MICHAEL D. JOBLOVE (*Pro Hac Vice*)
GENOVESE JOBLOVE & BATTISTA, P.A.
Bank of America Tower, 44th Floor
100 Southeast 2nd Street
Miami, FL 33131
Tel: 305.349.2300
Fax: 305.349.2310

JEFFREY A. ROSENFELD (Bar No. 136896)
GREGG D. ZUCKER (Bar No. 166692)
TIMOTHY S. BLACKFORD (Bar No. 190900)
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

Attorneys for Defendant
BURGER KING CORPORATION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NATIONAL FRANCHISEE ASSOCIATION, INC., 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,

v.

BURGER KING CORPORATION, a Florida Corporation, and THE COCA-COLA COMPANY, a Delaware Corporation,

Defendants.

Case No. 09 CV 0939 W-NLS

DEFENDANT BURGER KING CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT, OR, ALTERNATIVELY, TO TRANSFER

DATE: August 10, 2009
JUDGE: Hon. Thomas J. Whelan

NO ORAL ARGUMENT PURSUANT TO CIVIL LOCAL RULE 7.1(d)(1)

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Defendant Burger King Corporation ("BKC"), pursuant to Fed R. Civ. Pro. 12(b)(1), and 12(b)(3) and 28 U.S.C. §§ 1406 and 1404(a), hereby moves to dismiss, or alternatively, transfer this case to the United States District Court for the Southern District of Florida.[1]

I. INTRODUCTION

Plaintiff National Franchisee Association ("NFA") is a Nevada corporation headquartered in Atlanta, Georgia that filed this lawsuit against The Coca-Cola Company ("Coca-Cola"), headquartered in Atlanta, Georgia, and BKC, headquartered in Miami, Florida, involving a contract made in Miami. This contract, known as the Soft Drink Agreement ("SDA"),[2] relates to the supply of Coca-Cola products to BKC and to BURGER KING® Franchisees throughout the U.S.A. ("Franchisees").

The NFA claims to represent the interests of the Franchisees, who are not parties to the SDA but are alleged third party beneficiaries. The NFA contends that the SDA was improperly amended without Franchisee consent, despite the fact that the SDA, and the BURGER KING® Franchise Agreements ("Franchise Agreements") of the NFA's member franchisees, allows BKC the right to amend supply terms without franchisee consent.

By suing in this district, the NFA is forum shopping. The Franchise Agreements between the NFA's member franchisees and BKC require the application of Florida law and state that every dispute relating directly or indirectly to the franchise relationship be brought in the United States District Court for the Southern District of Florida. Likewise, the Soft Drink Agreement at issue requires the application of Florida law and contemplates that any disputes would be resolved in Miami.

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[1] This case is identical in all material respects to the case of *National Franchisee Association v. Burger King Corporation and Dr Pepper Snapple Group, Inc.*, U.S. District Court, Southern District of California, Case No. 09-CV 940 W NLS. Accordingly, this Court will find that this memorandum is virtually identical to that filed in support of a motion to dismiss filed by BKC in Case No. 09 CV 940 W NLS. Both cases arise in connection with virtually identical Franchise Agreements and Soft Drink Agreements and seek relief on identical claims.

[2] The SDA is discussed more fully below.

As discussed below, precedent from the United States Supreme Court and the Ninth Circuit require that this lawsuit, filed in California in violation of the forum selection clauses, must be dismissed. Alternatively, BKC respectfully requests a transfer of the case to the Southern District of Florida. Most of the witnesses and evidence reside in that district where the Agreement was made, whereas the Southern District of California bears little or no relation to the dispute. If this Court nevertheless decides to proceed with the action here, BKC respectfully requests that the case be dismissed because the NFA lacks standing to maintain its claims.

II. FACTS

A. The Parties

Plaintiff, NFA, is a Nevada corporation headquartered in Atlanta, Georgia. (Compl. ¶ 4). The NFA employs a professional staff located in Atlanta and Washington, D.C. (Greco Decl. at Ex. "1").[3] The NFA alleges that 75% of BURGER KING® Franchisees in the United States are members of the NFA or are members of regional franchise associations in the United States that are, in turn, members of the NFA. (Compl. ¶ 4). According to the NFA, it brings this action on the behalf of its member franchisees. (*Id.*).

BKC and its affiliates operate a worldwide system of company-owned and franchised BURGER KING® Restaurants ("BURGER KING® System"). (Granat Decl. at ¶ 3).[4] The BURGER KING® System now has more than 11,800 restaurants, including 7,273 BURGER KING® Restaurants in the United States. (*Id.*) Only 9% of the U.S. restaurants are located in California. (*Id.*) The remainder are in the other forty-nine (49) states. (*Id.*)

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[3] The Declaration of Carol Greco, a paralegal at the law firm of Genovese Joblove & Battista, P.A., in support of this motion is being filed concurrently herewith.

[4] The Declaration of Jill Granat, Assistant General Counsel for BKC, in support of this motion is being filed concurrently herewith.

Defendant Coca-Cola is headquartered in Atlanta, Georgia. (Mader Decl. at ¶ 2).[5] Pursuant to the SDA, Coca-Cola provides certain beverages to the BURGER KING System. (*Id.* at ¶ 4).

