

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION**

DICKEY'S BARBECUE RESTAURANTS, INC.)

Plaintiff,

v.

JOSEPH J. MATHIEU

Defendant.

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Civil Action No. 3:12-CV-05119-G

PLAINTIFF’S FIRST AMENDED COMPLAINT

Plaintiff, Dickey's Barbecue Restaurants, Inc. ("Dickey's"), for its First Amended Complaint against Joseph J. Mathieu (“Defendant”), states as follows:

**I.
THE PARTIES AND SERVICE**

1. Plaintiff, Dickey's Barbecue Restaurants, Inc., is a Texas corporation with its principal place of business at 801 E. Plano Parkway, #135, Plano, Texas 75074.

2. Defendant, Joseph J. Mathieu, is an individual and resident of the state of New Mexico and has been served with process at his primary residence at 5300 Remington Road, Las Cruces, New Mexico 8011 and has appeared.

**II.
JURISDICTION AND VENUE**

3. This Court has diversity jurisdiction in this matter pursuant to 28 U.S.C. § 1332(a) because the amount in controversy exceeds \$75,000.00 and the parties are citizens of different States.

4. Upon information and belief, the Defendant has sufficient contacts with this state and district such that this Court's exercise of personal jurisdiction over him comports with traditional notions of fair play and substantial justice.

5. The parties consented to jurisdiction in the Northern District of Texas, Dallas Division, pursuant to Article 27.3 of the Dickey's Barbecue Restaurants, Inc. Franchise Agreement dated March 4, 2009 (the "Franchise Agreement"), the contract which forms the basis of this action.

III. FACTUAL ALLEGATIONS

A. FACTUAL BACKGROUND.

6. Dickey's is in the business of franchising restaurants under the "Dickey's Barbeque Pit name, trademarks and business format system.

7. Dickey's Barbecue Restaurants, Inc. is a closely-held, private corporation whose sole business is to offer, sell, and service franchises for the development and operation of quick service, fast casual dining restaurants specializing in freshly prepared barbecue-style smoked meats.

8. Dickey's can trace its roots to 1941 when the first Dickey's Barbecue Pit restaurant opened in Dallas, Texas, serving the Dickey's family recipes and featuring barbecue meats smoked daily in the restaurant.

9. Dickey's was formed in 1994 and franchising of Dickey's Barbecue Pit began at that time.

10. Since that time, Dickey's Barbecue Pit has grown to become the largest barbecue restaurant chain in the world.

11. Dickey's has acquired the right to develop and as a result of the expenditure of time, skill, effort and money has developed, a unique and distinctive system relating to the establishment and operation of quick service, casual dining style restaurants under the name and mark "Dickey's Barbecue Pit" (each a "Restaurant") featuring the sale of freshly-prepared barbecued meats and other food products (the "System"). *See* Franchise Agreement, p.1 (a true and correct copy of the Franchise Agreement is attached hereto as **Exhibit 1**).

12. On or about March 4, 2009, Dickey's entered into the Franchise Agreement with Defendant to develop and operate a Dickey's Barbeque Pit in Las Cruces, New Mexico. (Exhibit 1.)

B. MATERIAL PROVISIONS OF THE FRANCHISE AGREEMENT.

13. Pursuant to Article 4.2 of the Franchise Agreement, Defendants are obligated to "pay a continuing nonrefundable royalty fee throughout the term of this Agreement, equal to five percent (5%) of the Net Sales (as defined in Article 4.6) of your Restaurant..." (Exhibit 1, article 4.2.)

14. Pursuant to Article 4.6 of the Franchise Agreement, Net Sales are defined as "all revenue from the sale of services and products by in-store dining, carry-out, delivery, catering, and otherwise, including, but not limited to, the sale of food and beverages, the redemption of gift cards, and the sale of merchandise ... and all other income of whatever nature or kind relating to the franchised business, whether for cash or credit and regardless of collection in the case of credit..." (Exhibit 1, article 4.6.)

15. Pursuant to Article 5.8 of the Franchise Agreement, Defendant is obligated to "contribute to the Marketing Fund four percent (4%) of [the] Net Sales of [Franchisee's]

Restaurant...[and] [s]uch fees shall be paid weekly in the manner set forth in Article 4.”
(Exhibit 1, article 5.8.)

