

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EYM PIZZA OF GEORGIA, LLC,	§	
EYM PIZZA OF ILLINOIS, LLC,	§	
EYM PIZZA OF INDIANA, LLC,	§	
EYM PIZZA OF SC, LLC AND	§	
EYM PIZZA OF WISCONSIN, LLC,	§	CIVIL ACTION NO. 3:24-cv-00646-X
	§	
<i>Plaintiffs,</i>	§	
v.	§	
	§	
PIZZA HUT, LLC,	§	
	§	
<i>Defendant.</i>	§	

PLAINTIFFS’ FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiffs EYM Pizza of Georgia, LLC, EYM Pizza of Illinois, LLC, EYM Pizza of Indiana, LLC, EYM Pizza of SC, LLC and EYM Pizza of Wisconsin, LLC, (collectively hereinafter “EYM”) who files this, Plaintiffs’ First Amended Complaint against Pizza Hut, LLC and, for cause, would show unto this Honorable Court as follows:

I. PARTIES

1. **Plaintiff EYM Pizza of Georgia, LLC** is a domestic limited liability company.
2. **Plaintiff EYM Pizza of Illinois, LLC**, is a domestic limited liability company.
3. **Plaintiff EYM Pizza of Indiana, LLC** is a domestic limited liability company.
4. **Plaintiff EYM Pizza of SC, LLC** is a domestic limited liability company.
5. **Plaintiff EYM Pizza of Wisconsin, LLC**, is a domestic limited liability company.
6. **Defendant Pizza Hut, LLC** (“Pizza Hut” and/or “Defendant”) is a Delaware

Limited Liability Company with its headquarters located at 7100 Corporate Drive, Plano, Texas

75024. It may be served with process by delivering a copy of the Complaint and Summons to its Registered Agent, C T Corporation System, at 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136, or wherever else he/she/it may be found.

I. JURISDICTION & VENUE

7. This Court has original federal question jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because Plaintiffs have asserted a cause of action arising under the laws of the United States, specifically 42 U.S.C. § 1981. Finally, and in the alternative, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 (a) because the amount in controversy exceeds \$75,000 and there is complete diversity as no Plaintiff shares a state of citizenship with the Defendant.

8. Venue in this Judicial District is proper under 28 U.S.C. § 1391(b)(1) as it is the judicial district in which Defendant resides and has its principal place of business.

II. FACTS

9. Eduardo Diaz is a self-made Hispanic entrepreneur who prior to starting EYM worked his way up through the ranks at McDonald's from Finance Director to Chief Financial Officer to President McDonald's Mexico and President McDonald's North Latin America Division. Diaz started EYM Group, Inc and EYM Foods, LLC in 2008.¹

10. In late 2015, Diaz decided to explore an opportunity with Pizza Hut. By 2016, EYM entered the Pizza Hut system when it purchased franchisees in the Illinois and Indiana markets from Pizza Hut. EYM paid \$10,851,059.53 for its Illinois franchises and \$8,672,362.56 for its Indiana franchises.

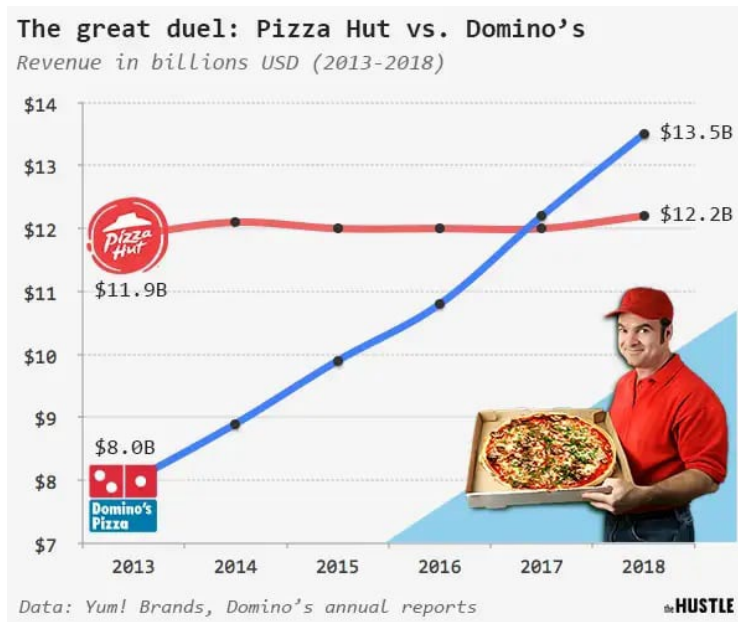
¹ Pursuant to Fed. R. Civ. P. 10(c), Plaintiffs adopt and incorporate by reference their Original Petition and Application for Temporary and Permanent Injunctive Relief ("Application"). The Application includes Plaintiffs' verification of the Original Complaint.