B. The BURGER KING® System

The BURGER KING® System is composed of franchisee owned and operated BURGER KING® Restaurants as well as company owned restaurants. (Granat Decl. at ¶¶ 2-3).[6] BKC's Franchise Agreements provide for uniform standards of operation, essential in any franchise system. (*Id.* at ¶ 4, Ex. "1" § 5). The Franchise Agreements provide that Franchisees will adhere to certain operating standards, including the service of only those drinks BKC approves, and utilizing equipment only approved by BKC. (*Id.* at Ex. "1" §§ 5A, 5D, 5F).

Significantly, the Franchise Agreements uniformly provide that the United States District Court for the Southern District of Florida is the exclusive venue for the litigation of any matter involving the Franchise Agreements, directly or indirectly, as follows:

> 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 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.

(*Id.* at Ex. "1" § 21.C(2)) (emphasis added). Additionally, BKC and its Franchisees agreed that the Franchise Agreements were made in Florida and governed in accordance with Florida law, (*Id.* at § 21.C(1)), where BKC is headquartered and where payments under the Franchise Agreements must be made. (*Id.* at § 9.E).

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[5] The Declaration of Michael Mader, Vice-President-Sales, Global Burger King Account Team of the Food Service and On-Premises Division of Coca-Cola, in support of this motion is being filed concurrently herewith.

[6] A sample BURGER KING® Franchise Agreement is attached as Exhibit "1" to the Declaration of Jill Granat filed concurrently herewith.

The forum selection clauses constitute a vital part of the Franchise Agreements. They were designed to avoid pre-trial motions, such as the instant motion, and to conserve judicial resources that otherwise would be devoted to deciding such motions. (*Id.* at ¶ 5). Without forum selection clauses, BKC would incur increased litigation expenses that would be passed on to franchisees through higher royalties and other charges. (*Id.* at ¶ 6). BKC anticipated cost savings from being able to litigate all franchise disputes in a single local forum (Miami, Florida) that would develop a body of case law allowing greater consistency and predictability in the resolution of franchise disputes to the benefit of all parties. (*Id.*). For all of these reasons, BKC insists that its U.S. Franchise Agreements uniformly contain forum selection clauses. (*Id.*).

The Complaint challenges the SDA between BKC and Coca-Cola entered in 1999, as amended on several occasions. (Compl. ¶¶ 3, 51-54, 60). The NFA complains about the terms of the amended SDA that govern the sale and promotion of certain Coca-Cola products in the BURGER KING® System. (*Id.* at ¶¶ 51-54, 60). Notably, the SDA – just like the Franchise Agreement – requires that all disputes must be brought in Miami, Florida. (SDA at ¶ 11.5).[7]

The NFA challenges a recent amendment to the Soft Drink Agreement made by BKC and Coca-Cola that re-allocates certain "Restaurant Operating Funds" ("ROF") to ensure that such funds are properly used for marketing and promotion. (Compl. ¶¶ 51-54, 60). According to the NFA, its member franchisees are third party beneficiaries of the SDA. (Compl. ¶¶ 34, 45, 59). If so, they must comply with the terms of the SDA and litigate in Miami, just as their Franchise Agreements require. The NFA is improperly forum shopping in California.

III. DISMISSAL IS REQUIRED UNDER FRCP 12(B)(3)

A. <u>Standard for 12(b)(3) Motions</u>

In the Ninth Circuit, a motion to dismiss pursuant to a forum selection clause is governed by Rule 12(b)(3). *R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996).

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[7] A copy of the SDA has been filed concurrently with this motion under seal. The provisions of the SDA require that the parties keep the terms of the agreement confidential. The information set forth therein is highly confidential and proprietary business information. Accordingly, BKC has requested that the SDA be kept confidential, and has filed the SDA under seal.

When a Rule 12(b)(3) motion is filed, the court need not accept the allegations in the Complaint as true and may consider facts outside the pleadings. *Id*. The burden of proof on such a motion rests with the Plaintiff. *eBay Inc. v. Digital Point Solutions, Inc.*, 608 F.Supp.2d 1156, 1161 (N.D.Cal. 2009).

In a diversity action, such as this case, federal law governs the analysis of a forum selection clause. *R.A. Argueta*, 87 F.3d at 324; *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir.1988). Specifically, federal law governs interpretation of the forum selection clause and the enforcement of the forum selection clause. *Id.* In this case, the forum selection clause is enforceable against the NFA.

B. The NFA Must Comply With the Forum Clause in the Franchise Agreements

The NFA alleges that it brings this action on behalf of its member franchisees, each of whom executed Franchise Agreements containing forum selection clauses designating Miami, Florida as the sole and exclusive forum for this action. According to the NFA, its member franchisees are third party beneficiaries of the SDA. (Compl. ¶¶ 34, 45, 59). As discussed above, the SDA likewise requires that any disputes regarding that agreement must be brought in Miami, Florida. (SDA at ¶ 11.5). To the extent that the NFA seeks to enforce any rights of the Franchisees pursuant to their Franchise Agreements and the SDA, those rights can be no greater than the rights of the parties to those agreements, which required disputes to be resolved in Miami, Florida. *See eBay Inc.*, 608 F. Supp. 2d at 1162 (N.D.Cal 2009) (third party beneficiary is bound by the terms of the agreement, including the forum selection clause); *Downey v. Federal Express Corp.*, No. C-92-4956 MHP, 1993 WL 463283 at *2 (N.D.Cal. Oct. 29, 1993) (third party beneficiary has no greater rights under the contract than the contracting parties); *see also Manetti-Farrow*, 858 F.2d at 514 n. 5 (alleged conduct of non-parties was so closely related to the parties that a forum selection clause applied to all defendants).

