

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 09-23435-Civ-Moore/Simonton

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

Plaintiff,

vs.

BURGER KING CORPORATION, a Florida corporation,

Defendant.

FAMILY DINING, INC., a Pennsylvania corporation;
RESTAURANT ASSOCIATES OF CINCINNATI, INC.;
BRAVOGRAND, INC, an Indiana corporation; ERW, INC.,
a Virginia corporation; and, ATLANTIC COAST FOODS,
INC., on behalf of themselves and all others similarly situated,

Consolidated
Case No. 10-21964

Plaintiffs,

vs.

BURGER KING CORPORATION, a Florida corporation,

Defendant.

CONSOLIDATED CLASS ACTION COMPLAINT

Plaintiffs Family Dining, Inc.; Restaurant Associates of Cincinnati, Inc.; Bravogrand, Inc.; ERW, Inc.; and Atlantic Coast Foods, Inc., (together the "Individual Plaintiffs"), and the National Franchise Association, representing its members (the NFA), on behalf of themselves and all others similarly situated, pursuant to the Order of this Court (DE 98), files this Consolidated Class Action complaint alleging as follows:

INTRODUCTION

1. This action arises out of a dispute between the NFA, representing its members,

and the Individual Plaintiffs, individually and on behalf of all owners of franchised Burger King® restaurants in the United States (the Franchisees or the Class), and Burger King Corporation (BKC) concerning BKC's actions in compelling the Franchisees to sell food products known as the BK Double Cheese Burger (DCB), and BK Buck Double (öBuck Doubleö) at no more than the maximum price of \$1, 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 NFA members, the Individual Plaintiffs and with the Franchiseesö even if those prices are below the NFA members's Individual Plaintiffs's and the other Franchisees's costs, and cause them to incur a loss on the sale of the product.

2. The NFA and the Individual Plaintiffs bring this consolidated class action complaint cognizant of this Court's May 20, 2010 order dismissing portions of the NFA's claims, which claims it does not re-assert here while, nonetheless, retaining its right to appeal those dismissed claims notwithstanding their admission from this supplemental pleading.

PARTIES

3. Plaintiff Family Dining, Inc., is a Pennsylvania Corporation with its principal place of business in Pennsylvania. It is a Burger King Franchisee that owns and operates approximately 26 Burger King franchised restaurants located in Pennsylvania.

4. Plaintiff Restaurant Associates of Cincinnati, Inc. is an Ohio corporation with its principal place of business in Ohio. It is a Burger King Franchisee that owns and operates eight Burger King franchised restaurants located in Ohio.

5. Plaintiff Bravogrand, Inc. is an Indiana corporation with its principal place of business in Indiana. It is a Burger King Franchisee that owns and operates approximately 39 Burger King franchised restaurants in Wisconsin.

6. Plaintiff ERW, Inc. is a Virginia corporation with its principal place of business in

Virginia. It is a Burger King Franchisee that owns and operates 15 franchised Burger King restaurants in Virginia and West Virginia.

7. Plaintiff Atlantic Coast Foods, Inc. is a North Carolina corporation with its principal place of business in North Carolina. It is a Burger King Franchisee that owns and operates 23 franchised Burger King restaurants in North Carolina.

8. Plaintiff 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; Franchisees 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, together with the Individual Plaintiffs, on behalf of a class of all Burger King Franchisees. The Franchise Agreements between the Franchisees and BKC expressly designate the NFA (referred to in the Franchise Agreements as the "Franchise Association" or the "Franchise Advisory Counsel") to represent the Franchisees with respect to certain matters including in relation to marketing and advertising.

9. 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

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

11. 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.

12. The Court also and alternatively has subject matter jurisdiction under 28 U.S.C. § 1332(a), as the Individual Plaintiffs, at least one of whose claims exceeds \$75,000, are diverse from BKC; further, the Court has jurisdiction over other plaintiffs or class members claims under 28 U.S.C. § 1367(a).

13. 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

14. Individual Plaintiffs Family Dining, Inc.; Restaurant Associates of Cincinnati, Inc.; Bravogrand, Inc.; ERW, Inc.; and Atlantic Coast Foods, Inc, each has standing to maintain this action, because each was a party to the Franchise Agreement (in materially the same form for present purposes), and has suffered, and will continue to 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 Buck Double and its setting that price below what it costs these Individual Plaintiffs, the Franchisees and the Class to produce and sell them.