16. Pursuant to Article 8.2 of the Franchise Agreement, Defendant is obligated to:

employ, in addition to the Operating Principal at least two (2) managers per Restaurant who are certified by Dickey’s to carry out the day-to-day management and supervision of each such Restaurant. To be certified, such manager must satisfactorily complete the initial training obligations set forth in Article 9, shall meet Dickey’s education, managerial and business standards and shall be approved in writing by Dickey’s. In addition, any manager must devote full time and best efforts to the daily management and supervision of your Restaurant...

(Exhibit 1, article 8.2.)

17. Pursuant to Article 8.3 of the Franchise Agreement, “[t]he Operating Principal and at least two (2) managers shall meet any other of Dickey’s standards and criteria for such positions, as set forth in the Manuals or otherwise in writing by Dickey’s.” (Exhibit 1, article 8.3.)

18. Pursuant to Article 8.4 of the Franchise Agreement, Defendant is required to meet the following training requirements:

The Operating Principal and at least two (2) managers shall satisfy the training requirements set forth in Article 9. If, during the term of this Agreement, the Operating Principal or any manager is not able to continue to serve in such capacity or no longer qualifies to act as such in accordance with this Article 8, you shall promptly notify Dickey’s and designate a replacement within thirty (30) days after the Operating Principal or manager ceases to serve, such replacement being subject to the same qualifications listed above. You shall provide for interim management of your Restaurant until such replacement is so designated, and such interim management to be conducted in accordance with this Agreement.

(Exhibit 1, article 8.4.)

19. Pursuant to Article 8.9 of the Franchise Agreement, Defendant is required to meet the following health and safety requirements:

You shall meet and maintain the highest health and safety standards and ratings applicable to the operation of your Restaurant. You shall furnish to Dickey's, within three (3) days after receipt thereof, a copy of any inspection report, warning, citation, certificate, rating, and any other document, of whatever nature or kind, issued by any federal, state, local, or other administrative agency, instrumentality or other organization with respect to the health or safety conditions of your Restaurant. To ensure the highest degree of health and safety of both your customers and employees, you shall prohibit unauthorized persons from gaining access to the kitchen.

(Exhibit 1, article 8.9.)

20. Article 8.10 of the Franchise Agreement requires the following from Defendant with respect to products and services:

To ensure that the highest degree of quality and service is maintained, you shall operate your Restaurant in strict conformity with such methods, procedures, standards and specifications as Dickey's may from time to time prescribe in the Manuals or otherwise in writing. You further agree:

1. To offer for sale and sell at your Restaurant all menu items and other designated products and services required by Dickey's and to provide such products and services in the manner and style prescribed by Dickey's;
2. To sell and offer for sale only the menu items, products and services that have been expressly approved for sale in writing by Dickey's, to refrain from deviating from Dickey's standards and specifications without Dickey's prior written consent, and to discontinue selling and offering for sale any menu items, products or services which Dickey's may, in its discretion, disapprove in writing at any time;
3. To maintain in sufficient supply and to use and sell at all times only such food and beverage items, ingredients, products, materials, supplies, uniforms, and paper goods that conform to Dickey's standards and specifications and that are purchased from vendors or suppliers approved by Dickey's, to prepare all menu items in strict accordance with Dickey's recipes and procedures for preparation contained in the Manuals or other written directives, including, but not limited to, the prescribed measurements of ingredients and serving sizes, and to refrain from deviating from Dickey's standards and specifications by the use or offer of non-conforming items or differing amounts of any items, without Dickey's prior written consent;
4. To permit Dickey's and its representatives and agents, at any reasonable time, to remove samples of food or non-food items from your inventory or from your Restaurant, without payment therefor, in amounts reasonably necessary for

testing by Dickey's or an independent laboratory to determine whether such samples meet Dickey's then-current recipes, standards and specifications. In addition to any other remedies it may have under this Agreement, Dickey's may require you to bear the cost of such testing if the supplier of the item has not previously been approved by Dickey's or if the sample fails to conform with Dickey's specifications.

(Exhibit 1, article 8.10.)

21. Pursuant to Article 8.11 of the Franchise Agreement, Defendant is obligated to:

obtain all food and beverage items, ingredients, supplies, and equipment...materials and other products used or offered for sale at or from [his] Restaurant solely from vendors or suppliers (including manufacturers, distributing and other sources) approved by Dickey's...

(Exhibit 1, article 8.11.)