A presumption of validity attaches to forum selection clauses. *See R.A. Argueta*, 87 F.3d at 324-25; *Laasko v. Xerox Corp.*, 566 F. Supp. 2d 1018, 1021 (C.D.Cal. 2008). These clauses must be enforced and applied except in limited circumstances which are inapplicable here. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972); *Carnival Cruise Lines v. Shute*, 499 U.S.

585, 590-96 (1991); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *R.A. Argueta*, 87 F.3d at 325; *Manetti-Farrow*, 858 F. 2d 509, 514 (11th Cir. 1989).

As the Supreme Court of the United States stated in *M/S Bremen*, forum selection clauses are presumptively valid and should be enforced unless the party challenging the clause "clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *M/S Bremen*, 407 U.S. at 15. *See also Am. Home Assurance Co. v. TGL Container Lines, LTD*, 347 F. Supp. 2d 749, 755 (N.D.Cal. 2004). The Supreme Court reiterated this position in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590-96 (1991), where the Supreme Court reversed a Ninth Circuit decision that would have allowed a Washington resident to sue a cruise line in Washington despite a forum selection clause found in small print on the back of the Washington resident's cruise ticket. The Supreme Court held that the forum selection clause was valid even though it was contained in a form contract where the passenger had no bargaining power. *Id.* at 593-95.

> The Ninth Circuit in *R.A. Argueta*, held that a forum clause is unenforceable only if:
>
> (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so "gravely difficult and inconvenient" that the complaining party will "for all practical purposes be deprived of its day in court," or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought.

R.A. Argueta, 87 F.3d at 325 (citations omitted).

There is no basis to deny enforcement of the forum selection clause(s) in this case. Coca-Cola, the only other party to the SDA besides BKC, does not claim that the forum clause was obtained through fraud/undue influence.[8] Indeed, the majority of BKC's negotiations with regard to the SDA all took place in Miami. (Granat Decl. at ¶ 12). As for the franchisees, who were not even parties to the SDA, their contractual relationship with BKC is managed from Miami, and the Franchise Agreements which govern their relationship with BKC (and the SDA) are all deemed to have been made there. (Granat Decl. at Ex. "1", ¶ 21(C)(1); SDA at ¶ 11.5). These facts belie

[8] To the contrary, Coca-Cola is joining in this motion and likewise requests transfer to the Southern District of Florida.

any claim of a bad-faith motive for including the venue clause in the Franchise Agreements or the SDA. *See Carnival*, 499 U.S. at 594-95.

Further, the NFA cannot contend that the Miami forum is so "gravely difficult and inconvenient" that the NFA will for all practical purposes be deprived of its day in court. To the contrary, the NFA's headquarters and employees are in Atlanta, Georgia, which is plainly closer to Miami than Southern California. Lastly, enforcement of the forum selection clause against the NFA will not contravene a strong public policy of California, because there is no California public policy protecting the interests of a Nevada franchise association headquartered in Georgia.

Given the Supreme Court's unaltered course in enforcing forum selection clauses, it is beyond dispute that the Franchise Agreements and SDA are valid and enforceable. The NFA cannot meet the "heavy burden of proof" the Supreme Court has imposed upon plaintiffs seeking to set aside a forum selection clause. As *Bremen*, *Carnival* and the Ninth Circuit make plain, BKC is entitled to enforcement of its forum selection clause as a matter of law.

IV. ALTERNATIVELY, TRANSFER IS WARRANTED UNDER 28 U.S.C. § 1404

If this Court does not dismiss this case pursuant to the Supreme Court and Ninth Circuit authority discussed above, then BKC moves to transfer this action to the Southern District of Florida pursuant to 28 U.S.C. § 1404. Where a defendant moves for transfer pursuant to 28 U.S.C. § 1404(a), the defendant must show "(1) that the district to which the defendant seeks to have the action transferred is one in which the action 'might have been brought,' and (2) that the transfer is '[f]or the convenience of the parties and witnesses, in the interest of justice.'" *Saleh v. Titan Corp.*, 361 F.Supp.2d 1152, 1155 (S.D.Cal. 2005)(citing 28 U.S.C. § 1404(a)).

A. Venue is proper in the United States District Court for the Southern District of Florida Pursuant to 28 U.S.C. § 1391(a)(1),(2)

Before considering whether transfer of venue is appropriate, venue must be proper in the transferee court. 28 U.S.C. § 1404(a). Here, it is beyond dispute that venue is proper in the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1391(a)(1) or (2). BKC resides in Miami. Likewise, pursuant to 28 U.S.C. § 1391(c), Coca-Cola is deemed to reside in that district as it was subject to personal jurisdiction in Florida at the

time the action commenced. 28 U.S.C. § 1391(c). Additionally, venue is proper in the Southern District of Florida where "a substantial part of the events and omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2).

