

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____

09-23435

NATIONAL FRANCHISEE ASSOCIATION,
a Nevada corporation, on behalf of its members
and on behalf of a class composed of all Burger King®
franchisees located in the United States,

Plaintiff,

CIV-MOORE

v.

BURGER KING CORPORATION,
a Florida corporation,

**MAGISTRATE JUDGE
SIMONTON**

Defendant.

_____ /

**CLASS ACTION COMPLAINT FOR
DECLARATORY RELIEF; JURY DEMAND**

CLASS ACTION

Plaintiff National Franchisee Association (the NFA) alleges as follows:

INTRODUCTION

1. This action arises out of a dispute between the NFA, on behalf of all owners of franchised Burger King® restaurants in the United States (the Franchisees), and Burger King Corporation (BKC) concerning BKC's actions in compelling the Franchisees to sell a food product known as the BK Double Cheese Burger (DCB) at no more than the maximum price of \$1.00, and BKC's claim that it has the legal right to dictate price points under the respective Franchise Agreements (the Franchise Agreements) previously entered into with the Franchisees—even if those prices are below the Franchisees' costs and cause them to incur a loss on the sale of the product.

PARTIES

2. The NFA is a corporation organized in Nevada with its principal place of business in Georgia. The NFA is organized and exists for the purpose of protecting and preserving the rights of the Franchisees and serves as the official voice of the Burger King® franchisee community. All Franchisees may be individual members of the NFA, and approximately 75% of them are; they may also be members of the respective geographical “regional associations” of Burger King® franchisees, and those regional associations are themselves members of the NFA. The NFA brings this action on behalf of its members and on behalf of a class comprised of all the Franchisees. The Franchise Agreements between the Franchisees and BKC expressly designate the NFA (referred to in the Franchise Agreements as the “Franchisee Association” or the “Franchisee Advisory Counsel”) to represent the Franchisees with respect to certain matters including in relation to marketing and advertising.

3. Defendant BKC is a Florida corporation with its principal place of business in Florida. BKC is in the business of operating, and granting franchises to operate, Burger King® restaurants.

JURISDICTION AND VENUE

4. The Court has personal jurisdiction over BKC because it carries on substantial business activities in Florida.

5. The Court has subject matter jurisdiction under 28 U.S.C. § 1332(d) because: (i) more than two thirds of the class members are citizens of a different states than BKC (i.e., less than one third of the class members are Florida citizens); (ii) less than two thirds of the class members are residents of the forum state (i.e., less than two thirds of the class members are citizens of Florida); (iii) the amount in controversy, in the aggregate, exceeds \$5 million,

exclusive of interest and costs; and (iv) the number of members of the proposed plaintiff class exceeds 100.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(a)(1) in that BKC resides in this judicial district. Under subdivision (c) of that section, defendant corporations are deemed to reside in any judicial district where they are subject to personal jurisdiction. Further, the Franchise Agreements provide this judicial district shall be the venue in which to adjudicate any case or controversy arising under the Franchise Agreements.

STANDING

7. The NFA has standing to maintain this action. At least one of its members (indeed, all of its members) will suffer injury in fact by the real and immediate threatened harm from BKC's actions in setting a mandatory maximum retail price for the DCB—and to set that price below what it costs the Franchisees to produce and sell it.

8. Further, the interests sought to be protected by this action are germane to the NFA's purpose. The interests sought to be protected are the Franchisees' rights not to be required under the Franchise Agreements to sell the DCB for \$1.00 or otherwise abide by price points set by BKC. Per Article II, § 1 of the NFA's bylaws: "The purposes of the NFA shall be to function as an association to foster and coordinate the activities of independent Burger King® franchisees and to serve as the official voice of the Burger King® franchisee community; . . . to protect and preserve the rights of independent Burger King® franchisees; and to do all things necessary and proper to the advancement of independent Burger King® franchisees."

9. The claim for relief involves an issue that is common to all members of the NFA—the nature and extent of their obligation, if any, under the uniform or materially uniform Franchise Agreements to sell the DCB (or any other product) at a maximum price unilaterally

imposed by BKC. The claim is for declaratory relief only and does not involve any potentially differing claims for monetary compensation.