15. In the alternative¹, the NFA also has standing to maintain this action as a class action. At least one of its members (indeed, all of its members) have suffered, and will continue to 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 Buck Double and to set that price at or below what it costs the Franchisees to produce and sell them.

16. 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 or the Buck Double for \$1, or otherwise abide by such price points set by BKC. Article II, § 1 of the NFA's bylaws says: "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."

17. 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, the Buck Double (or any other product) at a maximum price unilaterally imposed by BKC, especially when that price is at or below what it costs the Franchisees to produce and sell them.

CLASS ACTION ALLEGATIONS

18. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil

¹ Plaintiffs preserve their rights for NFA to pursue class certification and to pursue a FDUTPA claim in the event that the Court should reject the parties' Stipulation (DE 93), to which Plaintiffs still are adhering and recommending the Court's approval. Should the Court adopt the Stipulation, the NFA would not seek class certification and the Fourth Claim for Relief would be voluntarily dismissed without prejudice.

Procedure 23(a) and/or (b) (1), (2), and/or (b)(3), on behalf of a class consisting of all Franchisees. Non-franchised (i.e., company-owned) Burger King® restaurants are not included in this definition of the Class.

19. The members of the Class are so numerous that joinder of all members is impracticable. There are approximately 6,300 franchised Burger King® restaurants in the United States, owned by approximately 850 different Franchisees.

20. The claims of the Individual Plaintiffs and the NFA are typical of the claims of the members of the class. Indeed, its claims are the *same* as the claims of all class members that BKC does not have the authority under the Franchise Agreements to dictate maximum prices with respect to the DCB or Buck Double, especially when that price is at or below what it costs the Franchisees to produce and sell them.

21. The NFA and the Individual Plaintiffs will fairly and adequately protect the interests of the members of the class. The NFA and each Individual Plaintiff is willing and able to serve as a class representative and will be an adequate representative.

22. Individual class members prosecuting separate actions would, at a minimum, 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.

23. 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.

24. 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, especially when that price is at or below what it costs the Franchisees to produce and sell them.

THE FRANCHISE AGREEMENTS

25. 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 in a form which, for present purposes, is identical and has not changed in any way material to this dispute for at least three decades.

26. 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."

27. 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, notwithstanding the consequences.

28. The NFA and Individual Plaintiffs are 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 (which currently does not list the DCB or Buck Double). The NFA and the Individual Plaintiffs take the position that this action was improper and unauthorized under the Franchise Agreements.

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

30. Plaintiff Family Dining, Inc. entered into Franchise Agreements with BKC, in the same form as already seen in the record for present purpose, beginning on July 25, 1985. Family Dining, Inc. has complied with the material provisions of the Franchise Agreements, or any non-compliance has been waived.

31. Plaintiff Restaurant Associates of Cincinnati, Inc., entered into Franchise Agreements with BKC, in the same form as already seen in the record for present purpose, on, among other dates, June 30, 2001. Restaurant Associates of Cincinnati, Inc. has complied with the material provisions of the Franchise Agreements, or any non-compliance has been waived.

32. Plaintiff Bravogrand, Inc., entered into Franchise Agreements with BKC, in the same form as already seen in the record for present purpose, on, among other dates, on October 15, 2001. Bravogrand, Inc. has complied with the material provisions of the Franchise Agreements, or any non-compliance has been waived.

33. Plaintiff ERW, Inc., or its predecessor in interest, entered into Franchise Agreements with BKC, in the same form as already seen in the record for present purpose, on, among other dates, on May 22, 1995. ERW, Inc. has complied with the material provisions of the Franchise Agreements, or any non-compliance has been waived.

34. Plaintiff Atlantic Coast Foods, Inc., entered into Franchise Agreements with

BKC, in the same form as already seen in the record for present purpose, on, among other dates, on September 19, 1996. Atlantic Coast Foods, Inc. has complied with the material provisions of the Franchise Agreements, or any non-compliance has been waived.

THE RELEVANT PERFORMANCE OF THE FRANCHISE AGREEMENTS

35. BKC's prior practice 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."

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

37. After the formation of the NFA 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."

38. 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.

