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Amalia Rodriguez-Mendoza
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Travis District

CAUSE NO. D-1-GN-09000528

RED BIRD SUNSET VALLEY, LP,
EARLY BIRD ONE, LP, RED BIRD
PARMER-OPS3, LP, EARLY BIRD
AMARILLO OPS4, LP, RED BIRD
OPS7, LP, EARLY BIRD ONE BEVERAGE
COMPANY LLC, EARLY BIRD AMARILLO
OPS4 BEVERAGE COMPANY LLC,
RED BIRD OPS7 BEVERAGE
COMPANY LLC, RED BIRD PARMER
BEVERAGE COMPANY LLC, AND
RED BIRD-SUNSET VALLEY
BEVERAGE COMPANY, LLC,

Plaintiffs,

v.

STRATEGIC FUNDING SOURCE, INC.,

Defendant.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

ORIGINAL PETITION

Plaintiffs Red Bird Sunset Valley, LP, Early Bird One, LP, Red Bird Parmer-OPS3, LP, Early Bird Amarillo OPS4, LP, Red Bird OPS7, LP (collectively, the "OPS Limited Partnerships"), Early Bird One Beverage Company LLC, Early Bird Amarillo OPS4 Beverage Company LLC, Red Bird OPS7 Beverage Company LLC, Red Bird Parmer Beverage Company LLC, Red Bird-Sunset Valley Beverage Company, LLC (collectively, the "Beverage Companies," and collectively with the OPS Limited Partnerships, the "Plaintiffs") file their Original Petition as follows:

I. DISCOVERY LEVEL

1. The Plaintiffs intend to conduct discovery under Level II of the Texas Rules of Civil Procedure.

II. PARTIES

2. Plaintiff Red Bird Sunset Valley, LP ("OPS1") is a Delaware limited partnership with its principal place of business in Travis County, Texas.

3. Plaintiff Early Bird One, LP ("OPS2") is a Delaware limited partnership with its principal office in Travis County, Texas.

4. Plaintiff Red Bird Parmer, LP ("OPS3") is a Delaware limited partnership with its principal offices in Travis County, Texas.

5. Plaintiff Early Bird Amarillo, LP ("OPS4") is a Delaware limited partnership with its principal offices in Travis County, Texas.

6. Plaintiff Red Bird, LP ("OPS7") is a Delaware limited partnership with its principal offices in Travis County, Texas.

7. Plaintiff Early Bird One Beverage Company LLC is a Delaware limited liability company with its principal offices in Travis County, Texas.

8. Plaintiff Red Bird Parmer Beverage Company LLC is a Delaware limited liability company with its principal place of business in Travis County, Texas.

9. Plaintiff Early Bird Amarillo OPS4 Beverage Company LLC is a Delaware limited liability company with its principal place of business in Travis County, Texas.

10. Plaintiff Red Bird OPS7 Beverage Company LLC is a Delaware limited liability company with its principal place of business in Travis County, Texas.

11. Plaintiff Red Bird Sunset Valley Beverage Company LLC is a Delaware limited liability company with its principal offices in Travis County, Texas.

12. Defendant is Strategic Funding Source, Inc. ("SFSI" or "Defendant"), is a foreign corporation organized and existing under the laws of the State of New York. Defendant engages in business in Texas, but does not maintain a regular place of business or a designated agent for

service of process in this state or in the State of New York. Plaintiff's claims arise out of the business done by Defendant in this state. As such, under Section 17.044 of the Texas Civil Practice and Remedies Code, the Secretary of State of the State of Texas is the agent for service of process upon Defendant and Defendant may be served with process by sending via registered mail, two copies of the Citation and Plaintiff's Original Petition to the following address: Secretary of State, Citations Unit, P.O. Box 12079, Austin, Texas, 78711-2079. After receiving duplicate copies of Plaintiff's Original Petition and the Citation, the Secretary of State must immediately forward process by certified mail, return receipt requested to Defendant at its home office address, 750 Lexington Avenue, 6th Floor, New York, New York, 10022.

III. JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this case because the amount in controversy exceeds the minimum jurisdictional requirements.

14. The Court has personal jurisdiction over the Defendant because it purported to enter into contracts with the Plaintiffs in Travis County, Texas.

15. Venue is appropriate in Travis County, Texas, pursuant to Texas Civil Practice & Remedies Code, section 15.002(a)(1), because all or substantially all of the events or omissions giving rise to this action occurred in Travis County.

