

1 VINCENT J. BARTOLOTTA, JR., ESQ. (SBN 055139)
E-mail: Bartolotta@tbmlawyers.com
2 KAREN R. FROSTROM, ESQ. (SBN 207044)
E-mail: Frostrom@tbmlawyers.com
3 REBECCA B. MORRISON, ESQ. (SBN 259428)
E-mail: Blain@tbmlawyers.com
4 THORSNES BARTOLOTTA McGUIRE LLP
2550 Fifth Avenue, 11th Floor
5 San Diego, California 92103
Tel: (619) 236-9363 Fax: (619) 236-9653

6 Attorneys for Plaintiffs Amy Meadows, Dawn Toff,
7 Donna Schiano, and Alfred Pena, individually and as class
8 representatives

9 **IN THE UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 Amy Meadows, Dawn Toff, Donna
12 Schiano, and Alfred Pena, individually
and as class representatives,

13 Plaintiffs,

14 v.

15 Dickey’s Barbecue Restaurants, Inc.,

16 Defendants.

Case No.:

[CLASS ACTION]

COMPLAINT

[DEMAND FOR JURY TRIAL]

17
18 Plaintiffs allege as follows under information and belief:

19 **PARTIES**

20 1. Plaintiff Amy Meadows is, and at all times relevant herein was, a resident
21 of the State of California. Ms. Meadows obtained a Dickey’s Franchise Disclosure
22 Document and subsequently purchased a Dickey’s franchise in Pleasant Hill,
23 California.

24 2. Plaintiff Dawn Toff is, and at all times relevant herein was, a resident of
25 the State of California. Ms. Toff obtained a Dickey’s Franchise Disclosure Document
26 and subsequently purchased a Dickey’s franchise in Hollister, California.

27 3. Plaintiff Donna Schiano is, and at all times relevant herein was, a resident
28 of the State of California. Ms. Schiano obtained a Dickey’s Franchise Disclosure

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

1 Document and subsequently purchased a Dickey’s franchise in San Ramon.

2 4. Plaintiff Alfred Pena is, and at all times relevant herein was, a resident of
3 the State of California. Mr. Pena obtained a Dickey’s Franchise Disclosure Document
4 and subsequently purchased a Dickey’s franchise in Tracy, California.

5 5. Defendant Dickey’s Barbecue Restaurant is a Texas corporation with its
6 principal place of business at 4514 Cole Avenue, Suite 1015, Dallas, Texas 75205.
7 Defendant operates a chain of corporate and franchise restaurants known as Dickey’s
8 Barbecue Pits.

9 **JURISDICTION**

10 6. The Court has jurisdiction over this action pursuant to 28 U.S.C.
11 § 1332(a)(1) in that there is complete diversity of citizenship between all of the
12 Plaintiffs and all of the Defendants and the amount in controversy exceeds \$75,000.

13 7. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) in that
14 a substantial part of the events or omissions giving rise to the claims occurred in the
15 judicial district.

16 **FACTS**

17 **Defendants:**

18 8. Defendant Dickey’s was formed in 1994 for the purpose of selling
19 Dickey’s Barbecue Pit franchises. Dickey’s has affiliated companies, Dickey’s
20 Barbecue Pit, Inc., Restaurant Growth, Inc. and Pitmaster Team, Inc., that operates
21 corporate Dickey’s Barbecue Pit restaurants in Texas and South Dakota. The first
22 Dickey’s Barbecue Pit opened in 1941.

23 9. Dickey’s Barbecue Pit is a combination quick service/fast casual dining
24 experience. Customers place protein orders at the beginning of the service counter,
25 then move down cafeteria-style picking side dishes. When they reach the cash
26 register, their protein order is waiting, allowing them to pay and immediately eat.

27 **THE FRANCHISES**

28 10. The Dickey’s FDD provided to each Plaintiff contained the following

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

1 representations:

2 a. It would cost approximately \$60,000 to build out a restaurant
3 conversion franchise location;

4 b. Dickey’s would allow a franchise to request an alternate supplier,
5 which request would be granted upon evaluation of objective and reasonable criteria.

6 c. Dickey’s would protect Plaintiffs’ territory, which territory was to
7 be selected by Plaintiffs.

8 d. Dickey’s would provide on-site evaluation to assist in the
9 establishment of the franchise.

10 e. Dickey’s would provide an initial training prior to the opening of
11 the franchise.

12 f. Dickey’s would allow a franchise to request menu changes, which
13 request would be granted upon evaluation of objective and reasonable criteria.

14 g. Plaintiffs owed a total of 9% of **net** sales to Dickey’s to cover its
15 royalty and marketing fund.