CLASS ACTION ALLEGATIONS

10. The NFA brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and/or (b) (1), (2), and/or (3) on behalf of a class consisting of all Franchisees, whether members of the NFA or not. Non-franchised (i.e., company-owned) Burger King® restaurants are not included in this definition of the class.

11. The members of the class are so numerous that joinder of all members is impracticable. There are approximately 6300 franchised restaurants in the United States, owned by approximately 850 different Franchisees.

12. The NFA's claim is typical of the claims of the members of the class. Indeed, its claim is the same as the claims of all class members—that BKC does not have the authority under the Franchise Agreements to dictate maximum prices.

13. The NFA will fairly and adequately protect the interests of the members of the class; indeed, the NFA's *raison d'être* is to preserve and protect the interests of the members of the class, the vast majority of which are also the NFA's members. The NFA has also retained counsel competent and experienced in class action litigation.

14. Prosecuting separate actions by individual class members would create a risk (a) of inconsistent adjudications with respect to individual class members that would establish incompatible standards of conduct for BKC or (b) that adjudications with respect to individual class members would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair their ability to protect their interests.

15. BKC has acted or refused to act on grounds that apply generally to the class, so that declaratory relief is appropriate respecting the class as a whole.

16. Common questions of law and fact exist as to all members of the class and predominate over any questions solely affecting individual members of the class. Among those common questions are whether and to what extent the class members are obligated by the Franchise Agreements to abide by BKC's directive setting and mandating maximum prices. Because the NFA is seeking only declaratory relief, no individualized damages issues exist.

THE FRANCHISE AGREEMENTS

17. This action concerns the Franchisees' obligations under the Franchise Agreements they have entered into with BKC. Each Franchisee of a Burger King restaurant is required to execute a Franchise Agreement of a form which, for present purposes, are identical and have not changed in any way material to this dispute for at least three decades.

18. The provision of the Franchise Agreement at issue is Section 5, addressing "Standards of Uniformity and Operation." It provides that "BKC shall establish, and cause approved suppliers to the BKC System to reasonably comply with, product, service and equipment specifications."

19. While these provisions address standards of uniformity for various operational issues, including menu items, hours, and uniforms, nothing states that BKC has the right to impose mandatory price points for product sold by the Franchisees. The dispute between the parties is triggered by the position recently taken by BKC, contrary to decades of practice, that the general language of Section 5 gives it the power to set prices for its independently owned franchises.

20. Plaintiff is informed and believes, and on that basis alleges, that at some point in the past few years, BKC inserted an update to its Operations Manual (which is part of the MOD Manual) that purports to require a value menu (Value Menu) with items priced at \$1.00 (which currently does not list the DCB). Plaintiff takes the position that this action was improper and unauthorized under the Franchise Agreements.

21. Not only is Plaintiff's reading consistent with decades of practice, and the parties' pre-dispute interpretation of their own contract, BKC's addition of the DCB to the Value Menu through an update to its Manual is inconsistent with its duty of good faith and fair dealing because, inter alia, its decision forces the Franchisees to sell the DCB at a loss. Indeed, BKC on October 9, 2009 admitted in writing that sale of DCB's at the price specified by BKC could to lead to "bankruptcy."

THE RELEVANT PERFORMANCE OF THE FRANCHISE AGREEMENTS

22. The prior practice of BKC was that it made no attempt to dictate price points to its franchisees, and the relevant course of performance of the Franchise Agreements shows that BKC never claimed until relatively recently that the Franchise Agreements allowed it to dictate price points. As BKC acknowledged in 2002, "[i]t has been [BKC's] longstanding policy to allow each franchisee unfettered discretion to set all prices for products sold in the franchisee's Burger King Restaurants as it sees fit."

23. Since at least the late 1960's (if not back to the beginning of the BKC franchise system itself), BKC never attempted to unilaterally impose or require a price point for products sold by Franchisees, and did not take the position that it had the right to do so under the Franchise Agreements.

