

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

BUC-EE’S, LTD.

Plaintiff,

v.

**SHEPHERD RETAIL, INC., BLANCO
RESTAURANT, INC., LIVE OAK
RETAIL, INC., AND HARLOW
FOOD, INC.**

Defendants.

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CIVIL ACTION NO. 4:15-CV-03704

JURY REQUESTED

PLAINTIFF’S SECOND AMENDED COMPLAINT

Plaintiff, Buc-ee’s, Ltd. (“Buc-ee’s”) files this Second Amended Complaint against Defendants Shepherd Retail, Inc., Blanco Restaurant, Inc., Live Oak Retail, Inc., and Harlow Food, Inc.

**I.
NATURE OF ACTION**

1. This is a civil action to (i) enjoin acts of the following: violations of the Texas Anti-Dilution Statute, Texas Business and Commerce Code § 16.103; trademark infringement under Texas Business and Commerce Code § 16.102; trademark infringement under 15 U.S.C. § 1114; trademark infringement under 15 U.S.C. § 1125(a); false designation of origin under 15 U.S.C. § 1125(a); common law trademark infringement; unjust enrichment; unfair competition and misappropriation; and (ii) recover damages, profits, treble damages or profits, attorneys’ fees, and costs.

2. This case involves Defendants advertising, promoting, operating, and/or using a new travel center store in Atascosa, Texas, a combined convenient store and BBQ location in Whitsett, Texas, known as “Choke Canyon,” and other stores, centers and/or locations that use trademarks that are confusingly similar to Plaintiff’s trademarks. Defendants’ actions are creating, and will continue to cause, confusion in the marketplace and dilution of Plaintiff’s intellectual property because the Defendants are marketing their business using an alligator logo with human characteristics that infringes on Buc-ee’s trademarks, including Buc-ee’s federally registered trademarks and trademarks registered in the state of Texas.

3. Defendants have copied and usurped the trademarks that make Buc-ee’s stores immediately identifiable and unique. Defendants’ conduct is unlawful and Plaintiff seeks the full range of remedies provided by law.

II. **JURISDICTION AND VENUE**

4. This Court possesses subject matter jurisdiction over this action pursuant to the Lanham Act, 15 U.S.C. § 1051 et seq., and 28 U.S.C. §§ 1331, 1338(a). The Court also possesses supplemental jurisdiction over Plaintiff’s state law claim under 28 U.S.C. §§ 1338 and 1367.

5. The Court possesses personal jurisdiction over the parties, and venue is proper in this District pursuant to 28 U.S.C. § 1391(b), (c), and (d).

III. **PARTIES**

6. Plaintiff Buc-ee’s, Ltd. is a Texas limited partnership with its principal place of business at 327 FM 2004, Lake Jackson, Texas 77566.

8. Defendant Shepherd Retail, Inc. (“Shepherd”), d/b/a Choke Canyon Travel Center, is a corporation organized under the laws of the State of Texas with a principal place of

business at 20922 Creek River, San Antonio, Texas 78259. The registered agent for Defendant Shepherd is Amjad Panjwani at 20922 Creek River, San Antonio, Texas 78259. Upon information and belief, Defendant Shepherd owns and operates Choke Canyon Travel Center at 16565 S IH 35, Atascosa, Texas 78002.

9. Defendant Blanco Restaurant, Inc. (“Blanco”), d/b/a Choke Canyon Bar-B-Q, is a corporation organized under the laws of the State of Texas with a principal place of business at 7103 Harlow Drive, San Antonio, Texas 78218. The registered agent for Defendant Blanco is Amjad Panjwani at 20922 Creek River, San Antonio, Texas 78259. Upon information and belief, Defendant Blanco owns and operates the Choke Canyon Bar-B-Q location at 21510 Blanco Road, San Antonio, Texas 78260 and the Choke Canyon Bar-B-Q location at 868 FM 99, Whitsett, Texas 78075.