22. Pursuant to article 8.16 of the Franchise Agreement, Defendant is required to, at his expense,:

repair, paint and keep in a clean and sanitary condition the interior, the exterior, the parking lot, menu boards (interior and exterior, as applicable), signage, interior and exterior lighting, and the grounds of your Restaurant and the Accepted Location, and will replace all floor covering, wall coverings, light fixtures, curtains, blinds, shades, furniture, room furnishings, wall hangings, menu boards, signs, fixtures and other decor items as such items become worn-out, soiled or in disrepair. All mechanical equipment, including ventilation, heating and air conditioning, must be kept in good working order by you at all times and must meet Dickey's quality standards. All replacement equipment, décor items, furniture, fixtures, menu boards, signs, supplies and other items used in your Restaurant by you must comply with Dickey's then-current standards and specifications.

(Exhibit 1, article 8.16.)

23. Pursuant to Article 8.21 of the Franchise Agreement, Defendants must:

require your employees to wear the current standard attire uniforms as may be established and approved by Dickey's from time to time. All of your employees will wear clean and neat attire or uniforms and practice good personal hygiene as prescribed in the Dickey's Employee Handbook, if any, or other written directive.

(Exhibit 1, article 8.21.)

24. Pursuant to Article 9 of the Franchise Agreement, Defendants are required to meet the following training requirements:

You agree that it is necessary to the continued operation of the System and your Restaurant that you, the Operating Principal, any managers of your Restaurant and other Restaurant personnel receive the training as specified in the Manuals or as Dickey's may otherwise require and accordingly agree as follows:

9.1 INITIAL TRAINING PROGRAM.

1. Not later than twenty (20) days prior to the Opening Date, the Operating Principal and two (2) other managers (or, if Dickey's permits, three (3) of your employees other than the Operating Principal) shall have attended and completed, to Dickey's satisfaction, Dickey's initial training program.

2. Without limiting Dickey's right to terminate this Agreement pursuant to Article 16, if the initial training program is not satisfactorily completed by any replacement employee (or the initial designees if no replacement is designated) or if Dickey's determines that the training program cannot be satisfactorily completed by such person(s), as set forth above, Dickey's may, in its sole discretion, terminate this Agreement effective immediately upon notice to you. Dickey's shall not be obligated to return the Franchise Fee or any other fee paid by you under this Agreement.

9.3 MANAGERS; CHANGES IN PERSONNEL. If your Operating Principal or any trained manager shall, for any reason, cease to serve in such capacity, your replacement must, at your expense, be trained at an approved Dickey's Restaurant, and must successfully complete the management training program prior to being able to work in your Restaurant.

(Exhibit 1, article 9.)

25. The following provisions from Article 16 of the Franchise Agreement are applicable to this matter with respect to the default provisions:

16.1 EVENTS OF DEFAULT NOT SUBJECT TO NOTICE AND CURE. You shall be in default under this Agreement, and, at Dickey's option, all rights granted herein shall automatically terminate without notice to you, if:

...

6. You cease operation of your Restaurant, after opening, and such cessation continues for at least ten (10) days;

...

16.2 EVENTS OF DEFAULT SUBJECT TO 7-DAY NOTICE AND CURE
You shall be in default and Dickey's may, at its option, terminate this Agreement after notice to you, upon the occurrence of any of the following breaches hereunder, and such breaches are not cured to Dickey's satisfaction within seven (7) days following the date of written notice of default from Dickey's, if:

1. You fail to operate your Restaurant in accordance with the provisions, standards and specifications of Dickey's set forth in Articles 7 and 8 hereof or in the Manuals or other written directives of Dickey's (and in particular, and without limiting the generality of the foregoing, you shall comply with the provisions, standards and specifications set forth in Article 8 hereof); provided that any failure to operate your Restaurant pursuant to Article 8.9 shall be governed by Article 16.1;

2. You fail to timely pay your initial Franchise Fee, royalty fees, Marketing Fund contribution or any other monetary obligations owed to Dickey's or its affiliates under this Agreement or otherwise (including, without limitation, any interest accrued on any overdue payments), or, your failure to timely submit your Monthly Sales Report;

...

Provided, if you commit or permit any of these breaches two (2) times during any twelve (12) month period, Dickey's shall not be obligated to provide you notice or an opportunity to cure any subsequent breaches prior to terminating your rights under this Agreement. If any fact or circumstance giving rise to any event of default described in Article 16.2 is not susceptible to cure, such event of default shall be deemed an event of default under Article 16.1 and not subject to any notice and cure.

...