B. Transfer to the Southern District of Florida is Warranted for the Convenience of the Parties and Witnesses, in the Interest of Justice

Section 1404(a) "displaces the common law doctrine of forum non conveniens" with respect to transfers between federal district courts. *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1155 (S.D.Cal. 2005)(citation omitted). By passing section 1404(a), Congress "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than for dismissal pursuant to the doctrine of *forum non conveniens*. *Id.* (citing *Norwood v. Kirkpatrick*, 349 U.S. 29, 32, 75 S.Ct. 544, 99 L.Ed. 789 (1955)).

Although Section 1404 provides for consideration of all relevant factors in determining whether to transfer, the existence of a forum selection clause is virtually dispositive. *See Stewart Org., Inc.*, 487 U.S. at 33 (concurring opinion) (holding that Section 1404 analysis "forum selection clause is given controlling weight in all but the most exceptional cases"); *see also Rowsby v. Gulf Steam Coach, Inc.*, No. SA CV 08-1213 DOC (FFMx), 2009 WL 1154130 at * 4 (C.D. Cal. Feb. 9, 2009) (holding that transfer under Section 1404 was proper where forum selection clause in warranty agreement applied to purchaser of motor home despite claim that he did not sign agreement and forum clause warranted substantial consideration).

This case is not the "exceptional case" that justifies ignoring the forum clause and requiring litigation in California. If anything, the usual factors considered in whether to transfer a case – even in the absence of a forum clause – strongly justify a transfer here. Specifically, the factors a court considers in determining whether to transfer the case pursuant to 1404(a) include:

> (1) the plaintiff's choice of forum; (2) the extent to which there is a connection between the plaintiffs' causes of action and this forum; (3) the parties' contacts with this forum; (4) the convenience of witnesses; (5) the availability of compulsory process to compel attendance of unwilling non-party witnesses; (6) the ease of access to sources of proof; (7) the existence of administrative difficulties resulting from court congestion; (8) whether there is a "local interest in having localized controversies decided at home"; (9) whether unnecessary problems in conflict of laws, or in the

> application of foreign law, can be avoided; and (10) the unfairness of imposing jury duty on citizens in a forum unrelated to the action.

Saleh, 361 F. Supp. 2d at 1156.

1. NFA's Choice of Forum Warrants No Deference

Although courts may defer to a plaintiff's choice of forum, that deference is inappropriate where, as here, a plaintiff has already chosen the contractual forum for venue. *Rowsby*, 2009 WL 1154130 at *4 (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3rd Cir. 1995)). Additionally, even less deference is to be given to the NFA's choice of forum where the state wherein the action is filed is not the plaintiff's state of residence and has no connection to the acts giving rise to the lawsuit. *Owner-Operator Independent Drivers Assn, Inc. v. C.R. England, Inc.*, No. CV F 02-5664 AWI SMS, 2002 WL 32831640 at *6 (E.D.Cal. Aug. 19, 2002). As discussed above, the NFA is a Nevada corporation headquartered in Atlanta, Georgia, not a California corporation.

Indeed, the NFA brings this suit as a purported class action, requiring even less weight to be given the NFA's choice of forum. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). Thus, the express forum selection clause, the fact that the NFA is not a California citizen and the fact that the NFA purports to bring this action as a class action on behalf of its members, results in no deference being given to the NFA's choice of forum.

2. The Parties' Contacts With This Forum and the Connection Between the NFA's Claim and This Forum Warrants Transfer

There is no substantial connection to California, and the connection to Miami, Florida is great. Specifically, the negotiations, execution of agreements and decision-making with regard to this matter all took place in Miami (or Atlanta). (Granat Decl. at ¶¶ 12-13; Mader Decl. at ¶ 6). Further, the NFA has not alleged that any of the critical acts in this matter took place in this forum, nor could it.

3. The Convenience of Witnesses and Access to Proof Favors Transfer

The convenience of the parties and potential witnesses weighs strongly in favor of transferring this matter to the Southern District of Florida. Again, the NFA is a Nevada

corporation with its principal place of business in Atlanta, Georgia. (Compl. ¶ 4). Atlanta, Georgia is far closer to the Southern District of Florida than it is to California. Further, BKC and the vast majority of its potential witnesses are located in Miami, Florida. (Granat Decl. at ¶¶ 14-16).[9] Likewise, Coca-Cola, and the vast majority of its potential witnesses are located in Atlanta, Georgia, which is significantly closer to Miami, Florida than to California. (Mader Decl. at ¶¶ 3-7).[10]

Further, the relative ease and access to proofs also weighs in favor of transferring this matter. The documents at issue in this case include the Agreements, correspondence among the parties, and certain internal records and correspondence of the parties. These documents, as well as any others of significance, are maintained by BKC in Florida, Coca-Cola in Georgia and the NFA in Georgia. (Granat Decl. at ¶ 12; Mader Decl. at ¶ 8).