10. Defendant Live Oak Retail, Inc. (“Live Oak”), d/b/a Choke Canyon Exxon, is a corporation organized under the laws of the State of Texas with a principal place of business at 7103 Harlow Drive, San Antonio, Texas 78218. The registered agent for Defendant Live Oak is Amjad Panjwani at 18319 Redriver Dawn, San Antonio, Texas 78259. Upon information and belief, Defendant Live Oak owns and operates Choke Canyon Exxon at 868 FM 99, Whitsett, Texas 78075.

11. Defendant Harlow Food, Inc. (“Harlow”) is a corporation organized under the laws of the State of Texas with a principal place of business at 7103 Harlow Drive, San Antonio, Texas 78218, and, on information and belief, is involved with the operation of at least Choke Canyon Bar-B-Q and Choke Canyon Travel Center. The registered agent for Defendant Harlow is Amjad Panjwani at 7103 Harlow Drive, San Antonio, Texas 78218.

IV.
FACTUAL BACKGROUND

12. Over the last three decades, Buc-ee's has offered quality convenience store services and merchandise to the public under the Buc-ee's brand and Buc-ee's beaver logo through facilities providing a distinctive overall commercial impression or appearance. As a result of such use, Buc-ee's has become a household name across Texas and other states. Buc-ee's started as a single convenience store in Lake Jackson, Brazoria County, Texas, and has grown to twenty-seven stores operating across Texas.

13. Buc-ee's has established its footprint across the State of Texas, operating in such cities as New Braunfels, Bastrop, Madisonville, Luling, and of course Lake Jackson. Buc-ee's has prided itself in providing premium goods and services to its customers, standing by its motto of "Clean, Friendly, and In Stock.SM" The original iconic Buc-ee's trademarks have been in continuous service since at least July 1, 1982.

A. The Buc-ee's Marks

14. On May 29, 2007, August 2, 2011, and April 9, 2013, Buc-ee's registered the Buc-ee's beaver logo with the United States Patent and Trademark Office under Registration Numbers 3,246,893, 4,007,064, and 4,316,461, respectively.

15. Registration Number 3,246,893 is directed to trademark class 35 (advertising and business services) and specifically includes retail store services featuring convenience store items and gasoline.

16. Registration Number 4,007,064 is directed to trademark classes 12 (vehicle goods), 16 (paper goods and printed matter), 21 (housewares and glass), 25 (clothing goods), 28-31 (toys and sporting goods, meats and processed foods, staple foods, and natural agricultural products) and 35 (advertising and business services), and specifically includes, for example,

drinking glasses, drinking mugs, insulated mugs, and portable beverage coolers sold in retail convenience stores, clothing sold in retail convenience stores (*e.g.*, shirts), foods sold in retail convenience stores, (*e.g.*, pickled fruits and vegetables, jellies, fruit preserves, fruit-flavored butters, nut-based snack foods, trail mixes, nuts, snack food dips, food package combinations consisting primarily of meat and/or cheese, candy, candy with nuts, salsa, trail mixes comprised primarily of crackers, pretzels, and/or popcorn) and retail store services for similar goods.

17. Registration Number 4,316,461 is directed to trademark classes 16 (paper goods and printed matter), 21 (housewares and glass), 25 (clothing goods), 28-31 (toys and sporting goods, meats and processed foods, staple foods, and natural agricultural products) and 35 (advertising and business services), and specifically includes, for example, drinking glasses, drinking mugs, insulated mugs, and portable beverage coolers sold in retail convenience stores, clothing sold in retail convenience stores (*e.g.*, shirts), foods sold in retail convenience stores (*e.g.*, pickled fruits and vegetables, jellies, fruit preserves, fruit-flavored butters, nut-based snack foods, trail mixes, nuts, snack food dips, food package combinations consisting primarily of meat and/or cheese, candy, candy with nuts, salsa, trail mixes comprised primarily of crackers, pretzels, and/or popcorn) and retail store services for similar goods.

18. Buc-ee's also obtained Texas state registrations for the Buc-ee's beaver logo, including Registration Numbers TX 800651507, TX 800651502, TX 800651500, and TX 800478206, in 2005 and 2006.