24. After the formation of the Plaintiff and a Marketing Advisory Committee in 1989 and shortly thereafter, BKC did not attempt to set, much less enforce, mandatory price points for its franchisees without the agreement of a supermajority of the franchisees.

BKC First Claims it Has the Right to Dictate Price Points in its 2002 “Policy Statement.”

25. On October 15, 2002, BKC issued a “99¢ BK Value Menu Policy Statement” concerning a previous Value Menu that it was proposing at that time. In it, BKC asserted that “Recent changes in the law now allow BKC to establish a maximum price a franchisee can charge for certain products in certain situations.” BKC’s position that changes in the law caused by intervening court decisions changed the parties’ rights under the unchanged Franchise Agreement was erroneous. To the contrary, it is the law in effect at the drafting of Section 5 of the Franchise Agreement that is incorporated into those agreements as a matter of law.

26. In any case, until just this year, BKC did not attempt to set any price points without the agreement of two-thirds of the franchisees. The proposal for the 2002 Value Menu, for example, passed by the required vote of Franchisees.

The 2005 Show of Support Regarding the New Value Menu

27. In 2005, BKC sought to introduce a new \$1.00 Value Menu. To that end, BKC sent out a “Show of Support Voting Form” (SOS Voting Form) for its proposed new Value Menu.

28. Recognizing its pattern of obtaining Franchisee consent before introducing price points, BKC, in connection with the 2005 SOS, issued a statement that “***If*** this Show of Support receives 67.7% [sic] yes votes—the six national Value Menu items will be required items at \$1.00.” (Emphasis added).

29. The SOS Vote for advertising the new Value Menu passed, and BKC rolled it out thereafter.

The 2008 Value Menu Dispute and Resulting Guidelines

30. In early 2008, BKC announced its intention to place the DCB on the \$1.00 Value Menu. The NFA and Franchisees objected, both to BKC's contention that it had the unilateral right to add items to the Value Menu, and also to the specific proposal to add the DCB to the Value Menu. The Franchisees did not agree to the directive and, due to Franchisees' objections to adding the DCB to the \$1.00 Value Menu, BKC abandoned the idea.

THE CURRENT DISPUTE OVER THE DCB

31. In 2009, BKC decided to try again to place the DCB on the \$1.00 Value Menu.

32. Consistent with the past practices of BKC and the Franchisees and the parties' agreement, BKC submitted the proposal, twice, to a vote by the Franchisees, who twice rejected the BKC proposal.

33. At least part of the reason for rejection is that it costs Franchisees more than \$1.00 to produce a DCB—something that is not true of any of other item previously placed on the Value Menu.

34. Nonetheless, BKC announced on or about August 31, 2009 that it required Franchisees, starting on October 19, 2009, to offer the DCB on the Value Menu for \$1.00. This is the first time that BKC has ever purported to impose a price point on the Franchisees without their majority consent pursuant to the show of support process.

35. The NFA has therefore brought this action on behalf the Franchisees seeking a declaration that BKC does not have the authority under the Franchise Agreements, including as interpreted and applied by BKC, the NFA, and the Franchisees through their course of

performance, to impose price points, including for the \$1.00 DCB, on the Franchisees without their consent.

36. Indeed, BKC concedes that at the time Section 5 of the Franchise Agreements was drafted, it could not legally set price points under federal anti-trust laws. As such, Section 5 could not and does not grant BKC that right. Nonetheless, BKC has never attempted to amend its Franchise Agreements to account for the change in federal law and to state that it has the right to set prices for products sold by the Franchisees, nor have the Franchisees ever agreed that BKC has any such right.

37. BKC has also never disclosed in its Uniform Franchise Offering Circular (UFOC) that it maintains the right to establish retail prices, or that one of the Franchisees' obligations is to comply with pricing mandates.