Likewise, the cost to the parties to litigate in the Southern District of Florida will be significantly less than litigating in this District because the parties are headquartered in Florida or Georgia. Otherwise, they would have to waste significant manpower and time flying across the country.

Any decisions concerning the instant case were also made by BKC in Miami, Florida. Significantly, Plaintiff's Complaint alleges a controversy that is supposedly based on the Franchise Agreements, the SDA and the decision of BKC and Coca-Cola regarding certain Restaurant Operating Funds. As a result, the primary witnesses will be the BKC employees, located in Miami, Florida, who are the most knowledgeable of the alleged BKC corporate policies and practices that form the basis of NFA's Complaint. (Granat Decl. at ¶¶ 14-15). Given that the

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[9] Eight of BKC's ten listed witnesses reside in the Southern District of Florida. The current location of the other two witnesses, two former employees of BKC, is presently unknown although their last known business address was in San Francisco, California. (Granat Decl. at ¶¶ 14-16).

[10] Four of Coca-Cola's five listed witnesses reside in the Atlanta area. The other individual lives in New York. All of these individuals live significantly closer to the Southern District of Florida than Southern California. Further, Coca-Cola, and its employees, agreed to the Miami forum to resolve disputes and intended that any dispute would be resolved in Florida, a jurisdiction relatively close to its headquarters. (Mader Decl. at ¶ 9).

majority of the witnesses are located in either Florida or Atlanta as are the documents, the convenience of the parties and ease of proofs strongly favors the Southern District of Florida.

4. The Availability of Compulsory Process to Compel Attendance of Unwilling Non-Party Witnesses Favors Transfer

The availability of compulsory process to compel attendance of non-party witnesses is another factor that this Court may consider. Here, the current and former employees of Restaurant Services, Inc. ("RSI"), the other party involved in the negotiations regarding the SDA, have information material to this suit and primarily reside in the Southern District of Florida. (Granat Decl. at ¶ 16). Further, the majority of former BKC employees who were integral to the negotiations of the SDA live in Miami and would more readily be subject to the subpoena powers of the court in Miami. (*Id.* at ¶¶ 15-17).

5. The Existence of Administrative Difficulties Resulting From Court Congestion Weighs in Favor of Transfer

Another factor a court may consider is the existence of administrative difficulties resulting from court congestion. In this case, the Florida District Court generally disposes of civil cases quicker than this Court. (*See* http://www.uscourts.gov/cgi-bin/cmsd2008.pl).[11] Thus, for this reason as well, this Court should transfer this matter to the Southern District of Florida.

6. The Florida Choice of Law Provision and Local Interest in Having the Case Decided In Florida Warrants Transfer

As discussed above, the Franchise Agreements, the SDA and the amendments to the SDA each expressly provide that they shall be construed and enforced pursuant to the laws of the State of Florida. (Granat Decl. at Ex. "1" § 21.C(1); SDA at ¶ 11.5). The Southern District of Florida undoubtedly would be more familiar with Florida law. Notably, a forum's familiarity with the governing law is an important factor to be considered in determining whether to transfer venue.

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[11] BKC requests that this Court take judicial notice of its Federal Court Management Statistics Website, which shows the 2008 Judicial Caseload Profiles setting forth the median times from filing to disposition and filing to trial in civil cases for this Court and the Southern District of Florida.

Accordingly, a diversity case, such as the case at bar, should generally be tried in the "forum that is at home with the state law that must govern the case." *Ferens v. John Deere Co.*, 494 U.S. 516, 530 (1990) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

For example, in *Ririe v. Claritas Corp.*, No. C-89-3731 (MHP), 1990 WL 126559 (N.D. Cal. April 27, 1990), the California district court held that, despite other factors, the "overwhelming interest of justice" favored a Virginia forum by virtue of the parties selection of Virginia law in the agreement at issue. *Id.* at *4; *see also Bell v. K-Mart Corp.*, 848 F. Supp. 996, 1000 (N.D. Ga. 1994) (public interests of justice are best served by transferring cases to the localities in which they arose).

Additionally, BKC is headquartered in Florida. Thus, the Florida court has a significant interest in deciding this case due to the substantial involvement of its resident, BKC. *See Owner-Operator Independent Drivers Assn.*, 2002 WL 32831640 at *12. As discussed above, the NFA is not a resident of this district, the alleged acts underlying the declaratory judgment claim did not take place in California and California does not have a significant interest in applying the laws of the state of Florida. Thus, this factor weighs heavily in favor of transfer.

7. Imposing Jury Duty on Citizens in California who are Unrelated to the Action Warrants Transfer

In light of the minimal connection this case has with this district, it would place a heavy burden on the jurors in this district to hear this matter. In contrast, it would not be an undue burden for jurors in the Southern District of Florida to decide this case given that BKC, one of its citizens, was involved. *See Saleh*, 361 F.Supp.2d at 1167 (transfer to Eastern District of Virginia was appropriate given minimal contact controversy had with jurisdiction, and thus, deciding case would have imposed undue burden on jurors within district). Given the forum selection clause, the expectation of the parties to resolve disputes in Miami, and all of the factors set forth above, this is not such an "exceptional case" to justify proceeding in California.