16 11. Outside of the FDD, Dickey’s employees made the following
17 representations to Plaintiffs:

18 a. Dickey’s employees represented to the Plaintiffs that Dickey’s was
19 experiencing “tremendous growth” with store revenues increasing at a rate of 5% each
20 year, that Dickey’s was the fastest growing barbecue concept in the country and that
21 they were beating their “record low build out costs” at just under \$60,000 including
22 the franchise fee and purchase of initial inventory;

23 b. Dickey’s would provide everything that a bank would need to
24 approve a loan to open the franchise;

25 c. Dickey’s had never had a franchise that ever had trouble finding
26 financing once they saw Dickey’s business plan;

27 d. Dickey’s would only sell one franchise in each northern California
28 city;

1 e. If Plaintiffs did not accept the locations chosen by Dickey's, they
2 would lose their deposit and not be given another opportunity to open a franchise store
3 in that city;

4 f. Plaintiffs did not need to have prior restaurant experience because
5 they would be trained completely by Dickey's;

6 g. Each store would make at least \$800,000 in the first year and it
7 would only go up from there. Plaintiffs would make so much money that they would
8 want a second and then a third restaurant, at which point they could retire and just
9 collect the income;

10 h. Plaintiffs should get a secondary, not a prime, location because a
11 Dickey's will draw as a destination restaurant;

12 i. Plaintiffs needed to use an architect referred by Dickey's for the
13 build out;

14 j. Dickey's provided national advertising for the franchisees out of
15 the marketing fund;

16 k. Plaintiffs were required to buy a dedicated van to support the
17 catering business;

18 l. Dickey's would provide accountings showing how it used the
19 marketing fund;

20 m. Franchisees could purchase used equipment;

21 n. Dickey's required the stores to purchase from US Foods at a price
22 that Dickey's negotiated for the benefit of its stores; and

23 o. A franchise could be sold, including transfer of all store
24 obligations.

25 **CLASS ALLEGATIONS**

26 12. The joinder of all class members as parties is impracticable. The
27 disposition of these claims in a class action will provide substantial benefits to both
28 the parties and the Court. The class is ascertainable and maintains a sufficient

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

1 community of interest. The rights of each class member were violated in a similar
2 fashion upon Defendants' wrongful conduct. The remedy requested will involve all
3 class members.

4 13. The class representatives' claims are typical of the claims of the members
5 of the class because of class representatives and all other members of the class were
6 damaged by the same wrongful conduct committed by Defendants as alleged more
7 fully above and below.

8 14. Plaintiffs will fairly and adequately protect the interests of the class. The
9 interests of the class representatives are coincident with, and not antagonistic to, the
10 interests of the other members of the class.

11 15. The class representatives have retained competent class counsel who are
12 experienced in the prosecution of class-action litigation.

13 16. Questions of law and fact common to the members of the class are
14 central here and predominate over questions which may affect only individual
15 members.

16 17. Plaintiffs bring this lawsuit individually and on behalf of those similarly
17 situated. The class is defined as follow: All companies and individuals who own or
18 have owned some portion of a Dickey's Barbecue Pit franchise restaurant in the State
19 of California.

20 18. Common issues amongst class members include:

- 21 a. They were sold a franchise based on a false FDD.
- 22 b. They were misled about the cost of opening the restaurant.
- 23 c. They were not provided with appropriate marketing and
24 promotional support.
- 25 d. They were not provided a protected territory.
- 26 e. They were forced to purchase goods at above-market prices.
- 27 f. They were subjected to excessive expenses.
- 28 g. They were not provided adequate training.

FIRST CAUSE OF ACTION

Fraud

19. All preceding allegations are incorporated by reference.

20. Defendants made the following representations to Plaintiffs:

a. Conversion of a restaurant space into a Dickey’s, including payment of all opening inventory, permit fees, franchise and training fees, would total approximately \$60,000.

b. Dickey’s was selling franchises in Northern California pursuant to a lawful FDD.

c. Dickey’s would provide a protected territory.

d. Dickey’s would provide an on-site evaluation prior to lease execution.

e. Dickey’s would provide pre-opening training.

f. Royalties and marketing fees would be based on the “net” sales.

g. Dickey’s provided a valid basis for estimating anticipated restaurant revenues.

h. Franchisees could use alternate suppliers so long as they suggested sources that could be objectively evaluated as reliable.

i. Franchisees could add new menu items so long as they could demonstrate that they were conducive to the Dickey’s image and standards.

j. Dickey’s operated a national marketing program and conducted promotions.

k. Dickey’s would provide accountings related to its marketing program.

l. The franchisees could purchase used equipment.

m. A senior member of Dickey’s would be present for the restaurant opening.

n. Dickey’s negotiated competitive prices at group discount rates.

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

1 21. Those representations were false as follows:

2 a. The cost of the build-out alone exceeded specific and written
3 representations. This did not include opening inventory, permit fees, franchise fees or
4 training costs.

5 b. The FDD contained material falsities.

6 c. Dickey's did not provide a protected territory.

7 d. Dickey's did not provide a pre-opening evaluation of the
8 restaurants.

9 e. Dickey's did not provide pre-opening training. Instead, they made
10 the franchisees travel to Texas to wash dishes in their affiliates' corporate stores.

