

**FILED**

SEP 14 2012

  
CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

DICKEY'S BARBECUE RESTAURANTS, )  
INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
LEO R. HOLWAY AND KELLY A. STACY, )  
 )  
Defendant. )

CIV NO.: 12-5065

**COMPLAINT FOR  
DECLARATORY  
JUDGMENT, INJUNCTIVE  
RELIEF AND OTHER  
RELIEF**

Plaintiff, Dickey's Barbecue Restaurants, Inc. ("Dickey's"), for its Complaint for Declaratory Judgment and Other Relief against Defendants, Leo R. Holway ("Holway") and Kelly A. Stacy ("Stacy") (collectively the "Defendants"), states as follows:

**THE PARTIES**

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, Leo R. Holway, is an individual with his primary residence at 6632 Wellington Drive, Rapid City, South Dakota, 57702.
3. Defendant, Kelly A. Stacy, is an individual with her primary residence at 6632 Wellington Drive, Rapid City, South Dakota, 57702.
4. Upon information and belief, Defendants Holway and Stacy are currently married.

**JURISDICTION AND VENUE**

5. 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.

6. Upon information and belief, each of the Named Defendants has sufficient contacts with this state and district such that this Court's exercise of personal jurisdiction over them comports with traditional notions of fair play and substantial justice.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

## **FACTUAL ALLEGATIONS**

### **A. FACTUAL BACKGROUND.**

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

9. 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.

10. 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.

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

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

13. 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**).

14. On or about October 17, 2009, Defendants submitted a Franchise Application to Plaintiff. A true and correct copy of the Franchise Application is attached hereto as **Exhibit 2**.

15. The October 17, 2009 Franchise Application contains several material misrepresentations and omissions including, but not limited to, Defendant Holway's negative answer to the question of whether he had ever been involved in a legal action, and his related failure to disclose ten prior legal actions, a federal tax lien and two prior bankruptcy filings. *See* Exhibit 2.

16. On or about October 28, 2009, Dickey's entered into a Franchise Agreement with Defendants to develop and operate a Dickey's Barbeque Pit in Rapid City, South Dakota. Exhibit 1.

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

17. 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.

18. 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.

19. Pursuant to Article 8.2 of the Franchise Agreement, Defendants are 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 educational, 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. The Operating Principal shall execute this Agreement as one of your Principals and shall be individually, jointly, and severally bound by all obligations of you the Operating Principal and your Principals hereunder.

Exhibit 1, article 8.2.

20. 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.

21. Pursuant to Article 8.4 of the Franchise Agreement, Defendants are 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

22. Pursuant to Article 8.8 of the Franchise Agreement, Defendants are required to maintain the following standards:

maintain competent, conscientious and trained personnel to operate your Restaurant in accordance with this Agreement and the Manuals and all applicable laws, regulations, and codes of your jurisdiction and to take such steps as are necessary to ensure that your employees establish and preserve good customer

relations, comply with such dress code and/or wear such uniforms as Dickey's may prescribe in the Manuals or otherwise and observe reasonable standards of grooming and cleanliness.

Exhibit 1, article 8.8.

23. Pursuant to Article 8.9 of the Franchise Agreement, Defendants are 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.

24. Article 8.10 of the Franchise Agreement requires the following from Defendants 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.

25. Pursuant to article 8.16 of the Franchise Agreement, Defendants are required to, at their expense,:

[R]epair, 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.

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

[R]equire 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.

27. Pursuant to Article 8.22, Defendants are required to:

[G]rant Dickey's and its representatives and agents the right to enter upon your Restaurant premises at any time for the purpose of conducting inspections of your Restaurant and its operation. You shall cooperate with Dickey's representatives and agents by rendering such assistance as they may reasonably request and: upon notice from Dickey's or its representatives and agents and without limiting Dickey's other rights under this Agreement, you shall take such steps as may be necessary to correct immediately any deficiencies detected during any such inspection. Should you fail to correct such deficiencies within a reasonable time as determined by Dickey's, Dickey's shall have the right (without, however, any obligation), to correct such deficiencies and to charge you a reasonable fee for Dickey's expenses so acting, payable by you immediately upon demand.

Exhibit 1, article 8.22.

28. 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.

29. Pursuant to Article 13 of the Franchise Agreement, Defendants are required to maintain the following records:

You shall maintain during the term of this Agreement and shall preserve for such period as may be required by law but not less than three (3) years from the dates of their preparation full, complete and accurate books, records and accounts including, but not limited to, sales slips, coupons, purchase orders, purchase invoices, payroll records, check stubs, bank statements, sales tax records and returns, cash receipts and disbursements, journals and ledgers in accordance with generally accepted accounting principles on a timely basis and in a consistent form and manner as prescribed by Dickey's from time to time in the Manuals or in other written directives.

Exhibit 1, article 13.