11. Upon EYM’s purchase in the Illinois and Indiana markets it relocated, remodeled and/or opened many restaurant locations.

12. Everything appeared to be going well. EYM even received awards for top operators, Pizza Hut had a report called Rack and Stack that franchisees had access to and EYM was one of the top performers.

13. In 2017, EYM purchased restaurants in the Georgia and South Carolina markets from Pizza Hut for \$9,019,314.98. Like they did previously in other markets EYM remodeled and/or opened many restaurant locations. That same year, Domino’s overtook Pizza Hut as the largest pizza chain by global sales.



14. Despite, Pizza Hut's lack of innovation and flat sales, EYM was all in, it participated in marketing programs as "Test Market" in Illinois, Indiana and Georgia and South Carolina markets. While Diaz, participated several years in Latino Franchising Magazine symposium representing Pizza Hut at the Pizza Hut corporate offices. Diaz also participated in various committees including a diversity committee for YUM with previous CEO Greg Creed as well as participating during 2021 in the "Restaurant Economic Committee."

15. In 2018, Pizza Hut approved EYM's purchase of stores in the Wisconsin market from an underperforming Franchisee for \$6,881,913.40 and we bought another 16 restaurants from Pizza Hut for \$1,557,460.26.

16. By the last quarter of 2019, Pizza Hut as a brand was still struggling. When financials were released in the first quarter of 2020, headlines were reading, "Yum! Brands profit slumps on struggles at Pizza Hut." This resulted in Pizza Hut's decision to change management.

17. Prior to the management change, EYM was able to have a voice and had some honest conversations about the state of the pizza business with PH USA President Artie Starrs, PH USA CFO Mike Diamons and Charlie Short Director of Franchising among all others.

18. In July 2020, Pizza Hut's largest U.S. franchisee, NPC International, filed for Chapter 11 bankruptcy protection after struggling under the burden of \$1 billion in debt.

19. In 2020, EYM still proudly carrying the Pizza Hut flag, purchased several properties to develop Pizza Hut restaurants; however, Covid delayed the projects, resulting in EYM not starting until 2021 through 2022. By this time the cost of the developments labor and materials were extremely high vs budget (over 30 to 80%) plus delays from some cities for inspections and weather, EYM ended up having to build during winter adding additional costs.

20. Pizza Hut's new management was brought in. Charlie was out and Diane Simrall was now in as Director of Franchise Finance. Once Ms. Simrall came into the picture everything took a turn for the worse. Pizza Hut was now no longer willing to work hand and hand with EYM to pull it through tough times created by the economy and Pizza Hut corporate's mismanagement and lack of creativity.