IV. FACTUAL BACKGROUND

A. The Plaintiffs

16. Each of the OPS Limited Partnerships owns a Red Robin® restaurant. The restaurants are located in Austin, Amarillo, and Abilene, Texas. Each of the Beverage Companies is wholly owned by a corresponding OPS Limited Partnership. Thus, Early Bird One, LP, is the sole owner of Early Bird One Beverage Company, LLC. The Beverage Companies are business entities utilized to hold a license issued by the Texas Alcoholic

Beverage Commission permitting the sale of alcoholic beverages at each of the Red Robin restaurants. The Beverage Companies also handle the proceeds from the sale of alcohol.

B. William Barret Brannam

17. Pursuant to the limited partnership agreements for each of the five OPS Limited Partnerships (the "Partnership Agreements") William Barret Brannam ("Brannam") was previously in charge of managing the operations of the five OPS Limited Partnerships. *See* OPS Partnership Agreements, attached hereto as Exhibit A. He was the sole member and manager of two companies, BB Management, L.L.C., and RMS, LLC. Brannam and BB Management were both involved in the management and operation of OPS1, OPS3, and OPS7.

18. Brannam and RMS were both involved in the management and operation of OPS2 and OPS4. Under the regulations of West Texas Dining Management, LLC, a Texas limited liability company ("WTDM"), RMS served as the "Primary Manager" of WTDM, which is the General Partner of OPS2 and OPS4, and, under a management agreement with OPS2 and OPS4, served as "Manager" of the General Partner each of OPS2 and OPS4.

19. On December 19, 2008, Barret Brannam's, BB Management's, and RMS's management roles in the OPS Limited Partnerships were terminated when the Plaintiffs discovered that Brannam had engaged in a multi-faceted scheme to defraud the Plaintiffs and steal hundreds of thousands of dollars from them.

C. The Defendant

20. SFSI is a factoring company. SFSI purchases a certain amount of future credit card receivables (the "Purchased Amount") from a merchant, such as a restaurant, in exchange for a lump-sum payment (the "Purchase Price"), pursuant to a "Merchant Agreement." The merchant's receivables are, however, purchased at a steep discount. After the merchant receives

the Purchase Price, a specified percentage of credit card receivables from each of the major credit card companies (Mastercard, Visa, American Express, and Discover) arising from customer purchases are diverted from the merchant to SFSI. SFSI continues to process and collect the credit card payments until it receives total payment equaling the Purchased Amount. For example, a merchant agreement may provide for a Purchase Price of \$80,000, but SFSI will receive a total of \$110,400 by collecting 10-12 percent of the restaurant's credit card receivables.

D. Without Authorization or the Knowledge or Consent of the Plaintiffs, Brannam and SFSI Enter into the Merchant Agreements Purportedly Binding the Plaintiffs

21. Upon information and belief, in late 2008, Brannam and SFSI discussed entering into five "Merchant Agreements" that would purportedly bind the Plaintiffs to the terms of such agreements without their knowledge or consent and enrich Brannam and SFSI. *See Merchant Agreements*, attached hereto as Exhibit B. Upon further information and belief, Brannam provided SFSI with certain information and documentation about the Plaintiffs, including, but not limited to, the Partnership Agreements governing the relationship between Brannam, BB Management, RMS, and the OPS Limited Partnerships. These documents expressly limited Brannam's, BB Management's, and RMS's authority to act on behalf of the OPS Limited Partnerships and, in turn, the Beverage Companies. Specifically, the Partnership Agreements explicitly limited Brannam's authority to encumber the Plaintiffs with significant debt or to encumber the Plaintiffs' property with security liens. Upon further information and belief, SFSI either ignored the express limitations of Brannam's, BB Management's and RMS's authority or failed to conduct the bare minimum of due diligence on Brannam and the Plaintiffs reasonably required before entering into any merchant agreement.

22. On or about November 5, 2008, without the knowledge or consent of the OPS Limited Partnerships and in direct violation of the Partnership Agreements, Brannam

fraudulently executed five Merchant Agreements with SFSI. Brannam signed the Merchant Agreements "William Barret Brannam / President" of each of the five OPS Limited Partnerships. Brannam, however, was not, nor had he ever been "President" of any of the OPS Limited Partnerships. In fact, no such role or title existed at the time with regard to the OPS Limited Partnerships.

