

CAUSE NO. DC-16-06615

Tonya Pointer

<b>KENT RATHBUN</b>	§	<b>IN THE DISTRICT COURT</b>
	§	
<b>Plaintiff,</b>	§	
<b>v.</b>	§	
	§	
<b>H2R RESTAURANT HOLDINGS, LLC</b>	§	
<b>d/b/a ABACUS JASPER'S</b>	§	
<b>RESTAURANT HOLDINGS;</b>	§	<b>_____ JUDICIAL DISTRICT</b>
<b>ROTISSERIE TWO, LLC d/b/a</b>	§	
<b>RATHBUN BLUE PLATE KITCHEN and</b>	§	
<b>d/b/a KENT RATHBUN CATERING;</b>	§	
<b>KENT RATHBUN ELEMENTS, LLC</b>	§	
<b>and BRIARWOOD WEST</b>	§	
<b>INVESTMENTS, LLC</b>	§	
	§	
<b>Defendants.</b>	§	<b>DALLAS COUNTY, TEXAS</b>

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**PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT**

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**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, KEN RATHBUN, Plaintiff and files his original petition for declaratory judgment against Defendants **H2R RESTAURANT HOLDINGS, LLC d/b/a ABACUS JASPER'S RESTAURANT HOLDINGS; ROTISSERIE TWO, LLC d/b/a RATHBUN BLUE PLATE KITCHEN and d/b/a KENT RATHBUN CATERING; KENT RATHBUN ELEMENTS, LLC, and BRIARWOOD WEST INVESTMENTS, LLC**, as follows.

**DISCOVERY CONTROL PLAN**

Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3 and affirmatively pleads that this suit is not governed by the expedited-actions process of Texas Rule of Civil Procedure 169.

### **CLAIM FOR RELIEF**

1. Plaintiff brings suit seeking a declaration of the rights and responsibilities of the parties to an illegal and unenforceable contract which now threatens to destroy Plaintiff's livelihood and reputation as a Texas Restaurateur.

### **PARTIES**

2. Plaintiff **KENT RATHBUN** is an individual residing in Dallas County, Texas.

3. Defendant **H2R RESTAURANT HOLDINGS, LLC d/b/a ABACUS JASPER'S RESTAURANT HOLDINGS** is a limited liability company organized under the laws of the State of Texas. Defendant may be served with process by serving its registered agent, Claire C. Hyde at 9007 Briarwood Lane, Dallas, Dallas County, Texas 75209.

4. Defendant **ROTISSERIE TWO, LLC d/b/a RATHBUN BLUE PLATE KITCHEN and d/b/a KENT RATHBUN CATERING**, is a limited liability company organized under the laws of the State of Texas. Defendant may be served with process by serving Briarwood West Investments, LLC through its Registered Agent, Claire C. Hyde at 9007 Briarwood Lane, Dallas, Dallas County, Texas 75209.

5. Defendant **KENT RATHBUN ELEMENTS, LLC** is a limited liability company organized under the laws of the State of Texas. Defendant may be served with process by serving its registered agent, Claire C. Hyde at 9007 Briarwood Lane, Dallas, Dallas County, Texas 75209.

6. Defendant **BRIARWOOD WEST INVESTMENTS, LLC** is a limited liability company organized under the laws of the State of Texas. Defendant may be served with process by serving its registered agent, Claire C. Hyde at 9007 Briarwood Lane, Dallas, Dallas County, Texas 75209.

## **JURISDICTION AND VENUE**

7. The Court has jurisdiction over the lawsuit because the suit arises under provision of CPRC § 37.004(2).

8. Venue is proper in Dallas County because all the events and parties reside within the county and the parties to the purported contract which is the subject of this Petition agreed that all claims under the Agreement would be brought exclusively in the courts of Dallas County, Texas *See* Exhibit “1”, Paragraph III.3.

## **FACTS**

9. Plaintiff is a minority member in H2R Restaurant Holdings, LLC, a Texas Limited Liability Company, formed in August of 2007. This company was formed to acquire existing restaurant concepts that Rathbun had created and successfully run and to develop other restaurants to be conceived by Rathbun. The majority member, William Hyde, Jr. (hereinafter “Hyde”) was to provide financing and other general business services for the existing operations.

10. On March 2, 2009, more than two years after the formation of H2R Restaurant Holdings, LLC, Hyde placed in front of Rathbun a document entitled “Assignment of Rights to Use of Name and Likeness” (hereinafter the “Agreement”) and told him it needed to be immediately executed by Plaintiff as a condition to moving forward with company business. That Agreement is the subject of this Declaratory Judgment action and is attached hereto as Exhibit “1”.

