UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CAPITAL RESTAURANT GROUP, LLC, a Georgia limited liability company,

Plaintiff,

v.

BURGER KING CORPORATION,

Defendant.

_____/

CASE NO.:

COMPLAINT FOR DECLARATORY RELIEF

Pursuant to Federal Rule of Civil Procedure 57 and the Federal Declaratory Judgment Act under 28 U.S.C. 2201 and 2202, Plaintiff CAPITAL RESTAURANT GROUP, LLC ("Plaintiff"), files this this Complaint for Declaratory Relief against Defendant BURGER KING CORPORATION ("Defendant"), and state as follows:

NATURE OF THE ACTION

1. This action arises out of a state law based dispute between Plaintiff, a multi-unit franchisee of the iconic restaurant brand, Burger King, and Defendant, the franchisor, regarding Defendant's mismanagement, misappropriation, and failure to account for an advertising fund designed to benefit franchisees including Plaintiff. The franchise agreements at issue, described *infra*, contain a forum selection clause that purports to obligate Plaintiff to file its claims in the "U.S. District Court for the Southern District of Florida, or if such court lacks jurisdiction, the 11th Judicial Circuit (or its successor) in and for Miami-Dade County, Florida." Plaintiff, who is entitled under the law to be the master of its claim, wishes to prosecute its wholly state law based claims

in Florida state court.

2. Defendant's affiliates,[1] in search of what they perceive to be a friendly federal forum, have previously objected to other franchisees seeking redress in state court and has interpreted the substantially similar forum selection clause contained in the affiliated companies' franchise agreements as mandating litigation "exclusively" in the U.S. District Court for the Southern District of Florida. Such an interpretation is a bald-faced attempt to expand the limited jurisdiction of the federal courts in contravention of federal law.

3. By this Complaint, Plaintiff seeks Declaratory Relief pursuant to Federal Rule of Civil Procedure 57 and the Federal Declaratory Judgment Act under 28 U.S.C. 2201 and 2202. Specifically, Plaintiff seeks a declaration that the contractual forum selection clause contained in Plaintiff's franchise agreements is unenforceable under federal law for improperly attempting to expand the jurisdiction of the federal courts in violation of the laws of the United States, and therefore does not prevent Plaintiff from pursuing its state law claims in Florida state court.

THE PARTIES

4. Plaintiff Capital Restaurant Group, LLC is a limited liability company organized under the laws of the state of Georgia, with its principal place of business in Charleston, South Carolina. Its sole member is Darryl Berry, who is a resident of the state of Georgia.

5. Defendant Burger King Corporation is a Florida Corporation with its principal place of business in Miami-Dade County, Florida.

[1] Defendant is a subsidiary of the holding company Restaurant Brands International ("RBI"), which is an international conglomerate that owns the fast food brands Tim Hortons, Burger King, and Popeyes Louisiana Kitchen. Between these three brands, RBI franchises or owns over 25,000 restaurants worldwide. *See* Restaurant Brands International Inc., Form 10-K, Sec. and Exchange Comm., at p. 4 (Feb. 22, 2019), http://www.rbi.com/SEC-Filings.

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JURISDICTION AND VENUE

6. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as district courts have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. Specifically, in this case Plaintiff seeks a declaration determining its rights and obligations under a forum selection clause in relation to federal venue and jurisdiction statutes, to wit: 28 U.S.C. § 1441(b)(2) and 28 U.S.C. § 1390(a).[2]

7. This Court also has diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332, as the Plaintiff and Defendant are diverse in citizenship and the amount in controversy exceeds the sum or value of $75,000.00, exclusive of interest, costs, and attorneys' fees.

8. This Court has jurisdiction over the Florida Declaratory Judgment Act claim pursuant to 28 U.S.C. §1367 as the claim is substantially related to and arises out of the same common facts, and is therefore subject to applicable principals of supplemental jurisdiction.

9. Defendant is subject to the personal jurisdiction of the Court because its primary place of business is in Florida.

10. Venue is properly founded in this District pursuant to 28 U.S.C. § 1391(b) and (c) and/or 28 U.S.C. § 1400(a) because Defendant is subject to personal jurisdiction within this judicial district, and/or a substantial part of the events or omissions giving rise to the claims occurred within this District.

[2] As more fully discussed herein, this action involves the issue of whether Defendant can circumvent the forum defendant rule—28 U.S.C. § 1441(b)(2)—and whether Defendant can, by use of a venue provision in a contract, force its franchisees to litigate exclusively in district court under 28 U.S.C. § 1390(a). At a minimum, resolution of these issues will require significant examination of the foregoing federal statutes as they are implicated by the terms of the parties' franchise agreements.