30. 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 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.

31. Pursuant to Article 18 of the Franchise Agreement, Defendants 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.**

32. As early as June, 2010, Defendants began violating the terms of the Franchise Agreement, causing damages to Plaintiff. Defendants' violations include, but are not limited to, failure to verify that expenses reported as attributable to the Restaurant were indeed related to the operation of the Restaurant despite repeated requests for verification; 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; failures to provide monthly sales reports; high voids reported on sales reports (often a sign of employee theft) and failure to address the same; the use of the Restaurant floor for perishable food thawing and food storage on the floor; food storage at improper temperatures; failure to employ the required number of certified managers; failure to pay appropriate royalties and failure to abide by the business model set forth in the Franchise Agreement and operations manual.

33. Upon information and belief, Defendant Holway would frequently be absent from the Store premises during operating hours, without appointing a qualified trained store manager to supervise operation of the Store. Defendant Holway's management style would create a

difficult environment for employees and would be heard by customers to utter offensive language while talking about the staff, harming the goodwill and image of the Dickey's system and brand, and the reputation of the Restaurant in the community. Holway's own consultant verified this observation, which was also communicated by Dickey's staff. *See Attached* is a true and correct copy of correspondence from Holway's consultant as **Exhibit 3**.

## **COUNT ONE**

### **DECLARATORY JUDGMENT**

34. Paragraphs 1 through 33 are incorporated and made a part of this claim.

35. Defendants have failed to operate the Restaurant in accordance with Dickey's system standards and specific Franchise Agreement provisions, in breach of their obligations under the Franchise Agreement.

36. Plaintiff is entitled to a Declaratory Judgment that Defendants have materially violated the Franchise Agreement and are 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**

37. Paragraphs 1 through 36 are incorporated and made a part of this claim.

38. Defendants have failed to operate the Restaurant in accordance with Dickey's system standards and specific Franchise Agreement provisions, in breach of their obligations under the Franchise Agreement.

39. Defendants' on-going acts of non-compliance and breach are willful, and deliberate.

40. Defendants' on-going acts of non-compliance and breach have inflicted and continue to inflict irreparable harm on Plaintiff.

41. Plaintiff has no adequate remedy at law.

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

43. Plaintiff is entitled to an Order enjoining Defendants from displaying or utilizing the Dickey's name or Marks and from operating any barbeque style restaurant in the subject area of Rapid City, South Dakota, should they 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 Defendants to specifically perform with the terms of the Franchise Agreement.

### **COUNT THREE**

#### **BREACH OF CONTRACT**

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

45. 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.

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

47. Defendants have failed to make payments in accordance with the terms of the Franchise Agreement based on Net Sales.

48. Plaintiff has been damaged by Defendants' failure to make proper payments in accordance with the Franchise Agreement.

49. Defendants have failed to operate the Restaurant in accordance with accepted food safety standards in breach of Section 8.9 of the Franchise Agreement.

50. Defendants have failed to comply with other material provisions of the Franchise Agreement.

51. These other breaches and failures by Defendants have damaged Plaintiff.

52. 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**

#### **UNJUST ENRICHMENT**

53. Paragraphs 1 through 52 are incorporated and made a part of this claim.

54. Defendants have been operating a Dickey's restaurant in a manner which does not comply with the Franchise Agreement between the parties, including, but not limited to the failure by Defendants to accurately record their Net Sales and pay appropriate royalties to Plaintiff.

55. Defendants have received substantial benefit from their operation of the restaurant in such a manner.

56. It would be unjust, unfair and inequitable for Defendants to be permitted to retain those benefits.

57. Accordingly, Plaintiff seeks restitution of all such benefits from Defendants in an amount to be proven at trial.

### **COUNT FIVE**

#### **ACCOUNTING**

58. Paragraphs 1 through 57 are incorporated and made a part of this claim.

59. Defendants are indebted to Plaintiff for the reasons set forth above.

60. The exact amount of monies from Defendants to Plaintiff is unknown to Plaintiff and cannot be ascertained without an accounting of Defendants' operations.

61. Article 13 of the Franchise Agreement provides for these materials to be provided to Plaintiff for audit, and for accurate books and records of the business to be maintained by the Defendants in accordance with generally accepted accounting principles. Defendants were observed to utilize a separate credit card processing terminal that was not connected to the point of sale computer system intended to track all sales transactions. Plaintiff demanded that Defendants cease using such a system and follow the operations manual requirement for processing all credit card transactions through the point of sale system. Defendants have refused to provide verification that all sales transactions, particularly catering transactions, have been properly entered into the point of sale accounting system. *See* Exhibit 1, article 13.

62. Accordingly, the Court should Order that there be an accounting of Defendants' operations and Order that Defendants pay over to Plaintiff all amounts due and owing to Plaintiff, plus interest thereon, as well as attorneys' fees and costs.