16.3 EVENTS OF DEFAULT SUBJECT TO 30-DAY NOTICE AND CURE.
You shall be in default and Dickey's may, at its option, terminate this Agreement upon notice to you, upon the occurrence of any of the following breaches hereunder, and such breaches are not cured to Dickey's satisfaction within thirty (30) days following the date of written notice of default from Dickey's, if:

1. You or your Principals breach any other covenant, agreement, obligation or term set forth in this Agreement (other than such breaches specified in Articles 16.1 and 16.2); or

2. If any representation or warranty made by you or your Principals in this Agreement or in any certificate, report, notice, financial statement or other

document furnished to Dickey's at any time in connection with this Agreement or the operation of your Restaurant shall be false, misleading or erroneous in any material respect when made.

Provided, if you commit or permit any of these breaches two (2) times during any twelve (12) month period, Dickey's shall not be obligated to provide you notice or an opportunity to cure any subsequent breaches prior to terminating your rights under this Agreement. If any fact or circumstance giving rise to any event of default described in Article 16.3 is not susceptible to cure, such event of default shall be deemed an event of default under Section 16.1 and not subject to any notice and cure.

(Exhibit 1, article 16.)

26. Pursuant to Article 18 of the Franchise Agreement, Defendant agreed to the following covenants:

1. You covenant that during the term of this Agreement, except as otherwise approved in writing by Dickey's, you and the Operating Principal shall devote full time, energy and best efforts to the management and operation of the franchised business.

...

5. You and your Principals expressly agree that the existence of any claims you may have against Dickey's, whether or not arising from this Agreement, shall not constitute a defense to the enforcement by Dickey's of the covenants in this Article 18, you and your Principals agree to pay all costs and expenses (including reasonable legal fees), incurred by Dickey's in connection with the enforcement of this Article.

(Exhibit 1, article 18.)

C. BREACHES AND VIOLATIONS OF THE FRANCHISE AGREEMENT BY DEFENDANTS.

27. Almost immediately upon opening his Dickey's Barbecue Pit Restaurant located at 1660 South Valley Drive, Las Cruces, New Mexico (the "Restaurant"), Defendant began violating the terms of the Franchise Agreement, causing damages to Plaintiff. Defendant's violations include, but are not limited to, failure to purchase food products, including Plaintiff's

proprietary menu items, from Plaintiff's approved suppliers; failure to comply with food safety and health standards; poor customer service; poor management and poor staff supervision training, as observed by Dickey's field representatives and confirmed by customer complaints; failure to follow the operating methods, management, financial reporting and customer service standard established by the operations manual and Franchise Agreement; failure to provide complete monthly sales reports; high voids reported on sales reports (often a sign of employee theft) and failure to address the same; food storage at improper temperatures; failure to employ the required number of certified managers; failure to pay appropriate royalties; failure to abide by the business model set forth in the Franchise Agreement and operations manual; and failure to maintain operations of the Restaurant.

28. On or about July 24, 2012, Plaintiff sent Defendant written notice of non-compliance ("July 2012 Non-Compliance Notice") with the terms of the Franchise Agreement, wherein he was provided notice that he must cease purchasing food and other products for use and service in the Restaurant from unapproved suppliers. A true and correct copy of the July 2012 Non-Compliance Notice is attached hereto as "Exhibit 2." The July 2012 Non-Compliance Notice provided Defendant an opportunity to cure until August 7, 2012.

29. Defendant continued purchasing products from unapproved suppliers. On or about August 7, 2012, Plaintiff sent Defendant a notice of default (the "August 2012 Notice of Default") via certified mail, return receipt request, wherein he was provided an additional six days to cease purchasing products from unapproved suppliers. A true and correct copy of August 2012 Notice of Default is attached hereto as "Exhibit 3."

30. Defendant continued purchasing products from unapproved suppliers. On or about August 30, 2012, Defendant notified Plaintiff of his intent to cease operation of the

Restaurant on September 30, 2012, approximately seventeen years prior to the expiration of the franchise term under the Franchise Agreement.

31. On or about August 31, 2012, Plaintiff sent Defendant written notice (the “Early Termination Correspondence”) that, in the event he ceased operation of the Restaurant on September 30, 2012, he would be in breach of the Franchise Agreement for premature termination and subject to actual damages, liquidated damages, attorneys’ fees, and costs. A true and correct copy of the Early Termination Correspondence is attached hereto as “Exhibit 4.”