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FACTS

11. Defendant is the franchisor of the "Burger King" franchise system, which operates and grants franchises to operate quick-service hamburger restaurants. The brand was founded in Miami, Florida in 1954.

12. Plaintiff is a long time franchisee of the brand and entered into numerous franchise agreements with Defendant pertaining to the operation and development of 30 Burger King restaurants in South Carolina. Of the 30 restaurants originally purchased by Plaintiff, this action concerns only those franchises presently operated by Plaintiff in the Greater Charleston, South Carolina market (the "Franchise Agreements").[3] As they pertain to this action, the terms of each of the Franchise Agreements are not materially different and an exemplary copy of the Franchise Agreements is attached hereto as **Exhibit "A."**

13. From the time that Plaintiff signed its first Franchise Agreements with Defendant, Defendant's principal place of business has been located in Miami, Florida. The services and support functions provided to Plaintiff by Defendant are operated out of Defendant's Miami headquarters.

14. In or around December 2014, Defendant was acquired by Restaurant Brands International ("RBI"), which is an international conglomerate which owns the fast food brands Tim Hortons, Burger King and Popeyes Louisiana Kitchen. *See* Footnote 1, *supra*.

15. RBI leases properties in the United States for the operations of its three brands, including its management's headquarters in Miami, Florida.

16. The Franchise Agreements state, in relevant part:

[3] Specifically, Plaintiff presently operates the following eleven Burger King restaurants in the Greater Charleston, South Carolina market, which restaurants are the subject matter of this action, and are identified with the following store numbers: BK186, BK518, BK1375, BK3220, BK4470, BK4544, BK5162, BK6357, BK6445, BK13242, and BK16586.

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> **C. Governing Law, Forum and Compliance**
>
> (2) Franchisee and BKC acknowledge and agree that the U.S. District Court for the Southern District of Florida, or **if such court lacks jurisdiction, the 11th Judicial Circuit (or its successor) in and for Miami-Dade County, Florida**, shall be the venue and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Franchise Agreement except to the extent otherwise provided in this Agreement and **the parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction or venue of these courts**.

See Exhibit A at p. 27 (emphasis added) (the "Subject Provision").

17. Pursuant to 28 U.S.C. § 1390:

> 'venue' refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

18. Per the statute, a choice of venue provision cannot expand the subject matter jurisdiction of the district courts.

19. Defendant purportedly seeks to impose upon its out-of-state franchisees (and this Court) exclusive subject-matter jurisdiction in federal court located in this District for all legal disputes – including those disputes that exclusively involve state claims.

20. The Supreme Court has expressly held that:

> A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Bremen v. Zapata Off–Shore Co., 407 U.S. 1, 15 (1972); *see also Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1242 (11th Cir. 2012).

21. It is axiomatic that the plaintiff is the master of the claim; a plaintiff may avoid federal jurisdiction by exclusive reliance on state law. *Caterpillar, Inc. v. Williams*, 482 U.S. 386,

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392, 107 S. Ct. 2425, 2429 (1987); *see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon.") (Holmes, J.); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809, n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); *Great North R. Co. v. Alexander*, 246 U.S. 276, 282 (1918) ("The plaintiff may by the allegations of his complaint determine the status with respect to removability of a case.").

22. This policy is codified in 28 U.S.C. § 1441(b)(2), known as the forum defendant rule. The statute provides, in relevant part:

> A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [*i.e.* diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441.

23. "[T]he forum defendant rule disallows federal removal premised on diversity in cases where the primary rationale for diversity jurisdiction—to protect defendants against presumed bias of local courts—is not a concern because at least one defendant is a citizen of the forum state." *Morris v. Nuzzo*, 718 F.3d 660, 665 (7th Cir. 2013). Removal statutes such as 28 U.S.C. §1441 are subject to strict construction. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). Doubts about whether federal jurisdiction exists must be resolved against a finding of jurisdiction. *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir. 2000).[4]

[4] At best, the differing interpretations of the meaning of the venue selection clause with respect to Plaintiff's rights to purse state court claims in state court renders the provision ambiguous. "[I]t is a long-standing rule that contractual ambiguities will be resolved against the drafters." *Federal Trade Commission v. MOBE Ltd.*, 2018 WL 4960232, at *5 (M.D. Fla. Aug. 8, 2018) (citing *Key v. Allstate Ins. Co.*, 90 F.3d 1546, 1549 (11th Cir. 1996)).