### **COUNT SIX**

#### **FRAUD / INTENTIONAL MISREPRESENTATION**

63. Paragraphs 1 through 62 are incorporated and made a part of this claim.

64. Defendants signed a Franchise Application on or about October 17, 2009. Exhibit 2.

65. In the Franchise Application, Defendants make several statements of fact which were untrue and known to be untrue by Defendants, including, but not limited to the failure to disclose numerous past legal actions, including at least two prior bankruptcies and a federal tax lien.

66. These statements were made recklessly and with the intent to deceive Plaintiff and induce it to act on the same.

67. The statements were also willful and made with intent to deceive and to induce Plaintiff to alter its position to its injury or risk.

68. Plaintiff relied on the information contained in the Franchise Application in considering whether to enter into a Franchise Agreement with Defendants. Plaintiff's position was altered to its injury and/or risk due to Defendants' intentional and willful deception. Plaintiff was unaware of the falsity of the representations by Defendants. Plaintiff would not have entered into a Franchise Agreement with Defendants had it known of the falsity of the representations made by Defendants.

69. Plaintiff has been damaged by its reliance on Defendants' intentional and willful deception.

70. Plaintiff is entitled to actual and punitive damages in an amount to be determined at trial, interest, attorneys' fees and costs of suit.

## **COUNT SEVEN**

### **DECEIT**

71. Paragraphs 1 through 70 are incorporated and made a part of this claim.



72. In the alternative, Plaintiff asserts this count against Defendants.

73. Defendants made one or more statements of fact (contained in Exhibit 2) that were not true.

74. Defendants did not believe the representations to be true.

75. Alternatively, Defendants made one or more statements of fact (contained in Exhibit 2) that were not true and Defendants had no reasonable grounds for believing them to be true.

76. Alternatively, Defendants suppressed certain information or provided information that was likely to mislead Plaintiff about Defendants and their financial position, ability to run a business, etc.

77. Plaintiff has been damaged by the deceit of Defendants in an amount to be determined at trial.

## **COUNT EIGHT**

### **NEGLIGENT MISREPRESENTATION**

78. Paragraphs 1 through 77 are incorporated and made a part of this claim.

79. In the alternative, Plaintiff asserts this Count against Defendants.

80. Defendants made one or more misrepresentations to the Plaintiff (as contained in Exhibit 2).

81. The representations were made without reasonable grounds for believing the statements to be true.

82. Defendants made the representations with the intent to induce Plaintiff to enter into a Franchise Agreement with Defendants.

83. Defendants did enter into a Franchise Agreement with Plaintiff with actual and justifiable reliance on the statements of Defendants.

84. Plaintiff has been damaged by the negligent misrepresentations of Defendants in an amount to be determined at trial.

## **COUNT NINE**

### **FRAUDULENT CONCEALMENT**

85. Paragraphs 1 through 84 are incorporated and made a part of this claim.

86. In the alternative, Plaintiff asserts this Count against Defendants.

87. Defendants intentionally concealed or suppressed their prior litigation history, their prior bankruptcies, and pending tax liens.

88. Defendants intentionally concealed or suppressed these facts with intent to defraud Plaintiff.

89. In justifiable reliance on these misrepresentations and omissions, Plaintiff was unaware of Defendants' true intent and would not have entered into a Franchise Agreement with Defendants if Plaintiff had known the concealed or suppressed facts.

90. As a direct and proximate result of the concealment or suppression by Defendants, Plaintiff sustained damages in an amount to be proven at trial.

91. The acts and conduct of Defendants were done with a conscious disregard for Plaintiff's rights with a specific intent to defraud and injure Plaintiff, such as to constitute fraud, oppression and malice. By virtue of Defendants' willful and wrongful conduct, Plaintiff is entitled to punitive and exemplary damages as determined by this Court.

### **PRAYER FOR RELIEF**

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

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

2. Plaintiff seeks an Order enjoining Defendants from displaying or utilizing the Dickey's name or Marks and from operating any barbeque style restaurant in the subject area of Rapid City, South Dakota, should they continue to fail to comply with the terms and obligations of the Franchise Agreement. Should the Court find that Defendants 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 Defendants to specifically perform with the terms of the Franchise Agreement.

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

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

5. Plaintiff seeks an Order that there be an accounting of Defendants' operations and Order that Defendants pay over to Plaintiff all amounts due and owing to Plaintiff, plus interest thereon, as well as attorneys' fees and costs.

6. Plaintiff seeks actual and punitive damages as a result of Defendants' fraud, fraudulent concealment, intentional misrepresentation, negligent misrepresentation and deceit, in an amount to be determined at trial, interest, attorneys' fees and costs of suit.

TRIAL BY JURY IS HEREBY REQUESTED

Dated this 14th day of September, 2012.

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