19. Registration Number TX 800651507 is directed to trademark class 30 (staple foods), and specifically includes, all staple foods sold in convenience stores, for example, coffee, soft drinks, candy, chips, milk products, bread products, over-the-counter medication and canned goods.

20. Registration Number TX 800651502 is directed to trademark class 29 (meats and processed foods) and specifically includes, for example, meats and processed food such as sandwich meats, deli sandwiches, pickles, breakfast tacos and beef jerky.

21. Registration Number TX 800651500 is directed to trademark class 4 (lubricant and fuel goods), and specifically includes, for example, fuels such as unleaded gasoline and diesel.

22. Registration Number TX 800478206 is directed to trademark class 35 (advertising and business services), and specifically includes, for example, retail convenience store chains.

23. Buc-ee's uses its distinctive marks in connection with the marketing and sale of its goods and services, including among other items, retail gasoline, t-shirts, mugs, general merchandise, novelties and food products. The beaver logo consists of a smiling buck-toothed beaver on a circle wearing a hat. In some examples of the logo (*e.g.* the logo embodied in Registration No. 4,007,064), the beaver has a red heart-shaped tongue on a yellow circle wearing a red hat pointing to the right, while in other versions (*e.g.* the logo embodied in Registration No. 4,316,461), the logo is colorless. Images of the logos from Buc-ee's federal and Texas state registrations follow below in a table listing the relevant Buc-ee's registrations (which are attached to this Complaint as Exhibits A-G), and these trademarks (including the federal registrations, state registrations, and common law rights Buc-ee's has in its logos) are collectively hereinafter referred to as the "BUC-EE's Marks":

Registration No.	Mark	Exhibit
U.S. 4,007,064		A
U.S. 4,316,461		B
U.S. 3,246,893		C
TX 800651507		D
TX 800651502		E
TX 800651500		F

TX 800478206		G
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B. Defendants' Unlawful Actions

24. In December of 2015, Buc-ee's received inquiries from customers asking whether Buc-ee's was aware of a convenience store known as the Choke Canyon Travel Center and their advertising. Upon further investigation, Buc-ee's went to the Facebook page for Choke Canyon Travel Center and their travel center location and discovered the use of the Choke Canyon Bar-B-Q logo. Upon information and belief, these establishments are owned and operated by Shepherd, Blanco, Harlow and/or Live Oak. Plaintiff further discovered the use of a logo by the Defendants (the "Choke Canyon Logo") that is a copy of, or at the very least confusingly similar to, the Buc-ee's logo. Below is a copy of Choke Canyon's Logo:



25. Defendants' anthropomorphic and cartoon representation of the alligator as shown above in connection with a convenience store copies the most important aspects of the iconic BUC-EE'S Marks. Specifically, besides Defendants' improper use of a friendly smiling cartoon

animal similarly oriented within a circle and wearing a hat pointed to the right, Defendants have copied the BUC-EE'S Marks with the use of a black circle encompassing the alligator (compare to the black circle around the beaver), prominent use of sharply drawn black edges for the alligator mascots (compare to the sharp black edges defining the beaver), similar use of a yellow background (compare to the yellow surrounding the beaver), and similar use of the red-colored tongue of the alligator (compare to the red tongue on the beaver).

26. Defendants' website includes descriptions of the Choke Canyon store and offerings therein reminiscent of Buc-ee's unique, rustic, Texas-themed look and feel.

27. In addition, Defendants have intentionally packaged and promoted t-shirts, food products, and other products in a manner that results in confusion to the consumer and further infringes upon the marks of Buc-ee's, including goods specifically covered by one or more of Buc-ee's state and federal registrations.