23. SFSI did not contact any persons other than Brannam involved in the operation and management of the Plaintiffs before executing the Merchant Agreements. Instead, and against commonly accepted business practices, SFSI apparently signed the Merchant Agreements without first reviewing the OPS Partnerships Agreements which Brannam provided to them for this purpose. Thus, SFSI failed in its duty to perform due diligence and review of the Partnership Agreements, which clearly outlined Brannam's limited role with the OPS Limited Partnerships. Accordingly, and in conjunction with the documents believed to have been provided to SFSI, SFSI knew or should have known that Brannam did not have the authority to enter into the Merchant Agreements on behalf of the OPS Limited Partnerships.

24. Upon execution of the Merchant Agreements, Brannam received the Purchase Price of \$368,000 in exchange for purportedly obligating the OPS Limited Partnerships to repay the Purchase Amount of \$507,840.¹ The individual contract amounts are as follows:

¹ The five Merchant Agreements each called for an individual OPS Limited Partnership to receive a Purchase Price of \$80,000 (for a total Purchase Price of \$400,000) and be obligated to pay a Purchase Amount of \$110,400 (for a total Purchase Amount of \$552,000).

Merchant Agreements		
OPS Limited Partnership	Purchase Price	Purchase Amount
Red Bird Sunset Valley	\$72,000	\$99,360
Red Bird Parmer OPS 3	\$76,000	\$104,880
Red Bird OPS7	\$72,000	\$99,360
Early Bird One	\$76,000	\$104,880
Early Bird Amarillo OPS 4	\$72,000	\$99,360
Totals	\$368,000	\$507,840

25. Thus, Brannam and SFSI purportedly bound the OPS Limited Partnerships to pay SFSI the principle amount of \$368,000, plus an additional \$139,840 as part of the transactions. This aggregate amount would be paid by diverting between 10-12 percent of credit card receivables from the OPS Limited Partnerships to SFSI. The Merchant Agreements also included cross-collateralization provisions granting SFSI a security in the property of each and every OPS Limited Partnership and Beverage Company.

26. The Merchant Agreements also call for the execution of related contracts with SFSI and/or the major credit card companies (or other unknown entities) to the extent necessary to implement the Merchant Agreements. Upon information and belief, Brannam and SFSI executed such contracts, again purportedly binding the Plaintiffs without their knowledge or consent and in direct violation of the Partnership Agreements.²

² The actual Purchase Price and Purchase Amount were reduced from the face amounts on the Merchant Agreements because the related agreements necessary to implement the Merchant Agreements with regard to American Express receivables were never executed.

E. Brannam's Financial Misconduct Is Uncovered and SFSI Is Made Whole

27. Upon discovery of Brannam's fraud and theft against the Plaintiffs, an internal investigation of his misconduct was undertaken. This investigation led to discovery of the Merchant Agreements and the diversion of funds relating to credit card receivables to SFSI. The investigation also identified approximately \$200,000 of Purchase Price funds that Brannam placed in accounts used by the OPS Limited Partnerships. Because SFSI has collected a percentage of all credit card receivables, SFSI has now collected more than \$300,000 from the OPS Limited Partnerships (an exact total cannot be immediately calculated). Because the Merchant Agreements are null and void and not binding upon the Plaintiffs, prior to filing this action, the Plaintiffs discontinued the payment scheme established by Brannam and SFSI to implement the Merchant Agreements

28. The remaining Purchase Price funds, totaling at least \$168,000, are believed to have been placed in accounts under the control of Brannam. Upon information and belief, Brannam converted these funds for his own personal use.

29. SFSI has, therefore, been made more than whole as to the amounts conveyed to the Plaintiffs by the payment of over \$300,000 in credit card receivables. In fact SFSI has been unjustly enriched in the amount of over \$100,000 in additional credit card receivables. SFSI is now in possession of excess funds of over \$100,000, with the balance due the Plaintiffs (the exact amount of which cannot be immediately calculated).

30. To date, SFSI refuses to acknowledge that the Merchant Agreements are null and void and refuses to refund the amount due to the OPS Limited Partnerships. Accordingly, a controversy exists between the Plaintiffs and SFSI necessitating judicial relief in the form of a declaratory judgment.