V. THE NFA LACKS STANDING

In the event the Court does not dismiss this case under Fed. R. Civ. Pro. 12(b)(3) and does not transfer this case under Section 1404, dismissal is still justified.

A. A Franchise Association Lacks "Associational Standing"

To invoke this Court's jurisdiction and assert claims on behalf of franchisees, the NFA has the burden to establish its standing. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).[12] The standing requirement ensures that federal courts hear only "cases" or "controversies" under Article III of the United States Constitution. An association has "organizational standing" if it seeks to redress an injury that it personally suffers. *See Babitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 299 n. 11 (1979). The NFA does not claim standing on this ground. Rather, it relies upon the doctrine of "associational standing" to bring a complaint "on behalf of its members." *N. Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988). (Compl. ¶¶ 3-4, 10, 12). Associational standing, however, carves out only a narrow exception from the ordinary rule that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499.

In *Warth*, the Supreme Court explained that in some cases "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause." *Id.* at 511. The Supreme Court held in *Warth* that an association of construction firms lacked standing to assert a claim on behalf of its members because "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof. *Id.* at 515-516.

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[12] Rule 12(b)(1) motions to dismiss for lack of standing are either "facial," in which the inquiry is limited to the complaint's allegations, or "factual," in which the court may look at extrinsic evidence as well. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). BKC's motion to dismiss for lack of standing presents a "facial" challenge based solely upon Plaintiff's Complaint and the documents therein referenced. The factual statements in the declaration BKC submitted with its motion support its 12(b)(3) arguments. BKC does no more than attach documents Plaintiff referenced in the Complaint, which does not convert this to a factual challenge. *Doe v. Mann*, 285 F. Supp. 2d 1229, 1232 (N.D. Cal. 2003). Accordingly, Plaintiff's opposition must be limited to the Complaint and documents incorporated by reference. *See Savage*, 343 F.3d at 1039 n.2 (holding that a non-moving party may submit evidence outside the complaint only if "the moving party has converted the motion to dismiss into a factual motion by presenting affidavits").

In *Hunt v. Washington State Apple Adv. Comm'n*, 432 U.S. 333, 343 (1977), the U.S. Supreme Court restated these principles as a three-part test:

> [A]n Association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and **(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.**

Id. (emphasis added). Here, the NFA has failed to satisfy the third requirement, because the participation of individual members will be required in this suit.[13]

The mandatory nature of the third *Hunt* requirement was emphasized by the Supreme Court in *Harris v. McCrae*, 448 U.S. 297 (1980), when it refused to permit representational standing to an association of women who claimed that a law violated its members' rights under the First Amendment's Free Exercise Clause. The Supreme Court held that individual participation was necessary to establish that the challenged conduct constituted infringement of the member's rights, because it is necessary in a free exercise case for one to show the enactment's coercive effect upon each member in the practice of her religion. *Id.* at 321.

Subsequently, in *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287 (1986), the Supreme Court added that application of the third *Hunt* requirement necessarily precluded associational standing, unless the association's complaint on behalf of its members raises pure questions of law. *Id.* The Court reasoned that once it is determined that a complaint raises more than a pure legal question, then it necessarily implicates the type of individualized factual inquiry that *Warth* and *Hunt* prohibit. *Id.*

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[13] BKC does not agree that the other two prerequisites for standing are present. Indeed, because the NFA admits that many of the entities/persons it purports to represent are not even members, it clearly lacks standing to represent them. *See Warth*, 422 U.S. at 511 (standing in representational capacity requires that representative litigate on behalf of its "members"); *Hope, Inc. v. County of DuPage, Ill.*, 738 F.2d 797, 814-15 (7th Cir. 1984)(rejecting argument seeking to expand standing to represent those who are not "members" of the association). Likewise, the Complaint's failure to identify a single franchisee that has suffered a concrete, particularized, actual injury, requires dismissal under the first prong of *Hunt*. *Coalition for ICANN Transparency, Inc. v. Verisign, Inc.*, 452 F. Supp. 2d 924, 933-34 (N.D. Cal. 2006); *Dealer Store Owners Ass'n v. Sears, Roebuck and Co.*, No. CIV05-1256 ADM/JSM, 2006 WL 91335 at *3 (D. Min. Jan. 12, 2006).

Applying this Supreme Court precedent, courts have rarely found associational standing in any type of commercial case. Rather, associational standing cases almost always challenge a statute/regulation and ask the court to determine a pure issue of law (*e.g.*, constitutionality of a statute). Courts routinely reject associational standing where an association claims breach of contract, quasi-contract, or tort because individualized proof necessarily is at issue. *See Warth*, 422 U.S. 515 (dismissing suit by association because "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof"); *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596-97 (2d Cir. 1993) (association representing landlords lacked standing to claim that the application of the city's rent control scheme was unconstitutional because the court could not assess whether a member had a claim for relief without "delving into individual circumstances"); *Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575 (5th Cir. 2002) (distinguishing between decisions that focused on pure questions of law and holding that there can be no associational standing in a tortious interference case without participation of the individual members); *Rockford Principals and Supervisors Ass'n v. Board of Educ. of Rockford School Distr. No. 205*, 721 F. Supp. 948 (N.D. Ill. 1989) (denying associational standing to bring breach of contract claim because individualized proof is necessary to prove existence of contractual obligations).

