

Client Alert

FRANCHISE AND DISTRIBUTION PRACTICE GROUP | JUNE 2012

WIGGIN AND DANA

Franchisee Association's Lawsuit Stayed Pending Arbitration With Individual Franchisees

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A recent decision in *NIACCF, Inc. v. Cold Stone Creamery, Inc.*, Case No. 12-20756-Civ-SCOLA, 2012 WL 1852941, 2012 U.S. Dist. LEXIS 70256 (S.D. Fla. May 21, 2012) granted Cold Stone Creamery, Inc.'s ("Cold Stone") motion to stay pending arbitration a lawsuit filed by the National Independent Association of Cold Stone Creamery Franchisees, Inc. ("NIACCF"), an independent association of Cold Stone franchisees and area developers.

By way of background not discussed in the court's opinion, NIACCF sued Cold Stone seeking a declaratory judgment that Cold Stone must disclose information about the amount of money in Cold Stone's vendor-contributed marketing fund and the value of unredeemed gift cards. As is commonly done in franchise systems, Cold Stone franchisees are required to purchase supplies from Cold Stone-approved vendors. Under Cold Stone's system, the authorized vendors pay rebates to the company based upon purchases by its franchisees, and the funds are used for marketing purposes under Cold Stone's Flexible Marketing Program. NIACCF sought a judicial declaration that Cold Stone must disclose, among other things, the amount of rebate funds used for marketing purposes and whether vendor prices are increased to offset rebate payments to Cold Stone. NIACCF also sought an accounting of the amount of sold, but unredeemed, gift cards and information about how Cold Stone has used revenue from the unredeemed gift cards.

Cold Stone moved to stay, pending a petition to compel arbitration in Arizona federal court, on the grounds that the individual franchisees named in the complaint agreed to "mandatory arbitration in Arizona of all disputes and controversies 'related in any way' to their franchise agreements or the relationship between them and Cold Stone, as franchisor." *NIACCF, Inc. v. Cold Stone Creamery, Inc.*, at *2. Cold Stone argued that its arbitration agreement with its franchisees would become meaningless "if NIACCF is allowed to proceed in this action without first giving Cold Stone a chance to invoke arbitration with individual franchisees." *Id.* at *3. NIACCF countered that no stay was warranted because it was not a signatory to any arbitration agreement with Cold Stone and, because it had "associational standing," it was free to pursue litigation on behalf of its members, regardless of arbitration clauses binding those members. *Id.*

The court declined to address associational standing and focused on arbitrability, holding that "[t]he question at this juncture is not whether NIACCF is entitled to seek relief as an association *vel non*, but whether interests of prudence and efficiency warrant a moderate stay to allow the Arizona court to act." *Id.* at *7 (emphasis in original). Accordingly, the court determined:

[it] is not persuaded by NIACCF's argument that a stay should be denied merely because the organization did not sign any agreement to arbitrate. Whether NIACCF signed an agreement to arbitrate is immaterial. As Cold Stone makes plain, it does not wish to arbitrate with NIACCF, and the stay it requests does not try to facilitate that outcome. Instead, Cold Stone argues, and the Court agrees, that NIACCF should not be able to

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end-run the arbitration agreements to which all franchisees are individually bound. An organization consisting of franchisees should not be permitted to do that which the individuals themselves may not do. This is all the more true given the strong federal policy favoring arbitration. Thus, there is good cause for this Court to stand aside and await the Arizona court's decision.

Id. at *6-7 (internal citations omitted). This decision affirms franchisors' ability to enforce their arbitration agreements with franchisees and prevents franchisees from avoiding arbitration by bringing their claims through franchisee associations.

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