V. CAUSES OF ACTION

Count I **Declaratory Judgment**

31. Here, a controversy exists as to the rights and status of the Plaintiffs and SFSI because one of the contracting parties, Brannam, did not have actual or apparent authority to contract on behalf of OPS Limited Partnerships or otherwise bind the Beverage Companies. Also, SFSI knew or should have known that Brannam lacked the authority to contract on behalf of OPS Limited Partnerships or otherwise bind the Beverage Companies. Further, SFSI either ignored the fact that Brannam lacked such or authority, or SFSI failed to perform reasonable due diligence to determine Brannam's (lack of) authority before signing the Merchant Agreements. Nevertheless, SFSI refuses to acknowledge that the Merchant Agreements are null and void.

32. These critical issues can only be resolved by a declaration from the Court because neither party understands its rights or obligations, if any, under the Merchant Agreements. Because the Plaintiffs understand the Merchant Agreements to be legally null and void and not binding on or enforceable against them, the Plaintiffs have discontinued the payment of credit card receivable funds established by Brannam and SFSI.

33. The Merchant Agreements only memorialize the flagrantly improper attempt by Brannam to usurp the authority of the OPS Limited Partnerships for his own financial gain. They do not memorialize any intent of the OPS Limited Partnerships or any of its legal representatives, to enter into a binding agreement with SFSI. Accordingly, the Plaintiffs are entitled to a declaratory judgment claim interpreting the Merchant Agreements and the rights and obligations of the Plaintiffs and SFSI.

34. The Court must clarify the proper legal effect of the Merchant Agreements to provide the Plaintiffs and SFSI the certainty as to how to proceed in accordance with the law.

Namely, the Court issue a declaratory judgment that the Merchant Agreements (and any and all related agreements entered into to implement the Merchant Agreements) are null and void and, therefore, not binding upon or enforceable against the Plaintiffs. The Court should further declare that the Plaintiffs have no further payment obligation to SFSI under the scheme established to implement the Merchant Agreements (or otherwise).

Count II
Unjust Enrichment

35. SFSI paid Brannam the Purchase Price of \$368,000, approximately 200,000 of which was deposited by Brannam into accounts held by the Plaintiffs.

36. To date, the Plaintiffs have already paid more than \$300,000 to SFSI in credit card receivables (an exact total cannot be immediately calculated). Thus, SFSI has received more than \$300,000 in credit card receivables under the legally null and void Merchant Agreements. SFSI has, therefore, been made more than whole by the receipt of over \$300,000 in credit card receivables. SFSI is now in possession of over \$100,000 excess funds with the balance due the Plaintiffs (the exact amount of which cannot be immediately calculated).

37. SFSI has been unjustly enriched by benefiting from the additional payments, which is the rightful property of the Plaintiffs.

38. As a direct and proximate result of SFSI's unjust enrichment, the Plaintiffs have incurred and will continue to incur damages, and have suffered and will continue to suffer damages in an amount to be proven at trial.

VI. ATTORNEYS' FEES

39. It has become necessary for the Plaintiffs to retain counsel to represent them in this matter. Pursuant to section 37.009 of the Texas Civil Practice and Remedies Code, OPS Limited Partnerships are entitled to recover their reasonable and necessary attorneys' fees.

VIII. CONSOLIDATED ALLEGATIONS

40. Each of the Plaintiffs' allegations is expressly incorporated into each of the causes of action set forth above.

IX. CONDITIONS PRECEDENT

41. All conditions precedent to the Plaintiffs' recovery have been performed or have occurred.

PRAYER

42. WHEREFORE, the Plaintiffs pray that this Court issue judgment in favor of the Plaintiffs against SFSI and award the Plaintiffs the following relief:

- a. A declaratory judgment claim interpreting the Merchant Agreements and (i) declaring the Merchant Agreements (and any and all related agreements entered into to implement the Merchant Agreements) are null and void and, therefore, not binding upon or enforceable against the Plaintiffs; (ii) declaring that the Plaintiffs have no further payment obligation to SFSI under the scheme established to implement the Merchant Agreements (or otherwise) and (iii) declaring that SFSI must immediately pay to the OPS Limited Partnerships the amount of credit card receivables over \$200,000 it received from the OPS Limited Partnerships.
- b. Actual and consequential damages;
- c. Attorneys' Fees;
- d. Pre- and post-judgment interest;
- e. Costs of court; and
- f. Such other and further relief to which the Plaintiffs may show themselves entitled.

Dated: February 17, 2009.

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

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