Moreover, in the related context where a franchise association has sued a franchisor on behalf of franchisees, courts unanimously find associational standing absent because such claims necessarily require franchisee participation. *See, e.g., Michigan Dairy Queen Operators' Ass'n v. Int'l Dairy Queen, Inc.*, No. 1:08-cv-36, 2008 2566547*1-5 (W.D. Mich. June 9, 2008) (holding that franchise association lacked standing to seek declaratory judgment with respect to rights under franchise agreements because of the need for franchisee participation); *King v. GNC Franchising, Inc.*, No. 04-5125 (SRC), 2006 WL 3019551*10 (D.N.J. Oct. 23, 2006) (holding that a franchisee association lacked standing to assert breach of franchise agreement and various statutory claims regarding the supply of products in the franchise system. *DDFA of S. Fla., Inc., v. Dunkin Donuts, Inc.*, No. 00-7455-CIV, 2002 WL 1187207 (S.D. Fla. 2002) (franchisee associations lacked standing to sue franchisor for declaration that franchisor breached obligations

to franchisees); *Dalworth Oil Co., v. Fina Oil & Chem.*, 758 F. Supp. 410 (N.D. Tex. 1991) (dismissing claim by Texas Oil Marketers Association on behalf of FINA® distributors against Fina Oil asserting breach of obligations under distributorship contracts and Petroleum Marketing Practices Act for lack of standing because individual participation is necessary); *see also* John Swierzewski, Standing in Franchise Disputes: Check the Invitations, Not Every Party Gets Inside, 26 Franchise L. J. 107,112 (2007) (stating that "the author is not aware of any reported cases involving a franchisee association successfully asserting a claim of associational standing on behalf of its members for tort or private contract claims"); William B. Steele III & A. Darby Dickerson, Standing Issues Related To Franchisee Associations, 12 Franchise L. J. 99,101-02 (1993)(same). The general principle in these cases is applicable here, because this action will require the participation of individual franchisees to show their compliance with, and reliance upon, the SDA.

B. The NFA's Claims are Typical of Other Failed Claims By Franchisee Associations That Have no Standing.

As discussed above, a franchise association cannot bring claims, especially not contract-related claims, on behalf of its member franchisees. By their very nature, contract-related claims require a court to inquire into the particular circumstances of the parties to the contract to determine the existence of the contractual rights and the fact and extent of any harm suffered as a result of any alleged breach of such rights.

The NFA's Complaint is replete with matters requiring individualized factual support, rather than determination of a pure question of law. By way of example, the Complaint alleges the following, each of which requires individualized proof from each franchisee:

- Whether each Franchise Restaurant Owner has performed their required obligations under [the SDA] … (Complaint ¶ 40).
- Whether each franchisee has reported Restaurant Operating Funds in their financial records, and used the records to obtain credit. (Complaint ¶ 46).
- Whether each franchisee has purchased or replaced equipment in reliance of the Restaurant Operating Funds (*Id.* at ¶47).
- Whether each franchisee has relied on the funds for the purchase of water filter systems (*Id.*)

- Whether each franchisee has met the standards of a "Total Soft Drink Quality Program" (*Id.*).
- Whether each franchisee has met performance criteria under the SDA (*Id.*).

Likewise, in paragraph 46, the NFA alleges detrimental reliance by each individual franchisee: "the Franchisee Restaurant Owners have assented to and relied on the promise and representations of continued receipt of ROFs from Coca-Cola to the full extent promised in the SDA." In paragraphs 48 and 49, the NFA alleges that "the Franchisee Restaurant Owners materially changed their positions in reasonable reliance upon the promise they would receive ROFs per the SDA's terms," and "[h]ad the Franchisee Restaurant Owners known that BKC and Coca-Cola intended to modify or eliminate the ROFs, they would not have undertaken these substantial expenses, debts, and obligations." All are individualized questions requiring individual proof.

Indeed, nothing about the NFA's Complaint justifies making it the first in which a franchise association is determined to have standing to assert franchisee's contract claims against their franchisor. To the contrary, the NFA's assertion of associational standing must fail for one of the same reasons stated in *DDFA v. Dunkin' Donuts*, 2002 WL 1187207.

In *Dunkin' Donuts*, a regional association of franchisees brought suit for a declaration of rights on behalf of its franchisee members claiming that the franchisor breached the franchise agreements by increasing advertising fees and by using part of the increase to fund national advertising. *Id.* at *3. The franchisor moved to dismiss on the ground that the association lacked standing.

The court held that, unlike association cases that had survived a standing challenge, the declaratory action against the franchisor did not challenge a statute, regulation or ordinance but instead made allegations of breach of contract and of tortious conduct. Thus the complaint did not involve "a pure question of law" as the Supreme Court required. Though the franchise agreements at issue in *Dunkin' Donuts* were uniform in nature, the court concluded that the association's claims would require individual franchisees to submit evidence that they each complied with their franchise agreements. Applying the Supreme Court precedent discussed

above (*Hunt* and W*arth*), the court held that because the claims asserted "require individual determinations as to whether [the association's] members . . . complied with the provisions of the franchise agreement, …[the association] lacks standing to pursue the claims…" *Id*. at *7-8.[14]

The NFA lacks standing because it is impossible to grant the relief Plaintiff seeks without receiving extensive evidence from individual franchisees establishing each element of the contract-based claims asserted.

