S21G0798

IN THE SUPREME COURT
STATE OF GEORGIA

EDIBLE IP, LLC

Plaintiff-Appellant,

v.

GOOGLE, LLC,

Defendant-Appellee.

BRIEF OF THE INTERNATIONAL FRANCHISE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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Introduction

This case presents an important issue for national and international commerce, and the free-market system in general. Over the past 20 years, Google has become a great champion of the internet revolution – and rightfully so. But when its business practices involve theft of other businesses' property, without compensation, the law must step in. In this case, Google's advertising model is profiting directly from using the trade names and goodwill of established companies for profit. This use is antithetical to fair business practices and the law, and it should not be allowed. As such, the International Franchise Association urges the Court to reverse the Court of Appeals and trial court and permit this case to proceed.

Interest of the Amicus Curiae

The International Franchise Association is the world's oldest and largest organization supporting the franchise community. Its worldwide membership includes franchisors, franchisees, and suppliers to the industry in all 50 states. Since 1960, it has educated franchisors and franchisees on beneficial methods and business practices to improve the

operation of their businesses through franchising. IFA represents more than 1400 brands in more than 300 industries. Its members include a vast range of industries, ranging from automotive repairs and services, hotels and motels, quick-service and full-service restaurants, tax preparation businesses, real estate brokerages, home health care and senior care facilities, home repair and remodeling companies, package shipping providers, hair care, fitness, financial services, childcare, tutoring, swim schools, and many more. Franchising includes more than 733,000 franchise establishments, supports nearly 7.6 million jobs, and contributes more than $674 billion to the U.S. economy. In Georgia, IFA has 102 franchisor members and 433 franchisees as members. Because the issues presented in this appeal may affect franchising nationwide, the IFA has a strong interest in supporting the appellant to protect the property interests of its members.

Argument and Citation of Authority

A. IFA members sell the rights to use the valuable property interests obtained by their efforts to build goodwill in their brands.

At a basic level, a franchisor sells the right to use the brand and the business methods that define the franchised business. This property right necessarily has value because of the goodwill built up in the brand. Georgia corporations like Chick-fil-A (an IFA member), among others, have long used the franchise model to license authorized use of their valuable brands, as well as to maintain a level of consistency and control among the goods and services provided under those licensing and franchise agreements. Collectively, franchises contribute a significant portion to the annual economy of the United States.

Of course, a brand does not gain value overnight. A brand—which generally includes the name of the business, equipment, suppliers, and methods of conducting the business—is something that gains its intrinsic value over time through the expenditure of effort, and money, by its owner. Even outside of intellectual property considerations, brands have long been recognized as being valuable property rights

under the laws of Georgia. Brand recognition and value is based on goodwill, and as this Court has noted, "[g]ood will is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage and resort to the old place." *Armstrong v. Atlantic Ice & Coal Corp.*, 141 Ga. 464 (1911), citing *Vonderbank v. Schmidt*, 44 La. Ann. 264, 10 South. 616, 617, 15 L. R. A. 462, 32 Am. St. Rep. 336. And, of course, inherent in the very definition of property is the right of the owner to sell or license the valuable property rights based on goodwill that it has worked to build in a particular brand. *See, e.g., Old Dearborn Distributing Co. v. Seagram-Distillers Corporation*, 299 U.S. 183, 192 (1936) (noting the "well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself….") (internal citations omitted).

B. When Google auctions valuable brand names to third parties for its own profit, IFA members suffer an unauthorized taking of the valuable property rights that they have licensed or purchased.

Google's advertising business model allows third parties to purchase keywords that include brand names, such that a user of Google's internet search services inputting the brand name as a search term would potentially be directed to the third party, and not the brand owner or a franchisee local to the user. None of the money paid by the third party to Google for the brand as a search keyword is paid to the brand owner or franchisees; Google keeps it all. It does not appear that Google has ever entered into any agreements with any brand owners[1] to allow it to auction the brand names to third parties for search keyword purposes—in other words, Google has never paid a license fee for the right to use the brand name, much less sell it for its own commercial gain. It seems axiomatic that no brand owner would ever consent to

[1] Google has claimed that a licensee of the plaintiff's name has agreed to arbitration. The appellant has thoroughly briefed this issue, but of course, a licensee/franchisee cannot authorize the use of a corporation's name or goodwill without an express agreement.

such unknown third-party purchase, which could include a brand owner's competitors.