Defendant would like the Court to analyze the Subject Provision without regard of its implications with respect to Federal statutory authority. However, the Court does not analyze

24. The Subject Provision cited in paragraph 15 above is improper because it violates the well-established public policies articulated in 28 U.S.C. § 1441 and 1446 as interpreted by numerous federal courts.

25. In particular, by purporting to make federal court the exclusive forum for all cases and controversies (even those sounding in state law) when the franchisor and the franchisee are of diverse citizenship, this choice-of-forum clause attempts to rob the franchisee of its right (mandated both statutorily and by judicial decision) to bring state law claims in Defendant's local state forum. *See* 28 U.S.C. § 1441(b)(2).

26. Without a clear determination of the validity and enforceability of the forum selection clause at issue, there is a real and present controversy between the language of the forum selection clause and federal statutes, specifically 28 U.S.C. § 1441(b)(2) (which prohibits removal by a resident defendant), 28 U.S.C. §1446 (which sets forth the appropriate removal deadlines), and 28 U.S.C. § 1390 (which defines venue in terms of "geographic specification" and not in terms of granting or restricting subject matter jurisdiction).

27. Put another way, if the forum selection clause at issue is interpreted and applied in the way Defendant suggests, Defendant will be effectively able to expand the subject-matter jurisdiction of the federal courts. Specifically, through its expansive use of a contractual venue provision, Defendant will be able to require all of its out-of-state franchisees to litigate exclusively in the federal courts and will be able to contractually override the resident-defendant rule and timing requirements of 28 U.S.C. § 1441 and 1446.

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statutory or contractual provisions in a vacuum. *See, e.g., WesternGeco LLC v. Geophysical Corp.*, 138 S.Ct. 2129, 2137 (2018) ("When determining the focus of a statute, we do not analyze the provision at issue in a vacuum."); *see also Vestoil, Ltd. v. M/V M PIONEER*, 2005 WL 3675960, at *3 (March 31, 2005) (noting that "the Court cannot assess the content of a contract in a vacuum").

28. This case has immense implications for this Court. Specifically, if this Court were to find that Defendant is allowed to circumvent the resident defendant rule in its franchise agreements, and force all of its franchisees to file lawsuits exclusively in federal court—specifically, this Court—this District will be exposed to potentially thousands of lawsuits involving a resident defendant and having nothing to do with issues of federal law.[5]

29. For example, on November 17, 2016, franchisees of Defendant's affiliated brand, Tim Hortons, filed a complaint against Tim Hortons for eight (8) state-law based causes of action in the 11th Judicial Circuit in and for Miami-Dade County, where Tim Hortons has its business office. Specifically, those franchisees filed claims for: breach of contract; breach of the implied duty of good faith and fair dealing; violation of the Florida Deceptive and Unfair Trade Practices Act; tortious interference with a contract; violation of the Ohio Business Opportunity Plans Act; violation of the Ohio Deceptive Trade Practices Act; intentional misrepresentation; and negligent misrepresentation. *Picktown Foods, LLC, et al. v. Tim Hortons USA, Inc.*, Circuit Court for Miami-Dade County Case No. 16-29754 CA 40.

30. Implicitly acknowledging the proper limits of the removal statute (§ 28 U.S.C. 1441(b)(2)), Defendant's affiliate, Tim Hortons, did not attempt to remove the *Picktown* action to state court.

31. Instead, on January 11, 2017, well after the deadline to effectuate a timely removal, Defendant's affiliate moved to dismiss the *Picktown* action based on the choice of venue provision contained within the applicable franchise agreements.[6] The *Picktown* plaintiffs argued that

[5] As of December 31, 2018, Burger King, Tim Hortons, and Popeyes, RBI franchises or owns over 25,000 restaurants worldwide. *See* Footnote 1, *supra*.

[6] Indeed, the operative language contained in the choice of venue provision in the Tim Hortons franchise agreements is similar to that employed by Defendant in the Franchise Agreements and, presumably, Defendant will argue that it has the same effect of mandating that

dismissal was not proper because the forum selection clause that Tim Hortons sought to enforce was invalid as against public policy and contrary to federal law under 28 U.S.C. § 1441 and 1446.