28. Examples illustrating the Defendants' infringement of the BUC-EE'S Marks follow below.

29. Below are example images of representative food products offered for sale by Defendants:



30. Below are example images of representative food products offered for sale by Buc-ee's:



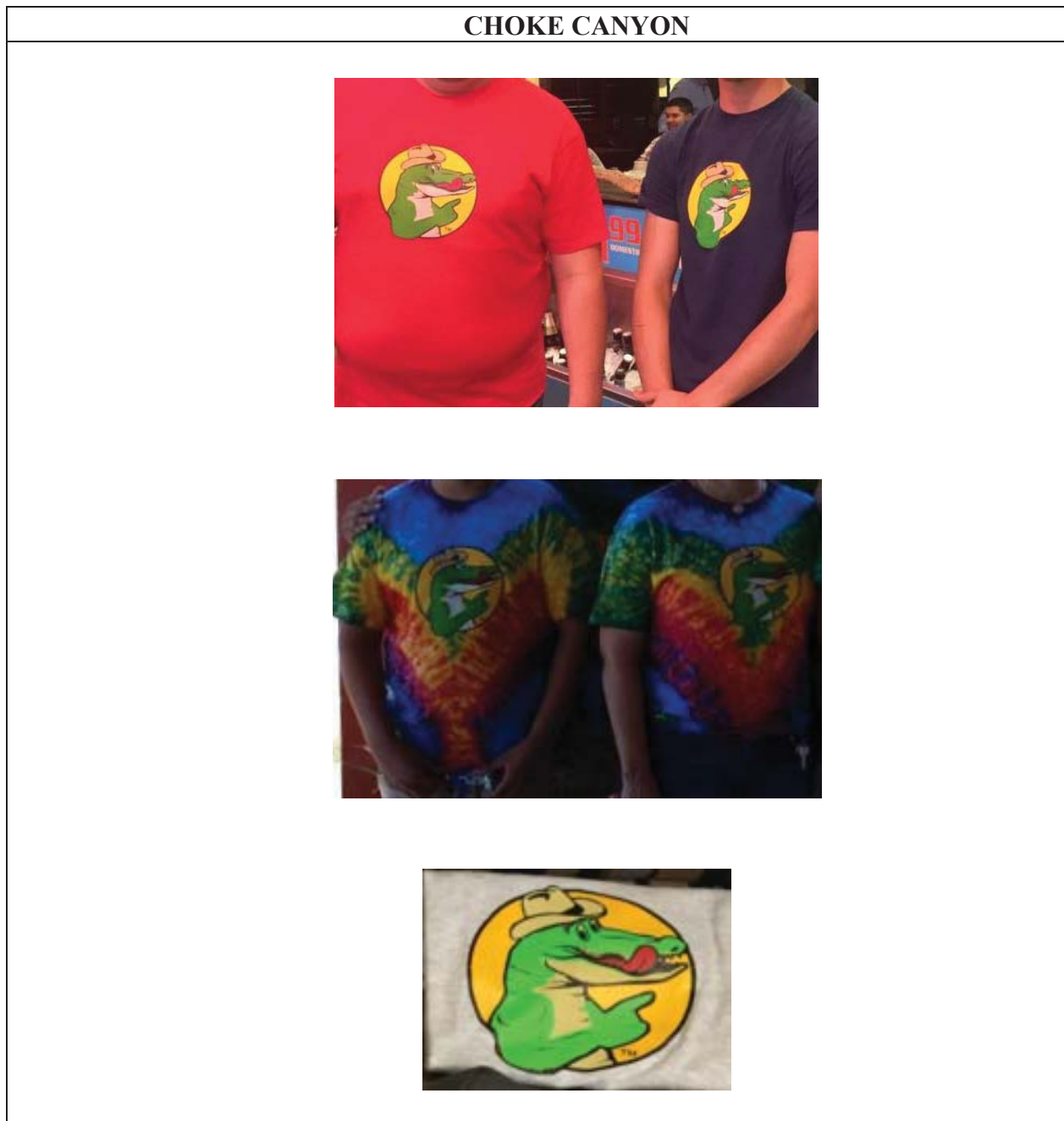
31. Below are example images of additional food and drink products offered for sale by Defendants:



