

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

**DICKEY'S BARBECUE  
RESTAURANTS, INC.**

**Plaintiff,**

**v.**

**ERIC R. MULKEY**

**Defendant.**

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**Civil Action No.**

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**PLAINTIFF'S ORIGINAL COMPLAINT**

Plaintiff, Dickey's Barbecue Restaurants, Inc. ("Plaintiff" or "Dickey's"), for its Original Complaint against Eric R. Mulkey ("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, Eric Mulkey, is an individual and resident of the state of Georgia, and may be served with process at his primary residence at 553 Old Mill Ct. Norcross, Georgia 30093. Summons is requested.

**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 15, 2013 (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 Barbecue 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 Barbecue Restaurants, Inc. was formed in 1994 and franchising of Dickey's Barbecue Pit® restaurants 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®" 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 15, 2013, Dickey's entered into the Franchise Agreement with Defendant to operate a Dickey's Barbecue Pit® in Warner Robins, Georgia (the "Restaurant"). (Exhibit 1.)

**B. MATERIAL PROVISIONS OF THE FRANCHISE AGREEMENT.**

13. Pursuant to Article 2.1 of the Franchise Agreement, Plaintiff and Defendant agreed that the initial term of the Franchise Agreement would be twenty (20) years from the effective date of the Franchise Agreement. (Exhibit 1, Article 2.1)

14. Pursuant to Article 8.7 of the Franchise Agreement, Defendant agreed to operate the Restaurant and "maintain business hours as provided for in the Manuals or as Dickey's may specify from time to time in writing." (Exhibit 1, Article 8.7)

15. Article 8.10 of the Franchise Agreement requires the following from Defendant Franchisee 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.)

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

**"16.2 EVENTS OF DEFAULT SUBJECT TO NOTICE BUT WITHOUT CURE** You shall be in default and Dickey's may, at its option, terminate this Agreement upon delivery of written notice and without providing you an opportunity to cure if:

1. You cease operation of your Restaurant, after opening, and such cessation continues for at least ten (10) days;
2. Any transfer in violation of Article 15;
3. You are in default under your lease of your Restaurant premises;..."

(Exhibit 1, Article 16.2)

17. The following provisions from Article 17 of the Franchise Agreement are applicable to this matter with respect to the termination provisions:

"1. You shall immediately cease to operate your Restaurant as a Dickey's Restaurant and shall not thereafter, directly or indirectly, represent to the public or hold yourself out as a present or former franchisee of Dickey's. Unless otherwise indicated in a writing from Dickey's, you shall pay to Dickey's in a single lump-sum payment, as liquidated damages and not as a penalty, royalty fees for the remaining term of the Agreement (or the renewal term, if applicable) calculated based upon the average Net Sales of your Restaurant for the twelve (12) complete calendar months prior to termination. If, for example, your average Net Sales for the twelve (12) preceding

calendar months was \$83,333.33 per month, and you have three (3) years remaining on the term of your Agreement, your liquidated damages would be \$150,000.00 (\$83,333.33 x five percent (5%) royalty x twelve (12) calendar months in a year x three (3) remaining years). If, at the time of termination, your Restaurant had not yet opened for business or had been operating for less than twelve (12) months, liquidated damages will be calculated based upon the average Net Sales of all Dickey's Restaurants in operation for less than twelve (12) months."

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

18. On October 11, 2013, Plaintiff was notified that Defendant was in default of the commercial real estate lease for the Restaurant premises for failure to pay rent. On October 18, 2013, Plaintiff provided written notice to Defendant of his default under Article 16.2 of the Franchise Agreement and demanded that, in order to avoid termination of the Franchise Agreement, he cure his default on or before November 18, 2013. *See* Notice of Default (a true and correct copy of which is attached hereto as Exhibit 2). As of the date of this filing, Defendant has not cured his default.

19. On or about November 25, 2013, Defendant contacted Plaintiff and advised that, as a result of his failure to pay amounts due and owing, the approved vendor for Dickey's Barbecue Pit® had placed his account on hold. He further advised that, due to a lack of product and supplies, the Restaurant would not be open the following day. On November 26, 2013, the Restaurant was not open for business.

20. On November 26, 2013, Defendant sent a formal Notice of Termination under the Franchise Agreement. *See* Notice of Termination (a true and correct copy of which is attached hereto as Exhibit 3).

**IV.  
CAUSES OF ACTION**

**COUNT ONE - BREACH OF CONTRACT**

21. Paragraphs 1 through 20 are incorporated and made a part of this claim.

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

23. Specifically, Plaintiff has sustained a loss of future revenue over the remainder of the term of the Franchise Agreement.

24. As a result of Defendant's failure to continue operating the Restaurant during normal business, Plaintiff has also sustained damage to its brand and the goodwill of the System.

25. Pursuant to Article 17.1 Plaintiff is further entitled to liquidated damages in the amount of \$320,930.52.

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

**PRAYER FOR RELIEF**

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

27. Plaintiff requests that the Defendant be cited to appear and answer, and that upon final trial, Plaintiff have judgment against Defendant for all relief requested, pre-judgment interest, post judgment interest, costs of this suit, and all such other and further relief to which Plaintiff may show itself justly entitled, at law or in equity.

Respectfully submitted,

By: /s/ Christine S. Johnson  
Christine S. Johnson  
Texas State Bar No. 24041874

Sarah A. Walters  
Texas State Bar No. 24070842

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