11. There was no consideration given, offered or promised in exchange for the execution of the Agreement. Rathbun signed it under duress; being told that it was a formality, but one required for continued operations of the then-existing restaurants.

## **COUNT 1 – SUIT FOR DECLARATORY JUDGMENT**

12. The Agreement, in fact, is an unenforceable agreement because it is not a contract. There was no offer and acceptance and no meeting of the minds. No consideration was received by Rathbun for its execution.

13. The Agreement is impermissibly vague and violates the statute of frauds because it grants a right in perpetuity to the Defendants to the exclusive use of Rathbun's personal identity, likeness name and reputation. The Agreement is therefore unenforceable as a matter of law.

14. The Agreement is an unenforceable covenant not to compete. The Agreement is impermissibly broad as to scope and geographic territory and is therefore unenforceable and an invalid contract. The Agreement proposes to grant worldwide use to the Defendants, to the exclusion of Rathbun.

15. The Agreement is vague as to scope of use, and industries; purporting to eliminate the ability of Rathbun to make a living. Rathbun is an Internationally-known Celebrity chef. His likeness, image, name and reputation are priceless and cannot be stolen from him.

16. The Agreement is in direct conflict with the H2R LLC in that said LLC controls the relationship of the parties and expressly permits Rathbun to compete directly with Defendants at his choosing. Paragraph 6.9 of the Agreement provides:

6.9 Conflicts of Interest. Subject to the other express provisions of this Agreement, each Manager, Member and Office of the Company at any time and from time to time may engage in and possess interests in other business ventures of any and every type and description, independently or with others, including one in competition with the Company, with no obligation to offer to the Company or any other Member, Manager or officer the right to participate therein. The Company may transact business with any Manager, Member, officer or Affiliate thereof, provided the terms of those transactions are no less favorable than those the Company could obtain from unrelated third parties.

17. A justiciable controversy exists which results in serious harm to Rathbun and requires a declaration of his Rights. Rathbun resigned his employment with Defendants following a complete breakdown of business practices and a fundamental disagreement over the handling of the business of Defendants. Rathbun is seeking other employment and business opportunities and the threat by the Defendants that this Agreement means they “own” Kent Rathbun and that he can no longer work in his chosen field and rely on his international reputation to be gainfully employed is a real, present harm.

18. Plaintiff is entitled to recover reasonable and necessary attorney fees that are equitable and just under Texas Civil Practice & Remedies Code section 37.009 because this is a suit for declaratory relief.

### **JURY DEMAND**

19. Plaintiff demands a jury trial and tenders the appropriate fee with this petition.

### **CONDITIONS PRECEDENT**

20. All conditions precedent to Plaintiff’s claim for relief have been performed or have occurred.

### **REQUEST FOR DISCLOSURE**

21. Under Texas Rule of Civil Procedure 194, Plaintiff requests that Defendants disclose, within fifty (50) days of the service of this request, the information and material described in Rule 194.2.

### **REQUEST FOR RELIEF**

22. For these reasons, Plaintiff asks that Defendants be cited to appear and answer and that the Court declare:

a. Exhibit “1” is not a valid or enforceable contract; and

- b. That Rathbun is the sole owner and possessor of his name and his likeness, as well as his reputation, as more specifically described as the “Rathbun Rights” in Exhibit “1”;
- c. Actual damages;
- d. Pre-judgment and post-judgment interests;
- e. Court costs;
- f. Attorney’s fees; and
- g. All other relief to which Plaintiff may be justly entitled.

Respectfully submitted,

*/s/ Martin E. Rose*

**MARTIN E. ROSE**

State Bar No. 17253100

**CHRISTOPHER M. MCDOWELL**

State Bar No. 24002571

**ROSE•WALKER, L.L.P.**

3500 Maple Ave., Ste. 1200

Dallas, Texas 75219

214.752.8600 – Voice

214.752.8700 – Facsimile

[mrose@rosewalker.com](mailto:mrose@rosewalker.com)

[cmcdowell@rosewalker.com](mailto:cmcdowell@rosewalker.com)

**ATTORNEYS FOR PLAINTIFF**

## **ASSIGNMENT OF RIGHTS TO USE OF NAME AND LIKENESS**

THIS ASSIGNMENT OF RIGHTS TO USE OF NAME AND LIKENESS (the "Agreement") is made and entered into to be effective as of the 2nd day of March, 2009 (the "Effective Date") by and between KENT RATHBUN (the "Assignor"); and, H2R RESTAURANT HOLDINGS, LLC d/b/a ABACUS JASPER'S RESTAURANT HOLDINGS; ROTISSERIE TWO, LLC d/b/a RATHBUN BLUE PLATE KITCHEN and d/b/a KENT RATHBUN CATERING; and, KENT RATHBUN ELEMENTS, L.L.C. (collectively referred to herein only as the "Assignee").

