill of lading, manifest or any shipping information of substance at all. This e-mail was signed by Joe Spillman, the president of Wings.

54. Further, the shipping company that Wings had allegedly contracted with in order to ship Plaintiffs' merchandise to him told Plaintiffs that notwithstanding the fact that Wings had told Plaintiffs that the shipping company had picked up Plaintiffs' container has steadfastly denied that it ever picked up or received any container from Wings for shipment to Plaintiffs in Erbil, Kurdistan, Iraq.

55. Then, on June 10, 2009, the Vice President of International Operations for Wings sent an e-mail to Freight Mahetrans in Turkey stating that the container had not

been shipped which is a direct contradiction of the e-mail sent by Wings President, Joe Spillman, dated May 13, 2009 that the container had shipped on May 8, 2009.

INJURIES TO PLAINTIFFS

56. Plaintiff has and will continue to be damaged and injured by Wings' conduct by Wings withholding from Plaintiffs the merchandise bought and paid for.

57. Wings' actions have caused Plaintiffs damages in an amount within the jurisdictional limits of the court, by causing him to incur lease payments on a completely re-structured storefront created and paid for by Plaintiffs in keeping with the franchise agreement signed by parties which is now essentially worthless to Plaintiffs as Wings has not shipped items necessary for Plaintiffs to open his restaurant in keeping with the Wings franchise after Plaintiffs have paid Wings in full.

58. Plaintiffs are being harmed financially each and every day he does not have the necessary items to open and operate his Wings franchise as his daily lease fees are approximately \$250.00 US Dollars, Plaintiffs have been deprived of the use of his \$180,000.00 paid to re-structure his storefront, Plaintiffs have been deprived of his \$84,000.00 paid for the lease of his storefront, and Plaintiff have been deprived of the use of his \$150,000.00 paid to Wings for his franchise and the merchandise necessary to open and operate same after Wings failed to ship the equipment and items Plaintiffs had purchased to Plaintiffs, and until Plaintiffs have their merchandise from Wings, he has no means of operating his business or begin to recoup these losses.

REQUEST FOR TEMPORARY RESTRAINING ORDER

59. Unless Wings, Defendant herein, is immediately enjoined and restrained from 1) wrongfully withholding his equipment and items and 2) selling these items to another franchisee in

Iraq or another country with a similar electrical configuration Defendant will continue its pattern and practice of systematically alienating Plaintiffs from his property and/or funds and will sell said merchandise specially prepared for use in Iraq.

ELEMENTS FOR INJUNCTIVE RELIEF

60. In light of the above-described facts, Plaintiffs seeks recovery from Wings. The nature of the lawsuit is breach of contract, unjust enrichment; money had and received; common-law fraud; breach of fiduciary duty; conversion; the Texas Theft Liability Act; and the prospective deprivation of Plaintiffs by Defendant of Plaintiffs' ownership and property rights in his franchise and goods purchased and paid for.

61. Plaintiffs are likely to succeed on the merits of this lawsuit because Plaintiffs have paid Defendant over \$150,000.00 and has not received either the benefit of the purchase of his franchise, the merchandise purchased, or the return of Plaintiffs' money from Wings, therefore depriving Plaintiffs of their property rights.

62. Unless this Honorable Court immediately restrains the Defendant, Plaintiffs will suffer immediate and irreparable injury, for which there is no adequate remedy at law to give Plaintiffs complete, final and equal relief. More specifically, Plaintiffs will show the court the following:

A. The harm to Plaintiffs are imminent because the merchandise purchased from Wings is still in Wings' possession and could be sold to another individual at any time;

B. This imminent harm will cause Plaintiffs irreparable injury in that he will lose his investment in this specially prepared equipment and merchandise if Defendant is not

restrained;

C. There is no adequate remedy at law which will give Plaintiffs complete, final and equal relief because money withdrawn from a financial institution is a fungible good and not subject to an identifiable marking.

BOND

63. Plaintiffs request that a reasonable temporary restraining order bond be set by the Court.

REMEDY

64. Plaintiffs have met Plaintiffs' burden by establishing each element which must be present before injunctive relief can be granted by this court, therefore Plaintiffs are entitled to the requested temporary restraining order.

65. The only adequate, effective, and complete relief to Plaintiffs is to restrain Wings from further engaging in certain proscribed activities, as set forth below. Pursuant to Tex. R. Civ. P. § 680 et seq. and Tex. Civ. Prac. & Rem. Code § 65.001 et seq., and in order to preserve the status quo during the pendency of this action, the Plaintiffs seek a temporary restraining order, and upon hearing, a temporary and permanent injunction, ordering and immediately restraining the defendant, including the defendant's agents, servants, employees, independent contractors, attorneys, representatives, and those persons or entities in active concert or participation with them (collectively, the "Restrained Parties") as follows:

(1) Enjoining Wings from wrongfully withholding the items bought

and paid for in the revised purchase order dated August 27, 2008 which allegedly are sitting in a warehouse ready to be shipped to Plaintiffs according to Mr. Jim Clute, the Vice President of International Operations.

(2) Enjoining Wings from selling the equipment and items bought and paid for in the revised purchase order dated August 27, 2008 by Plaintiffs.

(3) Enjoining Wings from the destruction or deletion of any documents, evidence or record, electronic or otherwise, that relates to any of the matters implicated by this lawsuit or pertaining to the plaintiff, including but not limited to all hard drives, backups, archives, and other possible sources of stored metadata or information.

66. It is essential that the court immediately and temporarily restrain Wings, Defendant herein, from selling the property and merchandise included in the Purchase Order attached hereto as **Exhibit B**.

67. It is essential that the court act immediately, prior to giving notice to Defendant and a hearing on the matter because Defendants have deprived Plaintiffs of their ownership interest in the property for which he has already rendered payment.

68. In order to preserve the status quo during the pendency of this action, Plaintiffs request that Wings be temporarily enjoined from selling the property and merchandise included in the Purchase Order attached hereto as **Exhibit B** to anyone other than Plaintiffs.

69. On final trial on the merits, Plaintiffs request that the Court permanently enjoin Wings, Defendant herein, from withholding the items bought and paid for by Plaintiffs from

Wings and/or selling the property and merchandise included in the Purchase Order attached hereto as **Exhibit B** to anyone other than Plaintiffs.

DAMAGES FOR PLAINTIFFS BRWA AZIZ AND RAWAZ KHOSHNAW AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Brwa Aziz and Rawaz Khoshnaw, respectfully pray that the Defendant, Wings, be cited to appear and answer herein, and that upon a final hearing of the cause, judgment be entered for the Plaintiffs against Defendant for damages in an amount within the jurisdictional limits of the Court; actual damages as alleged herein; statutory additional damages as alleged herein; exemplary damages as alleged herein; for a temporary restraining order, temporary injunction, and permanent injunction as alleged herein; together with pre-judgment interest at the maximum rate allowed by law; post-judgment interest at the legal rate, costs of court; reasonable and necessary attorney's fees; and such other and further relief to which the Plaintiffs may be entitled at law or in equity.

Respectfully submitted,

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