32. On February 23, 2017, the state court entered an order dismissing the *Picktown* plaintiffs' claims in the State Court Litigation based solely on the forum selection clause, reasoning that it could not find that the state court was a proper venue for the dispute "until such time as a federal court determines its jurisdiction." A true and correct copy of the state court's Order of Dismissal is attached hereto as **Exhibit "B."**

33. The state court declined to decide the appropriate scope of federal court subject matter jurisdiction under the subject venue clause and left the issue of whether the venue selection clause is invalid open for the federal court to determine, stating:

> There is no allegation, averment, argument or otherwise which indicates the federal court has addressed the question of its own subject matter jurisdiction, or lack thereof. **Accordingly, until such time as the federal court determines its jurisdiction, venue is improper in this Court.**

See Ex. B at p. 2 (emphasis added).

34. The *Picktown* plaintiffs sought redress from this Court and sought a declaration that the choice of venue provision was invalid in connection with *Picktown Foods, LLC, et al. v. Tim Hortons USA, Inc.*, S.D. Fla. Case No.: 17-21072-CV-ALTONAGA/Goodman. In response, Tim Hortons filed a motion to dismiss arguing that the *Rooker-Feldman* doctrine applied to preclude the *Picktown* plaintiffs from litigating the venue dispute in Federal Court.[7] The Court did not reach

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Plaintiff may only pursue its claims for relief under state law in this Court.

[7] Notably, Tim Hortons' argument under the *Rooker-Feldman* doctrine relied upon the fact that the *Picktown* plaintiffs originally filed their substantive claims in state court, which Tim Hortons moved to dismiss pursuant to the Subject provision. Although it was the *Picktown* plaintiffs' position that the state court did not reach a substantive decision on the applicability of the Subject Provision, the *Rooker-Feldman* doctrine cannot apply in this matter, where Plaintiff has not first sought relief in a state court.

the question of the enforceability of the choice of venue provision, determining that such review was barred by the *Rooker-Feldman* doctrine. [*Picktown* DE 28]

35. Following *Picktown*, the question of whether a Defendant is permitted to unlawfully expand the jurisdiction of the federal courts in a manner inconsistent with federal law and policy remains open.

36. Put another way, this case presents a clear and significant conflict between the language of a forum selection clause in the operative Franchise Agreements and three fundamental federal principles: a federal court's limited jurisdiction, a plaintiff's right to access state courts for purely state law claims and the inability of an in-state defendant to exercise removal.

Count I – Action for Declaratory Relief

37. Plaintiff incorporates each and every allegation in paragraphs 1 through 36 above as if fully set forth in this Count.

38. This is an action pursuant to the Federal Declaratory Judgment Act under 28 U.S.C. 2201 and 2202.

39. There exists a bona fide adverse interest between Plaintiff and Defendant concerning the powers, privileges, immunities, and rights of the Plaintiff under the Franchise Agreements related to the enforceability of the Franchise Agreements' choice-of-forum clause.

40. Plaintiff believes that it has several claims against Defendant arising out of the Franchise Agreements and common law under the laws of the state of Florida. It wishes to assert these state-law only claims and is concerned that it will be deprived of its right to seek relief in a state forum.

41. In particular, Plaintiff believes that Defendant has violated its obligations set forth in Section 9 of the Franchise Agreements regarding Plaintiff's "Royalty and Advertising

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Contribution," which results in an advertising fund to be utilized for, *inter alia* "creative, production and other costs incurred in connection with the development of Advertising, sales promotions and public relations . . . **in the market area of [Plaintiff's] Franchised Restaurant[s]** . . . ." *See* Ex. A, § 9.B.(i) (emphasis added). Defendant has breached its obligations by failing to utilize Plaintiff's advertising contributions to market the Burger King brand in the Greater Charleston, South Carolina area, not properly accounting for the advertising expenditures, failing to provide Plaintiff with documents evidencing the results of audits conducted with regard to Defendant's use of advertising contributions, and by misappropriating funds for purposes other than advertising in the Greater Charleston, South Carolina area.[8]

42. The above-referenced actions and inactions on behalf of Defendant also give rise to claims for, *inter alia*, violations of the Implied Covenant of Good Faith and Fair Dealing, and the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").

43. Plaintiff wishes to prosecute its state law claims in state court. Given that Defendant is a Florida corporation and has its principal office located in Miami, Florida, if Plaintiff commences its state law claims in Florida state court, Defendant would be prohibited, by federal law, from removing this matter to federal court.