21. Pizza Hut has a great responsibility to its franchisees. It has not kept up with the heavy competition from its competitors, e.g., Dominos, Little Cesars. Pizza Hut has failed to keep up with modern times. Pizza Hut failed to adapt to modern business practices. Pizza Hut didn't observe carefully enough how people had begun to live. Pizza Hut failed to keep up with new technology. Pizza Hut failed to heavily invest in digital and delivery. Pizza Hut has no distinct identity like others. Pizza Hut has no image or identity that sticks with patrons. Pizza Hut lost its brand identity. Pizza Hut took millennials for granted, which are a demographic with money that should have been the target of ad campaigns. Pizza is a millennial approved food. Pizza Hut neglected loyal customers as well as its franchisees. Pizza Hut's modern gourmet menus flopped and did not target existing customers. Pizza Hut failed to innovate; in fact it rarely offers new items. Pizza Hut's revamped menu failed and scared off loyal customers. Pizza Hut cut its research and development budget and it has showed. In recent years, the best Pizza Hut has managed to do is change the cheese in its Stuffed Crust from mozzarella to cheddar, or trot out an occasional, ill-fated appetizer like the Stuffed Cheez-It or the Philly steak melt! Then despite Pizza Hut becoming the official pizza of the NFL, the Pizza Hut online ordering system failed during the Super Bowl, costing franchisees monetary losses on a day they should be profiting.

22. Due to Pizza Hut's failed strategies it lost old customers and did not attract new ones.

23. In mid-2021, EYM decided to sell its Pizza Hut business to maximize the opportunity. By October EYM had an offer for 89 million but the purchaser withdrew the offer and submitted a revised offer with a lower price and conditions EYM could not accept. At that point, EYM realized inflation was going to impact them hard.

24. In addition to Pizza Hut's management failures and internal struggles, in 2022, inflation hit EYM margins, sales were positively impacted by COVID closures from April 2020 to March 2021 despite all issues they had operationally.

25. In 2022 hyperinflation eroded EYM margins: tomato sauce increased 40% from base month Jan 2021 through 2022, the same with dough that was impacted 35 to 45%!

26. Between development cost to achieve EYM's commitments and margin erosion EYM had difficulty with its financial situation.

27. On December 13, 2022, Pizza Hut issued a First Notice of Default to EYM for failure to pay over \$3 million dollars (the "First Default Notice").

28. On March 6, 2023, Pizza Hut issued a Second Notice of Default for failure to pay over \$2.6 million dollars (the "Second Default Notice").

29. Although EYM eventually paid all amounts due under the First Notice of Default and most of the past due amounts under the Second Notice of Default, except for \$2,307.60 for DigiCo fees due on February 20, 2023 and FirstBook fees due on October 7, 2022 in the amount of \$8,573.00, on May 9, 2023, Pizza Hut sent another notice of default, to EYM and the guarantor under the Franchise Agreements, (the "Third Default Notice").

30. EYM and Pizza Hut then entered into a Forbearance Agreement dated August 2, 2023.

31. By November of 2023, the financials were coming down with headlines like, “Slow Pizza Hut sales in the U.S. weigh on Yum Brands’ revenue,” and “Yum! Brands misses on revenue, Pizza Hut sales slow while Taco Bell, KFC drive growth.”

32. Pizza Hut then served Notices of Default dated January 10, 2024, and January 31, 2024 copies of which are attached as **Exhibits “A,” and “B”** hereto (the “January Default Notices”).

33. On February 22, 2024, Pizza Hut then served another Notice of Default to EYM a copy of which is attached as **Exhibit “C”** hereto (the “February 2024 Default Notice”).

34. All while EYM has been under the gun with Pizza Hut and its default notices, EYM continues to pay Pizza Hut albeit slowly due in part to Pizza Hut’s failure to innovate its products and falling market share. Since the First Default Notice on December of 2022 through December of 2023, EYM has paid Pizza Hut a total of \$13,784,695.45.

35. EYM has opened/relocated (as new opening) 16 restaurants in 7 years with 4 more in development. Today, EYM has 142 locations in those markets.

36. EYM has invested \$46,600,000 in Pizza Hut franchises including the price for the restaurants. EYM has outstanding debt owed to the bank in the amount of \$23,050,000. EYM’s fixed assets as a whole are \$43,500,000. Today, EYM employees 427 employees in Wisconsin, 79 employees in South Carolina, 206 employees in Indiana, 689 employees in Illinois and 385 employees in Georgia.