### **RECITALS:**

**WHEREAS**, the Assignor currently owns an ownership interest in each of the Assignee; and, is the Chef associated with the restaurants owned, operated and/or managed by Assignee and/or any of its subsidiaries or affiliates.

**WHEREAS**, the Assignor wishes to assign the Assignee the right to exclusive use of Assignor's name and likeness to market and promote the restaurants now or hereafter owned, operated and/or managed by Assignee and/or its subsidiaries or affiliates (the "Restaurants").

**WHEREAS**, the Assignee desires to acquire the sole and exclusive right to the use of Assignor's name and likeness to market and promote the restaurants owned by Assignee pursuant to this Agreement.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all parties hereto, the parties agree as follows:

#### **I. Assignment of Rights to Use of Name and Likeness.**

1. **Assignment and Acceptance.** As of the Effective Date, the Assignor hereby transfers, assigns and conveys to Assignee all of his rights to use of his name "Kent Rathbun" and his likeness within the food services, food preparation and/or restaurant industries (the "Industry") (collectively the "Rathbun Rights"); and, Assignee hereby accepts the assignment of such Rathbun Rights from the Assignor.
2. **Assignor's Representations.** Assignor hereby represents, warrants and agrees that (i) Assignor has the right, power and capacity to make this Assignment; (ii) Assignor is the owner and holder of the Rathbun Rights; and (iii) no person, firm, corporation or other entity, other than Assignor, has any right, title or interest in, to or under the Rathbun Rights.

3. Agreement as to Rathbun Rights. The Assignor agrees to take all actions necessary to protect and secure the Assignee the rights and interest in and to the Rathbun Rights. It being understood and agreed that the purpose of this Agreement is to allow Assignee the right to the sole, exclusive and unrestricted use of the Rathbun Rights for the purposes of advertising, marketing, promoting and operating the Restaurants; including, without limitation, those purchased, established or acquired in the future. Assignor expressly agrees that except for this assignment to Assignee pursuant to this Agreement, he will not at any time in the future, directly or indirectly, authorize any other person or entity whatsoever to utilize his name, any variation thereof, his likeness or image in any manner whatsoever, for promotional, advertising, marketing or otherwise to the extent relating in any manner whatsoever to the Industry or in any manner which would be likely to be damaging or derogatory to Assignee or discredit or be detrimental to the reputation, character and standing of Assignee or any of the Restaurants.

## II. Indemnification.

1. Assignor (the "Indemnifying Party"), shall indemnify and hold harmless the Assignee and each member, manager, officer, employee, agent, affiliate, (except himself) successors and assigns of the Assignee (each a "Assignee Indemnified Party"), from and against, and agrees promptly to defend each Assignee Indemnified Party from and reimburse each Assignee Indemnified Party for, any and all actions, suits, proceedings (including any investigations or inquiries), losses, damages, costs, expenses, liabilities, obligations and claims of any kind or nature whatsoever which may be incurred by or asserted against or involve an Assignee Indemnified party, whether or not disclosed, including, without limitation, reasonable attorneys' fees and other legal costs and expenses ("Assignee's Losses"), arising out of or relating to any failure by the Assignor to carry out, perform, satisfy and discharge any covenants, agreements, undertakings, liabilities or obligations to be performed by him pursuant to the terms of this Agreement.
2. If a claim against an Assignee Indemnified party arises to which the indemnity of this Agreement is applicable, notice shall be given promptly by the Assignee Indemnified Party to the Assignor, and if such claim is due to a third party action against an Assignee Indemnified Party, the Assignor shall have the right to control all settlements (unless the Assignee Indemnified Party agrees to assume the cost of settlement), and to select lead counsel to defend any and all such claims at the sole cost and expense of the Indemnifying party; provided, however, that no such settlement shall be effected without the consent of the Assignee Indemnified party, which consent shall not be unreasonably withheld or delayed. The Assignee Indemnified Party may select counsel to participate in any such defense



at the sole cost and expense of an Assignee Indemnified party; provided, however, that if the legal representation of both the Assignor and an Assignee Indemnified Party by the same counsel shall, in the opinion of such counsel, represent a conflict of interest, the cost and expense associated with such counsel shall be borne by the Indemnifying Party. In connection with any such claim, action or proceeding, the parties shall cooperate with each other pursuant to a Joint Defense Agreement, and provide each with access to relevant books and records in their possession, as well as necessary employees or other agents.