The Court of Appeals' order found that

> Google has not taken Edible IP's trade name or sold it for profit. Rather, Google has auctioned off the opportunity to advertise on the results page produced when an individual types the keyword phrase 'Edible Arrangements' into the Google search bar.

Edible IP, LLC, v. Google, LLC, 358 Ga. App. 218, 221 (2021). This splitting of hairs makes no sense. There is no real difference between the sale of the "trade name"—the brand name, and the goodwill built up in that name by the brand owner—and the sale of an "opportunity to advertise on the results page produced" by a search *for that keyword*. Google's random search results pages are meaningless to advertisers. But where a user has searched for the brand name using Google's service, then that user has value to advertisers because of the relationship to the brand owner's goodwill. And Google has sold the right to appear on that search results page to a third party, who has specifically bid on that brand name, which neither it nor Google own or

have any licensed authority to use, for any purpose, much less their own profit.

The Court of Appeals quoted from the District Court for the Southern District of New York in finding that the sale of keywords for advertising purposes is

> akin to the product placement marketing strategy employed in retail stores, where, for example, a drug store places its generic products alongside similar national brand products to capitalize on the latter's name recognition. The sponsored link marketing strategy is the electronic equivalent of product placement in a retail store.

Merck & Co. v. MediPlan Health Consulting, 431 F. Supp. 2d 425, 427 (S.D.N.Y. 2006) (citation omitted). This is an anapposite anology. When a retail drug store places products *next* to each other, it has paid for both products. Further, when the makers of Advil (for example) sell their products to drug stores, they know that their products will be placed on a shelf with other similar products and that merchandising is built into the transaction. That, of course, did not happen in this case, and is not and never has been a part of Google's business model. In fact, its entire business model is built around *circumventing* that

requirement of a regular brick-and-mortar retail store, which must pay for the products it displays for resale. Google pays nothing to any brand owner for the use of their name.

Further, a Google search is not a trip to the drug store. In many ways, a customer who enters a brand name into Google has done the opposite of entering a retail store to shop- they have already specified a single brand because of that brand's goodwill. So, when a third party purchases from Google a keyword advertisement using a brand name which is then clicked on, Google is directly monetizing the opportunity to divert an existing customer. Google has essentially sold one brand's customer to another.

In short, Google's advertising business model is based—at least in part–on its selling brand names without paying for them, to other people who have not paid for them, for its own profit. IFA members are right to object to this unauthorized profiteering.

The Court of Appeals also found that "[t]he alleged 'sale' of that term for advertising placement does not constitute theft. To find otherwise would improperly broaden criminal liability." *Edible IP*, 358

Ga. App. at 221 (citation omitted). But this does not logically follow, because Google is, in fact, selling a brand name as an advertisement keyword to a third party, so that upon a search for that brand name the third party's advertisement will appear and, ultimately, be clicked by a user. To be as clear as possible, Google is selling a brand name that it does not own and is not authorized to sell to a third party who has no right to use the brand name, either. To continue the retail drug store analogy that the Court of Appeals quoted, this would be as if the drug store sold a sign that said "Cheerios" over a shelf of products to a third party, and allowed that third party to fill that shelf with whatever goods it wanted to—including competitor cereals. Both Google and the retail drug store in this example have taken a valuable property right—the brand name—that did not belong to them and which they had no authority to use, and conveyed it for money to a third party. Despite the Court of Appeals' conclusions, this certainly qualifies as theft under O.C.G.A. §§ 16-8-2 and 51-10-6(a), because it has deprived Edible IP, LLC, of the right to license its valuable brand on terms of its own choosing.

This is, of course, a widespread problem that affects many brand owners, and not just Edible IP, LLC. To its credit, Google's adwords system is ingenious and lucrative. But when it sells proprietary brand names, it becomes an ingenious and lucrative thumb in the eye of all brand owners. While it has made Google an extraordinarily rich entity over the past 20 years, the success of an enterprise does not allow it to take someone else's property, and that conduct must be stopped eventually. This case presents this Court with an opportunity to address these important national and international issues locally.

Conclusion

All businesses, including IFA's members and other members of the franchise industry, rely on the goodwill associated with their name. The Court should reverse the Court of Appeals' order and allow this case to proceed in order to give the plaintiff-appellant an opportunity to investigate Google's business practices and present its arguments in court.

Respectfully submitted this 2nd day of September, 2021

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