32. Thereafter, Plaintiff and Defendant entered into extensive negotiations to locate a buyer for the Restaurant to ensure that the Restaurant remained present and in continuous operation in the Las Cruces market. Plaintiff also entered into extensive negotiations with Defendant’s lender regarding a short sale of the Restaurant and release of Defendant’s personal guaranty and second mortgage.

33. Defendant ceased making royalty and marketing fund payments in October 2012. On or about October 12, 2012, Plaintiff sent Defendant written notice of non-compliance (“October 2012 Non-Compliance Notice), wherein he was provided the opportunity to bring his account current before Plaintiff commenced default and termination procedures. A true and correct copy of the October 2012 Non-Compliance Notice is attached hereto as “Exhibit 5.” Defendant failed to bring his account current.

34. On or about November 1, 2012, Plaintiff sent Defendant, through his counsel, Matthew G. Watson, notice of default and intent to terminate (the “November 2012 Notice of Default”), wherein he was provided formal notice of his default under the Franchise Agreement for failure to pay royalty and marketing fund fees and continued failure to purchase food and other products from only Plaintiff’s approved suppliers. A true and correct copy of the

November 2012 Notice of Default is attached hereto as “Exhibit 6.” The November 2012 Notice of Default provided Defendant until November 9, 2012 to cure his default.

35. Defendant failed to timely cure his default of the Franchise Agreement.

36. Plaintiff continued its negotiations with Defendant’s lender regarding the short sale of the Restaurant and agreed on a purchase price and a closing date of December 31, 2012. On or about November 7, 2012, Plaintiff and Defendant entered into a Termination Agreement and General Release (the “Termination Agreement”), whereby the parties agreed that Defendant would continue operating the Restaurant “in strict compliance with the terms of the Franchise Agreement and Operations Manual.” (See Termination Agreement, ¶ 3, a true and correct copy of which is attached hereto as “Exhibit 7.”) Plaintiff agreed to waive Defendant’s past due marketing fund fees and all marketing fund fees that accrued after the date of the Termination Agreement to assist Defendant in maintaining sufficient funds to operate the Restaurant in accordance with the Termination Agreement and Franchise Agreement until the closing date.

37. A routine operations evaluation of the Restaurant conducted by Plaintiff on December 5, 2012 revealed numerous violations of the Franchise Agreement. On same date, Plaintiff sent to Defendant, via his counsel, Mr. Watson, a notice of default (the “December 2012 Notice of Default”), wherein he was provided written notice of his numerous defaults under both the Franchise Agreement and Termination Agreement. A true and correct copy of the December 2012 Notice of Default is attached hereto as “Exhibit 8.”

38. Defendant failed to cure his default or otherwise respond to the December 2012 Notice of Default. Further, Defendant represented that he does not intend to proceed with the sale of the Restaurant to Plaintiff, and instead, intends to cease operation of the Restaurant on December 31, 2012.

39. Defendant has since ceased operation of the Restaurant on or about December 31, 2012 and such cessation has continued for at least ten days.

**IV.
CAUSES OF ACTION**

COUNT ONE – DECLARATORY JUDGMENT

40. Paragraphs 1 through 39 are incorporated and made a part of this claim.

41. Defendant has failed to operate the Restaurant in accordance with Dickey's system standards and specific Franchise Agreement provisions, in breach of his obligations under the Franchise Agreement.

42. Plaintiff is entitled to a Declaratory Judgment that Defendant has materially violated the Franchise Agreement and is in default pursuant to the terms of the Franchise Agreement. Should Defendants be found in default, Plaintiff has the right to terminate the Franchise Agreement and is entitled to liquidated or actual damages as well as interest, attorneys' fees and costs of suit.

COUNT TWO – INJUNCTIVE RELIEF

43. Paragraphs 1 through 42 are incorporated and made a part of this claim.

44. Defendant has failed to operate the Restaurant in accordance with Dickey's system standards and specific Franchise Agreement provisions, in breach of his obligations under the Franchise Agreement.

45. Defendant's on-going acts of non-compliance and breach are willful and deliberate.

46. Defendant's on-going acts of non-compliance and breach have inflicted and continue to inflict irreparable harm on Plaintiff.

47. Plaintiff has no adequate remedy at law.

48. No previous injunctive relief has been awarded with respect to this matter in this case or any other case.

49. Plaintiff is entitled to an Order enjoining Defendant from displaying or utilizing the Dickey's name or Marks and from operating any barbeque style restaurant in the subject area of Las Cruces, New Mexico, should he continue to fail to comply with the terms and obligations of the Franchise Agreement. Should the Court find that Defendant shall be enjoined in the manner so described, Plaintiff additionally requests liquidated or actual damages due to the breach as well as interest, attorneys' fees and costs of suit. Or, in the alternative, Plaintiff seeks an Order requiring Defendant to specifically perform with the terms of the Franchise Agreement.