3. The Assignee hereby agrees to indemnify and hold harmless the Assignor, and his agents, heirs, successors and assigns (each, a "Assignor Indemnified Party") from and against, and agrees to promptly defend each Assignor Indemnified Party from and reimburse each Assignor Indemnified Party from any and all actions, suits, proceedings (including any investigation or inquiries), losses, damages, costs, expenses, liabilities, obligations, and claims of any kind or nature whatsoever, which may be incurred by or asserted against or involve an Assignor Indemnified party, including, without limitation, reasonable attorneys' fees and other legal costs and expenses ("Assignor's Losses") arising out of or in any way relating to any failure by the Assignee to carry out, perform, satisfy and discharge any covenants, agreements, undertakings, liabilities or obligations to be performed by them pursuant to the terms of this Agreement.
4. If a claim against an Assignor Indemnified Party arises to which the indemnity of this Agreement is applicable, notice shall be given promptly by the Assignor to the Assignee and the Assignee shall have the right to control all settlements (unless the Assignor Indemnified Party agrees to assume the cost of settlement) and to select lead counsel to defend any and all such claims at the sole cost and expense of Purchaser; provided, however, that no such settlement shall be effected without the consent of the Assignor Indemnified party, which consent shall not be unreasonably withheld or delayed. The Assignor Indemnified Party may select counsel to participate in any such defense at the sole cost and expense of the Assignor Indemnified party; provided, however, that if the legal representation of both the Purchaser and the Assignor Indemnified Party by the same counsel shall, in the opinion of such counsel, represent a conflict of interest, the cost and expense associated with such counsel shall be borne by the Indemnifying Party. In connection with any such claim, action or proceeding, the parties shall cooperate with each other pursuant to a Joint Defense Agreement, and provide each other with access to relevant books and records in their possession.

### **III. Miscellaneous.**

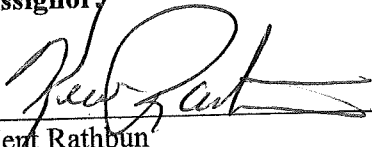
1. Further Assurances. Assignor and Assignee shall, at any time and from time to time after the Effective Date, execute, acknowledge and deliver all such further

acts, deeds, assignments, transfers, conveyances, powers of attorney, acknowledgments, documents, and assurances, and take all such further actions, as shall be necessary or desirable to give effect to the transactions contemplated by this Agreement.

2. Successors and Assigns. This Agreement and the covenants and agreements herein contained shall inure to the benefit of and shall bind the respective parties and their respective successors and assigns.
3. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas without regard to its principles concerning conflicts of law. This Agreement is performable in Dallas County, Texas, and the parties agree that any and all claims under the Agreement shall be brought exclusively in the courts of Dallas County, Texas.
4. Multiple Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument. Such multiple counterparts may be transmitted via facsimile or other electronic means, and execution by any of the undersigned by such means shall be deemed original for all purposes and have the same force and effect as a manually signed original.
5. Entire Agreement; Amendment. This Agreement is the entire contract between the parties with regard to the subject matter hereof. All amendments to this Agreement must be in writing and signed by the Assignor and the Assignee.
6. Termination of the Agreement. The Parties hereto agree that the Agreement may be terminated only in strict compliance with the Company Agreement effective as of August 3, 2007, unless subsequently amended or modified, of H2R Restaurant Holdings, LLC.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement to be effective as of the Effective Date.

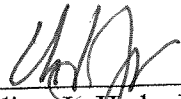
Assignor:

  
\_\_\_\_\_  
Kent Rathbun

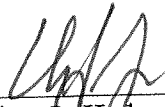
**Assignee:**

H2R RESTAURANT HOLDINGS, LLC

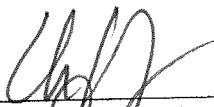
BY: Briarwood West Investments, LLC

By:   
William L. Hyde, Jr., Manager

ROTISSERIE TWO, LLC, d/b/a RATHBUN  
BLUE PLATE KITCHEN and d/b/a KENT  
RATHBUN CATERING

By:   
William L. Hyde, Jr., Manager

KENT RATHBUN ELEMENTS, L.L.C.

By:   
William L. Hyde, Jr., Manager