44. Instead, Defendant is likely to seek dismissal of the state court action on the grounds that the Subject Provision mandates that all litigation against it proceed "exclusively" in federal

[8] On May 8, 2019, Plaintiff sent Defendant a demand letter outlining these various breaches of contract and Defendant's concerted effort to divert marketing dollars away from the Charleston, South Carolina area to the detriment of Plaintiff (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit "C."**

In response to the Demand Letter, on May 13, 2019, Defendant sent Plaintiff a letter refusing to address the substance of Plaintiff's claims and, instead, making vague assertions that Plaintiff's claims "are pure fiction, are preposterous and are denied." A true and correct copy of Defendant's May 13, 2019 letter is attached hereto as **Exhibit "D."**

court as its affiliate did in the *Picktown* case.

45. Plaintiff is entitled to have the doubt surrounding the enforceability of the forum selection clause removed by way of declaratory relief from this Court.

46. To the extent that issues of fact arise in this declaratory action, Plaintiff demands a jury trial as per Federal Rule of Civil Procedure 57.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter a judgment declaring that:

(i) the Franchise Agreement's choice-of-forum clause is void and unenforceable for violation of Federal law and public policy;

(ii) Plaintiff is entitled to its reasonable attorneys' fees and costs incurred as a consequence of being forced to seek the relief requested herein; and

(iii) granting such other and further relief as this Court deems just and proper.

Count II – Action for Declaratory Relief

47. Plaintiff incorporates each and every allegation in paragraphs 1 through 36 above as if fully set forth in this Count.

48. This is an action pursuant to the Florida Declaratory Judgment Act, § 86.011 *et seq*, Florida Statutes. This Court has jurisdiction over this state law cause of action because Plaintiff's other claim involves federal questions and this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

49. There exists a bona fide adverse interest between Plaintiff and Defendant concerning the powers, privileges, immunities, and rights of the Plaintiff under the Franchise Agreements related to the enforceability of the Franchise Agreements' choice-of-forum clause.

50. Plaintiff believes that it has several claims against Defendant arising out of the

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Franchise Agreements and common law under the laws of the State of Florida. It wishes to assert these state-law only claims and is concerned that it will be deprived of its right to seek relief in a state forum.

51. For example, Plaintiff believes that Defendant has violated its obligations set forth in Section 9 of the Franchise Agreements regarding Plaintiff's "Royalty and Advertising Contribution," which results in an advertising fund to be utilized for, *inter alia* "creative, production and other costs incurred in connection with the development of Advertising, sales promotions and public relations . . . **in the market area of [Plaintiff's] Franchised Restaurant[s]** . . . ." *See* Ex. A, § 9.B.(i) (emphasis added). Defendant has breached its obligations by failing to utilize Plaintiff's advertising contributions to market the Burger King brand in the Greater Charleston, South Carolina area, not properly accounting for the advertising expenditures, failing to provide Plaintiff with documents evidencing the results of audits conducted with regard to Defendant's use of advertising contributions, and by misappropriating funds for purposes other than advertising in the Greater Charleston, South Carolina area.[9]

52. The above-referenced actions and inactions on behalf of Defendant also give rise to claims for, *inter alia*, violations of the Implied Covenant of Good Faith and Fair Dealing, and FDUTPA.

53. Plaintiff wishes to prosecute its state law claims in state court. Given that Defendant is a Florida corporation and has its principal office located in Miami, Florida, if Plaintiff commences its state law claims in Florida state court, Defendant would be prohibited, by federal law, from removing this matter to federal court.

54. Instead, Defendant is likely to seek dismissal of the state court action on the grounds

[9] *See* footnote 8, *supra*.

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that the Subject Provision mandates that all litigation against it proceed "exclusively" in federal court as its affiliate did in the *Picktown* case.

55. Plaintiff is entitled to have the doubt surrounding the enforceability of the forum selection clause removed by way of declaratory relief from this Court.

56. To the extent that issues of fact arise in this declaratory action, Plaintiff demands a jury trial as per Federal Rule of Civil Procedure 57.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter a judgment declaring that:

(i) the Franchise Agreements' choice-of-forum clause is void and unenforceable for violation of Florida law and public policy;

(ii) Plaintiff is entitled to its reasonable attorneys' fees and costs incurred as a consequence of being forced to seek the relief requested herein; and

(iii) granting such other and further relief as this Court deems just and proper.

WHEREFORE, Plaintiff CAPITAL RESTAURANT GROUP, LLC, demands judgment against Defendant, BURGER KING CORPORATION, for damages, interest, costs, and such other relief as the Court deems just and proper.

Dated: May 24, 2019

Respectfully submitted,

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