39. In any case, until 2009, 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

40. In 2005, BKC sought to introduce a new \$1 Value Menu. To that end, BKC sent out a "Show of Support Voting Form" (SOS Voting Form) for its proposed new Value Menu.

41. 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).

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

The 2008 Value Menu Dispute and Resulting Guidelines

43. In early 2008, BKC announced its intention to place the DCB on the \$1 Value Menu. The Individual Plaintiffs, the NFA and many 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. Many Franchisees did not agree with the directive and, due to Franchisees' objections to adding the DCB to the \$1 Value Menu, BKC abandoned the idea.

THE CURRENT DISPUTE OVER THE DCB

44. In 2009, BKC decided to try again to place the DCB on the \$1 Value Menu.

45. 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. The Individual Plaintiffs voted against the proposal, as did many NFA members.

46. At least part of the reason for rejection is that it costs Franchisees more than \$1 to produce a DCB— something that is not true of any of other item previously placed on the Value Menu.

47. Nonetheless, BKC announced on August 31, 2009 that it required Franchisees, starting on October 19, 2009, to offer the DCB on the Value Menu for \$1. 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.

48. The data and information that BKC disseminated to Franchisees regarding the DCB was, to the knowledge of the NFA and the Individual Plaintiffs, inaccurate, deceptive and/or manipulated to support BKC's business case purporting to justify the \$1 DCB.

49. The NFA and the Individual Plaintiffs have therefore brought these actions on behalf the Franchisees seeking, among other things, a declaration that BKC does not have the authority under the Franchise Agreements including as BKC and the NFA, the Individual Plaintiffs and the Franchisees interpreted and applied it through their course of performance, to impose price points, in particular for the \$1 DCB, on the Franchisees without their consent.

50. Indeed, BKC concedes that at the time Section 5 of the Franchise Agreement 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.

51. 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.

THE CURRENT DISPUTE OVER THE BUCK DOUBLE

52. On April 12, 2010, BKC stopped requiring the Franchisees to sell the DCB at no more than \$1; rather, after April 12, 2010, the DCB could be priced at no more than \$1.29. At the same time, however, BKC added a new menu item to the Value Menu, the Buck Double, and required that *it* be priced at no more than \$1.

53. BKC did not even bother to put up this change to a vote through the show of support process.

54. The Buck Double is identical in every way to a DCB, with one exception – it has one less slice of cheese. The difference in cost between the DCB and the Buck Double (*i.e.*, the cost of one slice of cheese) is negligible.

55. Thus, the Buck Double is also sold at a loss when sold for \$1. And the Franchisees, including the members of the NFA and the Individual Plaintiffs, have lost and continue to lose substantial sums selling it for \$1.

56. Additionally, BKC has materially breached the Franchise Agreements with the Individual Plaintiffs and the other Franchisees by violating the Franchisees' right to have prices set in good faith, as the Franchise Agreement provides and the law requires.

FIRST CLAIM FOR RELIEF

**(By the Individual Plaintiffs and the Class vs. BKC)
(For Money Damages for Breach of Contract)**

57. The Individual Plaintiffs, on their own behalf and on behalf of the Class, reallege and incorporate paragraphs 1 through 56, above.

58. Each Franchisee, including each Individual Plaintiff, and BKC, are parties to the Franchise Agreement, as detailed above.

59. Each Franchisee, including each Individual Plaintiff, has performed all covenants, conditions, and promises to be performed on their part under the Franchise Agreement, except those obligations that have been excused, waived, otherwise released, or which have not yet arisen.

60. Paragraph 5 of the Franchise Agreement provides in pertinent part that BKC has the right to change the standards, specifications and procedures through "modifications, revisions and additions" to the MOD Manual "but only insofar as BKC in the good faith exercise of its judgment believes [them] to be desirable and reasonably necessary."

61. Many NFA members and the Individual Plaintiffs voted against BKC's imposition of the DCB, and were never allowed even to vote on the addition of the Buck Double, or the Dollar Menu.