It is difficult to conceive of a case mandating a more individualized factual inquiry. As in *Dunkin' Donuts*, rather than invoke a pure question of law, allegations of "reasonable reliance" beg for individualized factual inquiry. These include the Complaint's reference to the franchisees' disparate individual financial circumstances, that some allegedly reported on their cash flow projections amounts of funds they received from Coca-Cola in the past, that some used these projections to obtain bank financing, and that some "reasonably relied" upon a belief that the formula for calculation of the amounts that would be paid to them from Coca-Cola in the future would not change in incurring bank debt. The allegations highlight the extraordinarily complex individualized factual nature of the claims asserted. *See Vietnam Veterans of Am. v. Guerdon Indus.*, 644 F. Supp. 951, 966 (D. Del. 1986)(association's allegation that members paid increased finance charges and suffered loan defaults as result demonstrated that individual participation was required in violation of *Hunt's* third prong).

What is more, the Complaint seeks damages flowing from BKC's and Coca-Cola's amendment to their soda agreement, namely that certain monetary payments be made to each franchisee. (Compl. ¶ 62). The Complaint specifically requests a judgment that Coca-Cola is legally obligated to continue paying Restaurant Operating Funds to the franchisees. (*Id.*) As the Supreme Court held in *Warth*, when the relief sought requires calculation of money damages based upon the harm suffered by members of the association, the association cannot satisfy the third prong of the standing test. *Warth*, 422 U.S. at 515-16; *see United Union of Roofers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990) (holding that "no federal court has allowed an

[14] *Dunkin' Donuts* also explains why the NFA chose to forum shop and bring this case as far away as possible from Florida, where *Dunkin' Donuts* was decided.

association standing to seek monetary relief on behalf of its members."); *see also Bano v. Union Carbide Corp.*, 361 F.3d 696, 715 (2d Cir. 2004) (association lacked standing to pursue equitable relief in form of reimbursements for costs of medical monitoring of members or property remediation); *Long Term Care Pharmacy Alliance v. United Health Group*, 498 F. Supp. 2d 187, 193 (D.D.C. 2007) (In virtually all cases, a claim for monetary damages requires the participation of individual members of the association, thus failing the third prong of the *Hunt* test.").

An association cannot circumvent the rule that damages necessarily requires individual proof by seeking a declaration entitling members to payment of certain money. *Long Term Care*, 498 F. Supp. 2d at 194 (A plaintiff organization "may not circumvent the standing requirements by seeking a declaration of entitlement to money damages") (quoting *Pesticide Pub. Policy Found. v. Village of Wauconda, Ill.*, 622 F. Supp. 423, 435 (D.C. Ill. 1985), *aff'd*, 826 F.3d 1968 (7th Cir. 1987)); *Reid v. Dept. of Commerce*, 793 F.2d 277 (5th Cir. 1986) (union lacked standing to assert claims for member reinstatement and back pay because claims required particularized proof dependent on the individual circumstances of each union member); *Terre du lac Ass'n v. Terre du lac, Inc.*, 772 F.2d 467, 470-71 (8th Cir. 1985) (association's characterization of claim as being for specific performance rather than for damages was unavailing to create standing where claim required court "to receive substantial evidence relating to the individual claims and damages of members of the Association in order for it to determine whether specific performance, as opposed to a damages remedy, would be 'fair, just and equitable.'"); *see also Watkins v. Westinghouse Hanford Co.*, 12 F.3d, 1517, 1528 n.5 (9th Cir. 1993)(a court must look to the "substance of the remedy sought . . . rather than the label placed on that remedy"); *Vietnam Veterans*, 644 F. Supp. at 966 (because injunctive relief is unavailable where damages provide an adequate legal remedy, association could not allege injunction claim as substitute for damages claims which the association lacked standing to pursue).[15]

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[15] Likewise, it does not matter whether the damages may be calculated under a simple formula. *See Rockford Principals*, 721 F. Supp. at 950-51 (school administrators association lacked standing to sue school board for wrongful rescission of salary increase notwithstanding "fact that the monetary relief could be arrived at based on straightforward mathematical calculations").

As the unbroken line of decisions cited above make plain, this is not a close case. Plaintiff NFA's complaint clearly violates the third prong of the Supreme Court's *Hunt* decision and BKC respectfully requests final judgment in its favor. *See Dalworth Oil*, 758 F. Supp. at 413 (entering final judgment for lack of associational standing because permitting association to amend where claims require individual participation "would be an exercise in futility.")

VI. CONCLUSION

For the foregoing reasons, BKC respectfully requests that this Court dismiss this case or in the alternative transfer it to the Southern District of Florida.

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DLA PIPER LLP (US)

By /s/ Timothy S. Blackford

tim.blackford@dlapiper.com

GENOVESE JOBLOVE & BATTISTA, P.A.
Michael D. Joblove

Attorneys for Defendant Burger King Corporation