37. Pizza Hut has now terminated EYM’s forbearance agreement and is trying to force EYM to sell for pennies on the dollar. Pizza Hut is now threatening to shut down all EYM’s restaurants because it didn’t take the low-ball offers made to it. For example, Pizza Hut wants

EYM to sell its 15 stores in Indiana for \$1,500,000, that is \$100,000 a store! It costs at least \$600,000 to open a brand-new store from the ground up!

38. EYM has been negotiating recently with potential purchasers to help it exit the failing business of Pizza Hut; however, Pizza Hut has gone to great lengths to interfere with and sabotage EYM, for reasons that appear to be more personal and discriminatory in nature like the fact that EYM has a Hispanic owner and executives. Pizza Hut has been communicating confidential information to the potential purchasers to the detriment of EYM in an effort to give the potential purchasers who are “approved” Pizza Hut franchisees an upper hand.

39. If that is not enough, Pizza Hut has unilaterally contacted EYM’s bank attempting to set up meetings without EYM’s authorization and/or consent. Pizza Hut knows that one timely placed call from them to EYM’s lender can cause the bank to call EYM’s loans which, of course, would be a disaster for EYM. Pizza Hut’s attempt to contact EYM’s bank raised serious concerns for the bank, straining EYM’s bank relations. Pizza Hut’s recent threat is, “Pizza Hut is not planning to have additional correspondence with EYM’s lender today or Monday” is totally transparent. In other words, Pizza Hut is saying, if you don’t sign our draconian paperwork today, then we will make sure the bank calls your loans on Tuesday. Pizza Hut has a well-earned reputation for using strong-arm tactics to pressure its franchisees. Pizza Hut knows exactly what it is doing. Pizza Hut through Ms. Simrall is interfering with EYM’s negotiations with prospective purchasers despite the fact it is in the process of trying to sell and is trying to apply additional pressure by threatening to contact EYM’s bank and recently informed them that Pizza Hut intends to terminate them all together. Through all the chaos created by Pizza Hut including allegations of Food Safety, EYM is receiving kudos from the Pizza Hut Sr. Franchise Business Partner for its attention to food safety. (See **Exhibit “D”**).

III. CAUSES OF ACTION

BREACH OF CONTRACT (FORBEARANCE AGREEMENT)

40. EYM re-alleges each and every paragraph as though they are set forth fully herein.

41. Pizza Hut failed to perform under the Forbearance Agreement with EYM. Pizza Hut's actions constitute a breach of its agreement with EYM as set forth herein, which resulted in actual, consequential, and incidental damages to EYM in an amount exceeding the minimum jurisdictional limits of this Court. EYM is entitled to an award of actual, incidental, consequential and special damages, as well as attorneys' fees, costs and expenses.

42. All conditions precedent to EYM's right of recovery on the agreement have occurred or have been waived by Pizza Hut.

TORTIOUS INTERFERENCE WITH CONTRACTS (BANK LOAN) AND PROSPECTIVE BUSINESS RELATIONS (PROSPECTIVE PURCHASERS)

43. EYM re-alleges each and every paragraph as though they are set forth fully herein.

44. EYM expects and has expected to continue its advantageous economic relationships with its bank and prospective purchasers of the EYM franchisee locations currently for sale.

45. These relationships contained the probability of future economic benefit. Had Pizza Hut refrained from engaging in the unlawful and wrongful conduct described in this Petition, there is a substantial probability that EYM's current and prospective purchasers would continue to engage EYM and continue to negotiate in good-faith with EYM if not for Diane Simrall's interference.

46. Pizza Hut was aware of these economic relationships and intended to interfere with and disrupt them by unlawfully and wrongfully by speaking to prospective buyers and disclosing

confidential information as well as attempting to contact EYM's lender in order to either cause the bank to place EYM in default and/or interfere with EYM's relationship with its bank.

47. These acts were undertaken by the Defendants to disrupt EYM's business and ultimately ruin EYM's business to the point where it is worthless.

48. Pizza Hut's conduct was wrongful by a measure beyond the fact of the interference itself. As a result of Pizza Hut's acts, the above-described relationships have been actually disrupted.