11 f. Royalties and marketing fees were not calculated based on the net
12 sales. Rather, they were calculated based on gross sales. Had they been calculated
13 based on net sales, no royalties would ever have been due because store was never
14 profitable.

15 g. Pre-contract representations created an unreasonable expectation of
16 how much the stores would earn.

17 h. The Franchisees repeatedly requested a change in vendors to
18 decrease costs and improve product quality. Each time the new vendor was either
19 superior or equal to the existing vendor but no approval was forthcoming.

20 i. Plaintiffs repeatedly requested permission to offer new menu items
21 such as BBQ chicken salad or breakfast items, all of which are offered by other
22 Dickey's stores. However, Dickey's refused each request.

23 j. Dickey's did not offer a marketing program in Northern California.
24 Those dollars were spent in Texas where they provided no benefit to the California
25 restaurants. Dickey's also did not provide promotions. The franchisees were on their
26 own to come up with their own promotions on a case by case basis.

27 k. The franchises never received any marketing fund accountings.

28 l. Dickey's required the franchisees to purchase expensive oversized

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

1 and new equipment.

2 m. A senior member of Dickey’s did not attend the store openings.

3 n. Dickey’s franchisees were forced to purchase product at over-
4 market prices and were not permitted to source cheaper equivalent quality
5 replacements.

6 22. At the time each of the above misrepresentations was made, Defendants
7 knew or should have known of the falsity.

8 23. Plaintiffs relied on the representations in deciding to pay the application
9 fee and open a Dickey’s Barbecue Pit.

10 24. As a result of Defendants’ bad conduct, Plaintiffs suffered injury in an
11 amount to be proven at the time of trial.

12 25. Defendants committed the above-described conduct with oppression,
13 fraud, and malice, entitling Plaintiffs to an award of punitive damages.

14 **SECOND CAUSE OF ACTION**

15 **Violation of California Franchise Investment Law**

16 26. All preceding allegations are incorporated by reference.

17 27. California Corporations Code §§ 31200 and 31201 prohibits
18 misrepresentation or material omission in a Franchise Disclosure Document.

19 28. California Corporations Code § 31302 provides that anyone who
20 participates in the violation of the California Franchise Investment Law is jointly and
21 severally liable for all damages awarded.

22 29. Defendants violated each of the above-referenced laws.

23 30. Defendants’ violation of the Franchise Investment Laws caused damage
24 to Plaintiff in an amount to be proven at the time of trial.

25 31. Plaintiffs will also seek an award of attorneys’ fees, declaratory relief and
26 injunctive relief as provided by California Corporations Code § 31302.5.

27 ///

28 ///

THIRD CAUSE OF ACTION

Violation of Unfair Competition Laws

- 32. All preceding allegations are incorporated by reference.
- 33. Defendants engaged in unfair conduct as is set forth above.
- 34. Defendants engaged in fraudulent conduct as is set forth above.
- 35. Defendants engaged in unlawful conduct as is set forth above.
- 36. Plaintiffs were proximately harmed as the result of Defendants’ unfair, fraudulent and/or unlawful conduct.

FOURTH CAUSE OF ACTION

Declaratory Relief

- 37. All preceding allegations are incorporated by reference.
- 38. Section 27 of the franchise agreement purports to require all disputes between Plaintiffs and Dickey’s to be resolved by AAA arbitration. This provision is unenforceable and Plaintiffs seek a judicial declaration to that end and, if necessary, an injunction to prevent Dickey’s from enforcing the provision unlawfully.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury, on all issues triable by a jury, in the above-entitled action.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for relief as follows:

On the First Cause of Action:

- 1. For damages according to proof;
- 2. For punitive damages;
- 3. For costs of suit;
- 4. For such and other relief as the Court deems appropriate.

On the Second Cause of Action:

- 1. For damages according to proof;
- 2. For an award of attorneys’ fees;

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

THORSNES BARTOLOTTA MCGUIRE LLP
2550 FIFTH AVENUE, 11TH FLOOR
SAN DIEGO, CALIFORNIA 92103
(619) 236-9363
FAX (619) 236-9653

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 3. For costs of suit; and
- 4. For such and other relief as the Court deems appropriate.

On the Third Cause of Action:

- 1. For declaratory relief;
- 2. For injunctive relief;
- 3. For restitution and disgorgement.
- 4. For costs of suit; and
- 5. For such and other relief as the Court deems appropriate.

On the Fourth Cause of Action:

- 1. For declaratory relief;
- 2. For injunctive relief;
- 3. For costs of suit; and
- 4. For such and other relief as the Court deems appropriate.

Dated: May 12, 2015

THORSNES BARTOLOTTA MCGUIRE LLP

Bv: /s/Karen R. Frostrom
 VINCENT J. BARTOLOTTA, JR., ESQ.
 KAREN R. FROSTROM, ESQ.
 REBECCA BLAIN MORRISON, ESQ.
 Attorneys for Plaintiffs
 Amy Meadows, Dawn Toff
 Donna Schiano, and Alfred Pena, individually
 and as class representatives