CLAIM FOR RELIEF

(DECLARATORY JUDGMENT)

38. The NFA re-alleges and incorporates paragraphs 1 through 37, above.

39. The Declaratory Judgment Act, 28 U.S.C. § 2201, et seq., grants the Court, in cases of actual controversy such as this one, the power to issue judgments declaring the rights and other legal relations of any interested party, whether or not further relief is or could be sought.

40. Certain disputes have arisen between the NFA, on behalf of the Franchisees, and BKC arising out of and relating to the Franchise Agreements.

41. These disputes include whether the Franchise Agreements give BKC the right to require the Franchisees to price menu items at prices set by BKC, including without limitation the DCB at the below-cost price of \$1.00.

42. The NFA contends that the Franchise Agreements do not obligate the Franchisees to abide by price points set by BKC, including without limitation the DCB at \$1.00. The NFA is informed and believes, and on that basis alleges, that BKC contends that the Franchise Agreements obligate the Franchisees to abide by price points set by BKC, including with respect to the DCB at \$1.00.

43. Therefore, an actual controversy has arisen and now exists between the NFA and BKC concerning the parties' respective rights and obligations under the Franchise Agreements with respect to pricing mandates issued by BKC, including without limitation for the DCB at \$1.00.

44. The NFA accordingly desires a judicial declaration that the Franchise Agreements do not obligate the Franchisees to comply with price points set by BKC for products sold by the Franchisees, including without limitation for the DCB at \$1.00.

45. A judicial declaration is necessary and appropriate at this time under the circumstances so that the parties to this action may ascertain their rights and duties. The facts have sufficiently crystallized to permit an intelligent and useful decision to be made, and the issues are fit for a judicial determination.

PRAYER

The NFA prays that the Court enter judgment in the NFA's favor and against BKC as follows:

46. For a judicial declaration that the Franchise Agreements do not obligate the Franchisees to comply with price points set by BKC for products sold by the Franchisees, including without limitation for the DCB at \$1.00.

47. For costs.

48. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a jury trial of all claims triable by a jury.

Date: November 10, 2009.

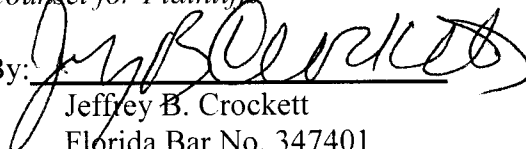
Respectfully submitted,

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Pro Hac Vice Motion to be submitted

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of maintaining the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.) **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

NOV 10 2009
STEVEN M. LARIMORE
CLERK U.S. DIST. CT
MIAMI-DADE COUNTY, FLA.

I. (a) PLAINTIFFS
National Franchise Association, a Nevada corporation, on behalf of its members
(b) County of Residence of First Listed Plaintiff Nevada
(EXCEPT IN U.S. PLAINTIFF CASES)
(c) Attorney's (Firm Name, Address, and Telephone Number)
EFFREY B. CROCKETT, ESQ.
JOFFEY BURLINGTON
699 South Bayshore Drive, PH, Miami, Florida 33133

DEFENDANTS
Burger King Corporation, a Florida corporation
County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.
Attorneys (If Known)
CIV-MOORE MAGISTRATE JUDGE
SIMONTON

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
 1 U.S. Government Plaintiff
 2 U.S. Government Defendant
 3 Federal Question (U.S. Government Not a Party)
 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

Citizen of This State	<input type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input checked="" type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input checked="" type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	LABOR	LABOR
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)
 1 Original Proceeding
 2 Removed from State Court
 3 Re-filed- (see VI below)
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multidistrict Litigation
 7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S).
 (See instructions second page):
 a) Re-filed Case YES NO
 b) Related Cases YES NO
 JUDGE _____ DOCKET NUMBER _____

VII. CAUSE OF ACTION
 Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):
 28 U.S.C. 1332(b)
 LENGTH OF TRIAL via 6 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ N/A CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE
 SIGNATURE OF ATTORNEY OF RECORD: *Jeff B. Crockett* DATE: November 10, 2009

FOR OFFICE USE ONLY
 AMOUNT: 350.00 RECEIPT # 101168 IFP
11/10/09