62. As alleged above, BKC has materially breached Paragraph 5 of the Franchise Agreement by requiring the Franchisees, including members of the NFA and the Individual Plaintiffs, to sell the DCB, and then the Buck Double, for no more than \$1 because, among other things, (1) that price, by BKC's own admission, results in the Franchisees selling these items at a loss; (2) BKC ignored the defeat of the DCB proposal (twice) through the SOS process and failed to even use the show of support process for the Buck Double; (3) the data and information that BKC disseminated to Franchisees regarding the DCB was, to the knowledge of the NFA and the Individual Plaintiffs, inaccurate, deceptive and/or manipulated to support BKC's business case purporting to justify the \$1 DCB; and (4) BKC imposed first the \$1 DCB and thereafter imposed the \$1 BD, when all data and information regarding the DCB's performance demonstrated that the DCB was causing most if not all Franchisees to suffer losses.

63. As a direct and proximate result of BKC's breach of the Franchise Agreement, the Franchisees, including the Individual Plaintiffs, have been damaged by being forced to sell

products at a loss, making less than a reasonable and appropriate profit margin, and suffering lost profits.

SECOND CLAIM FOR RELIEF

**(By the Individual Plaintiffs and the Class vs. BKC)
(For Money Damages for Breach of the Implied
Covenant of Good Faith and Fair Dealing)**

64. The Individual Plaintiffs, on their own behalf and on behalf of the Class, reallege and incorporate paragraphs 1 through 63, above.

65. Every contract, including the Franchise Agreement between the Franchisees and BKC, includes an implied covenant of good faith and fair dealing.

66. The Franchisees, including the members of the NFA and each Individual Plaintiff, have performed all covenants, conditions, and promises to be performed on their part under the Franchise Agreement, except those obligations that have been excused, waived, otherwise released, or which have not yet arisen.

67. BKC has materially breached the covenant of good faith and fair dealing implied in the Franchise Agreement by, among other things, requiring the Franchisees, including each of the Individual Plaintiffs, to sell the DCB, and then the Buck Double, for no more than \$1 because, among other things, (1) that price, by BKC's own admission, results in the Franchisees selling these items at a loss; (2) BKC ignored the defeat of the DCB proposal (twice) through the show of support process and failed to even use the show of support process for the Buck Double; (3) the data and information that BKC disseminated to Franchisees regarding the DCB was, to the knowledge of the NFA and the Individual Plaintiffs, inaccurate, deceptive and/or manipulated to support BKC's business case purporting to justify the \$1 DCB; and (4) BKC imposed first the \$1 DCB and thereafter imposed the \$1 BD, when all data and information regarding the DCB's performance demonstrated that the DCB was causing most if not all

Franchisees to suffer losses.

68. As a direct and proximate result of BKC's breach of the Franchise Agreement, the Franchisees, including the Individual Plaintiffs, have been damaged by being forced to sell products at a loss, making less than a reasonable and appropriate profit margin, and suffering lost profits.

THIRD CLAIM FOR RELIEF

**(By the NFA, Individual Plaintiffs and the Class vs. BKC)
(Declaratory Judgment)**

69. The NFA on behalf of its members and the Individual Plaintiffs, both on their own behalf and on behalf of the Class, reallege and incorporate paragraphs reallege and incorporate paragraphs 1 through 68, above.

70. 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.

71. Certain disputes have arisen between the NFA and Individual Plaintiffs, on behalf of the Class, on the one hand, and BKC, on the other, arising out of and relating to the Franchise Agreement.

72. These disputes include whether BKC has the right to require the Franchisees to sell the DCB and Buck Double at the price of \$1.

73. The Franchisees, including the Individual Plaintiffs and the NFA, contend that the Franchise Agreement does not obligate them to abide by BKC's directive to sell the DCB and Buck Double at \$1. The NFA and the Individual Plaintiffs are informed and believe, and on that basis allege that BKC contends that the Franchise Agreements obligate the Franchisees to sell the DCB and Buck Double at \$1.

74. Therefore, an actual controversy has arisen and now exists between the NFA, the Individual Plaintiffs, and the Class, on the one hand, and BKC, on the other, concerning the parties' respective rights and obligations under the Franchise Agreement with respect to pricing mandates BKC issued regarding the DCB and Buck Double.

75. The NFA, Individual Plaintiffs, and Class accordingly desire a judicial declaration that the Franchise Agreement does not obligate the Franchisees to comply with price points BKC set for the DCB and Buck Double.