COUNT THREE – BREACH OF CONTRACT

50. Paragraphs 1 through 49 are incorporated and made a part of this claim.

51. By virtue of the premature termination of the Franchise Agreement, Plaintiff sustained a loss of future revenue over the remainder of the term of the Franchise Agreement.

52. Plaintiff has been damaged by Defendant breach of its obligation to operate a Dickey's for the remaining term of the Franchise Agreement.

53. Defendant has failed to make payments in accordance with the terms of the Franchise Agreement based on Net Sales.

54. Plaintiff has been damaged by Defendant's failure to make proper payments in accordance with the Franchise Agreement.

55. Defendant has failed to operate the Restaurant in accordance with accepted food safety standards in breach of Article 8.9 of the Franchise Agreement.

56. Defendant has failed to purchase and offer for sale Plaintiff's approved food and products in the Restaurant in breach of Articles 8.10 and 8.11 of the Franchise Agreement.

57. Defendant has ceased operations of the Restaurant in violation of Article 16.1 of the Franchise Agreement.

58. Defendant has failed to comply with other material provisions of the Franchise Agreement.

59. These breaches and failures by Defendants have damaged Plaintiff.

60. Plaintiff is entitled to an Order against Defendants for actual damages in an amount to be determined at trial, liquidated damages, interest, attorneys' fees, and costs of suit.

COUNT FOUR – FRAUDULENT INDUCEMENT

61. Paragraphs 1 through 60 are incorporated and made a part of this claim.

62. Defendant made material representations regarding his intent to sell the Restaurant to Plaintiff on or before December 31, 2012 for the purchase price agreed upon by Plaintiff and Defendant's lender.

63. At the time that Defendant made such representations regarding his intent to sell the Restaurant to Plaintiff, he knew that they were false. Defendant in fact sought only to induce Plaintiff to release Defendant from his liability for lost future royalties under the Franchise Agreement and waive past due and accruing fees due under the Franchise Agreement.

64. Plaintiff relied on Defendant's material misrepresentations and entered into the Termination Agreement.

65. Defendant's fraudulent inducement of Plaintiff to execute the Termination Agreement has damaged Plaintiff.

66. Plaintiff is entitled to an Order against Defendant for actual damages in an amount to be determined at trial, exemplary damages, interest, attorneys' fees, and costs of suit.

67. All conditions precedent to the filing of this suit have occurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in its favor as follows:

1. Plaintiff seeks a Declaratory Judgment that Defendant has materially violated the Franchise Agreement and is in default pursuant to the terms of the Franchise Agreement. Should Defendant be found in default, Plaintiff seeks a declaration that it has a right to terminate the Franchise Agreement and is entitled to liquidated or actual damages as well as interest, attorneys' fees and costs of suit.

2. Plaintiff seeks an Order enjoining Defendant from displaying or utilizing the Dickey's name or Marks and from operating any barbeque style restaurant in the subject area of Las Cruces, New Mexico, should he continue to fail to comply with the terms and obligations of the Franchise Agreement. Should the Court find that Defendant shall be enjoined in the manner so described, Plaintiff additionally seeks liquidated or actual damages due to the breach as well as interest, attorneys' fees and costs of suit. Or, in the alternative, Plaintiff seeks an Order requiring Defendant to specifically perform with the terms of the Franchise Agreement.

3. Plaintiff seeks an Order against Defendant for actual damages in an amount to be determined at trial, liquidated damages, exemplary damages, interest, attorneys' fees and costs of suit.

4. Plaintiff seeks restitution of all benefits Defendant has derived from his operation of a Dickey's restaurant in violation of the Franchise Agreement in an amount to be proven at trial.

Respectfully submitted,

By: /s/ Bradley E. Chambers
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CERTIFICATE OF SERVICE

I hereby certify that on this the 15th day of January, 2013, I electronically transmitted the attached document to the Clerk of the Court using the ECF system for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrant(s):

Robert R. Fueille
Scotthulse, PC
201 East Main
P.O. Box 99123
El Paso, Texas 79999-9123
(915) 533-2493
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Attorney for Defendant

/s/ Bradley E. Chambers

BRADLEY E. CHAMBERS