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Litigator of the Week: E. Joshua Rosenkranz of Orrick, Herrington & Sutcliffe

By Alison Frankel

It's not every day that an appellate litigator gets to make an impassioned plea like the one E. Joshua Rosenkranz gave at the end of oral arguments before the U.S. Court of Appeals for the Ninth Circuit in the epic litigation over who owns the Bratz brand: Rosenkranz's client, MGA Entertainment, which turned the big-headed Bratz dolls into a billion-dollar franchise; or Mattel, which was awarded rights to the entire Bratz line after a 2008 trademark and copyright infringement trial.

"This has been the quintessential American nightmare," Rosenkranz said, according to a transcript of the hearing. "The equitable relief that has been granted has absolutely decimated MGA. It is hobbling right now. The recall [ordered by the district court] is currently under way. And every single day that goes by continues the march over the cliff. So if this court has any doubt about the validity of the relief that's been granted, I just beg the court to act as quickly as possible with an order at least staying the injunctive relief [so] MGA can survive while the court is ultimately issuing its decision. But the bottom line is, I just ask this court to end this nightmare, [which] is not just a nightmare for MGA, but, I think, for American law."

Rumor has it that when Rosenkranz finished his speech, his clients from MGA--and his tough-as-nails Orrick co-counsel, copyright expert Annette Hurst--were all teary-eyed. What's indisputable is that the three judges on the Ninth Circuit panel--Chief Judge Alex Kozinski and Judges Stephen Trott and Kim Wardlaw--heard what he was saying. Four hours after the Dec. 9, 2009, argument, they stayed the injunction against MGA. And on July 22, they overturned the ruling that gave the Bratz franchise to Mattel, in an opinion that also erases Mattel's $100 million jury verdict on damages.

The phrase "bet-the-company case" gets thrown around a lot, but in this instance, it's actually accurate. Orrick's appellate team essentially saved MGA from corporate extinction.

And they did it only months after joining the case. The litigation between MGA and Mattel--which had employed the doll designer who eventually took his Bratz ideas and drawings to MGA--was notoriously bitter. Trial teams for Mattel (Quinn Emanuel Urquhart & Sullivan) and MGA (Skadden, Arps, Slate, Meagher & Flom) litigated with an animosity that matched the venomous rivalry between their clients. Every issue was hard-fought, and the record, Rosenkranz told us, was jam-packed with well-preserved potential appellate arguments.

But Rosenkranz, who was hired to handle the Ninth Circuit appeal after MGA ran through two other appellate firms (Howard Rice Nemerovski Canady Falk & Rabkin and Sidley Austin), decided to home in on a few issues he thought would resonate with the appeals court. Sidley had argued in MGA's first motion for a stay of the injunction turning the Bratz franchise over to Mattel that the injunction violated the Seventh Amendment because it was inconsistent with the jury verdict. The Seventh Amendment argument failed to sway the Ninth Circuit panel that heard the stay case, and Orrick dropped it entirely as it briefed the Ninth Circuit appeal.

Rosenkranz instead argued that the document at the heart of the case--the doll designer's employment contract with Mattel--was far too flimsy a basis for destroying a billion-dollar brand. Not only was the two-page contract barely legible (Judge Trott, in particular, complained several times at the December hearing that he couldn't read it, even with magnifying glasses), but it didn't specify that Mattel owned the doll designer's ideas. Nevertheless, the district court judge who imposed the injunction gave the contract great deference in a summary judgment ruling for Mattel.

"This single piece of paper became the engine of MGA's economic ruin," Rosenkranz said at the Ninth Circuit argument. "The very notion of an employer laying claim to an employee's idea is very scary. [But] if an employer wants to lay claim to ideas--if that's even legal, your honors--it has to be at least clearly laid out in the document."

The Ninth Circuit agreed, finding that the district court erred in its summary judgment interpretation of the contract. The appellate court found the contract to be ambiguous, at best.

"To say that Mattel owned any expression of any ethnic doll with big heads and big eyes--that troubled me. That's something we should all care about," Rosenkranz told us. "When we briefed the case, we weren't just talking about Bratz dolls. We were talking about the next generation of solar energy research, the next generation of cancer research."

The case now returns to Santa Ana federal district court judge David Carter, who took over when the judge who oversaw the infringement trial left the bench. "Figuring out where we go from here is quite a challenge," Rosenkranz said. "I imagine both sides will be maneuvering to interpret the road map the Ninth Circuit laid out for the district court."

We did have one last question for Rosenkranz. Earlier this month, The Am Law Daily reported on a suit O'Melveny & Myers filed against MGA, claiming that MGA owes O'Melveny $10.2 million for early work in the Bratz litigation. Is MGA paying Orrick's bills?

"They have paid every penny that they owed us on the appeal," Rosenkranz said.

Clearly, that's money well spent for MGA.