76. 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.

FOURTH CLAIM FOR RELIEF

**(By the Individual Plaintiffs and the FDUTPA sub-class vs. BKC)
(For Money Damages for Violation of the
Florida Deceptive and Unlawful Trade Practices Act)**

77. The Individual Plaintiffs reallege and incorporate paragraphs 1 through 76, above.

78. Florida's Deceptive and Unlawful Trade Practices Act (FDUTPA) prohibits "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce...." Fla. Stats. § 501.204(1).

79. That Act defines violations to include, *inter alia*, "any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq.*" Fla. Stats. § 501.203 (3)(a).

80. The Federal Trade Commission (FTC) has promulgated rules pursuant to the Federal Trade Commission Act (FTC Act) requiring that prospective franchisees be provided by a franchisor a disclosure document, previously called a Uniform Franchise Offering Circular (UFOC) and now known as a Franchise Disclosure Document (FDD). *See* 16. C.F.R. § 436.1, *et*

seq.

81. BKC has committed unfair and deceptive trade practices in transactions covered by FDUTPA by among other things, requiring the Franchisees, including each of the Individual Plaintiffs, to sell the DCB, and then the Buck Double, for no more than \$1 when (1) that price, by BKC's own admission, results in the Franchisees selling these items at a loss; (2) BKC ignored the defeat of the DCB proposal (twice) through the show of support process and failed to even use the show of support process for the Buck Double; (3) the data and information that BKC disseminated to Franchisees regarding the DCB was, to the knowledge of the NFA and the Individual Plaintiffs, inaccurate, deceptive and/or manipulated to support BKC's business case purporting to justify the \$1 DCB; and (4) BKC imposed first the \$1 DCB and thereafter imposed the \$1 BD, when all data and information regarding the DCB's performance demonstrated that the DCB was causing most if not all Franchisees to suffer losses.

82. Under these FTC rules and through the UFOC/FDD, a franchisor is required to provide a prospective franchisee with disclosures regarding, *inter alia*, material terms and conditions of the franchise agreement.

83. Since at least October 15, 2002, BKC has claimed that it has the right under the Franchise Agreement to set maximum prices of the products the franchisees sell. If BKC has this right under the Franchise Agreement, that constitutes a material term of that agreement.

84. BKC's UFOC/FDD does not now disclose, and at no time since October 15, 2002 has it disclosed, that BKC has the right to set maximum prices under the Franchise Agreement.

85. BKC has therefore violated the FTC Act, and hence the FDUTPA, with respect to every franchisee who has signed and/or renewed (including certain of the Individual Franchisees) a franchise agreement since October 15, 2002 (the FDUTPA sub-class). Further, and at a minimum, BKC's failure to disclose its claimed right in the Franchise Agreement set maximum

prices is deceptive and/or unfair as to the FDUTPA sub-class.

86. As such, BKC is liable to the FDUTPA sub-class for damages and attorneys' fees.

See Fla. Stats. § 501.211(2).

PRAYER

The NFA, on behalf of its members, prays that the Court enter judgment in the Franchisees' favor and against BKC as follows:

87. For a judicial declaration that the Franchise Agreement does not obligate the Franchisees to comply with price points BKC set for products the Franchisees sold, including without limitation for the DCB and Buck Double at \$1;

88. For an injunction, enjoining BKC from requiring the Franchisees to sell the DCB or Buck Double at mandated maximum prices.

The Individual Plaintiffs pray that the Court enter judgment in the Franchisees' favor and against BKC as follows:

89. For money damages according to proof;

90. For a judicial declaration as prayed immediately above;

91. For injunctive relief as prayed above.

Both the NFA and the Individual Plaintiffs pray for judgment in the Franchisees' favor and against BKC as follows:

92. For attorneys' fees and costs;

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

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury of all issues triable to a jury.

Respectfully submitted,

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Family Dining, Inc.; Restaurant Associates of
Cincinnati, Inc.; Bravogrand, Inc.; ERW Inc.;
and, Atlantic Coast Foods, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Mailing Information for Case 1:09-cv-23435-KMM. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF. Counsel of record who are not on the Mailing Information list to receive e-mail notices for this case have been served via U.S. Mail.

s/Jeffrey B. Crockett