49. As a direct and proximate result of Pizza Hut's actions, EYM has suffered economic harm.

50. Pizza Hut's wrongful conduct was a substantial factor in causing this harm.

51. Pizza Hut's interference with EYM's prospective economic advantage with its current and future potential purchasers, as described above, was willful, malicious, oppressive, and in conscious disregard of EYM's rights and EYM is, therefore, entitled to an award of punitive damages to punish its wrongful conduct and deter future wrongful conduct of not less than three times the amount of actual damages.

52. Further, Pizza Hut was aware that current and prospective business relationships existed and that its conduct was independently tortious or unlawful.

53. As a proximate result of Pizza Hut's tortious interference, EYM has suffered economic damages, including but not limited to actual and consequential damages, potential lost costs, lost profits, and exemplary damages for which EYM is entitled to recover, and now brings this suit.

BREACH OF FIDUCIARY DUTY

54. EYM re-alleges each and every paragraph as though they are set forth fully herein.

55. Pizza Hut as the franchisor owes fiduciary duties to EYM as its franchisee. As a result of its unlawful acts and conduct, Pizza Hut breached the following fiduciary duties:

1. duty of loyalty and utmost good faith;
2. duty of candor;
3. duty to refrain from self-dealing;
4. duty to act with integrity of the strictest kind;
5. duty to provide similar treatment among similarly situated individuals or
6. entities” (i.e., other franchisees).
7. duty of fair and honest dealing;
8. duty of full disclosure;
9. duty of good faith, fair dealing, loyalty, and fidelity;
10. duty to make EYM’s assets productive;
11. duty of full disclosure on all matters affecting EYM;
12. duty to maintain confidential information obtained from EYM and not to use or disclose such information to EYM’s detriment.

56. Pizza Hut’s breach of its fiduciary duties resulted in injury to EYM. EYM has been damaged by the unlawful acts and conduct of Pizza Hut. The damages suffered by EYM were a foreseeable result of Pizza Hut’s breach of its fiduciary duties.

57. EYM seeks all actual, consequential, and incidental damages that have resulted from Pizza Hut’s breaches of its fiduciary duties.

VIOLATION OF 42 U.S.C. §1981.

58. EYM re-alleges each and every paragraph as though they are set forth fully herein.

59. Under 42 U.S.C. § 1981. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

60. At all times herein, Plaintiffs believe the Defendant’s conduct has been motivated by a desire to discriminate against or single out EYM and has included but not limited to suspicious

timing, inconsistent behavior and/or inconsistent treatment compared to similarly situated franchisees owned by white persons who are provided more favorable terms. EYM contends that Pizza Hut has not enforced brand standards against other similarly situated franchisees and is merely singling out EYM because it wants the Hispanic owned EYM out of the system, does not like the Hispanic owned EYM or because of some other discriminatory motive.

CONDITIONS PRECEDENT

61. All conditions precedent necessary for EYM to have and recover in this action have been performed or have occurred.

62. Plaintiffs also request the entry of a temporary and permanent injunction. Plaintiffs' Application and its facts, legal argument, and exhibits are all incorporated by reference as if full set forth herein, as permitted per Fed. R. Civ. P. 10(c).

PRAYER

WHEREFORE, PREMISES CONSIDERED, EYM respectfully requests that Pizza Hut be cited to appear and answer, as required by law and that EYM have the following relief:

- Judgment against Defendant for actual, economic, and non-economic damages in an amount within the jurisdictional limits of this Honorable Court;
- Attorneys' fees;
- Prejudgment and post-judgment interest as provided by law;
- Costs of suit;
- Exemplary damages; and,
- Such other and further relief, at law or in equity, to which EYM may show themselves to be justly entitled.

Respectfully submitted,

FRIEDMAN & FEIGER, L.L.P.

by: /s/ Jason H. Friedman

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2024, I electronically filed the foregoing Plaintiffs' Amended Complaint with the clerk of the court for the U.S. District Court, Northern District of Texas, Dallas Division, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Jason H. Friedman

Jason H. Friedman