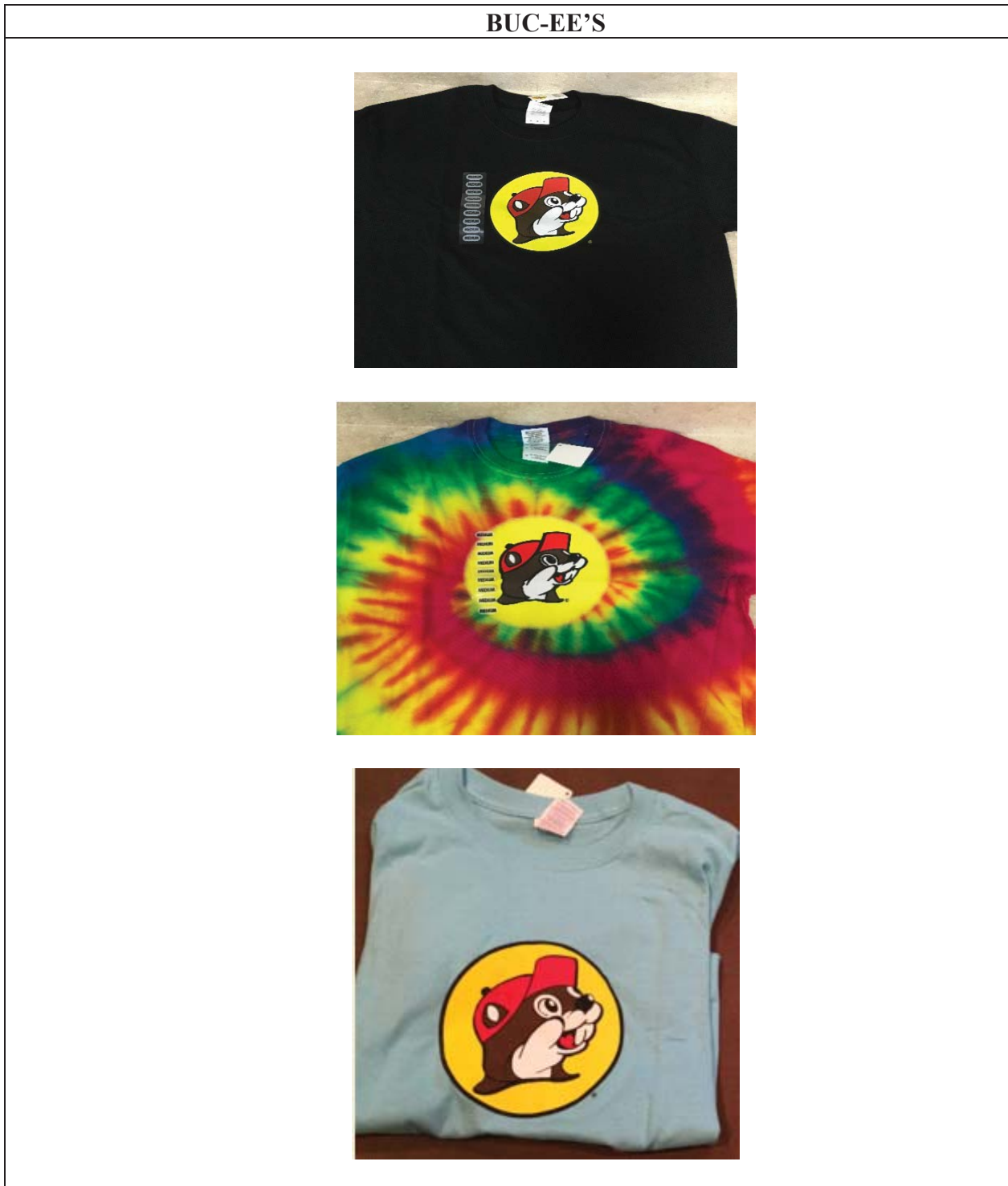
32. Below are example images of additional food and drink products offered for sale by Buc-ee's:



33. Below are example images of representative clothing items offered for sale by Defendants:



34. Below are example images of representative clothing items offered for sale by Buc-ee's:



35. Below are example images of drinkware and beverage coolers offered for sale by Defendants:

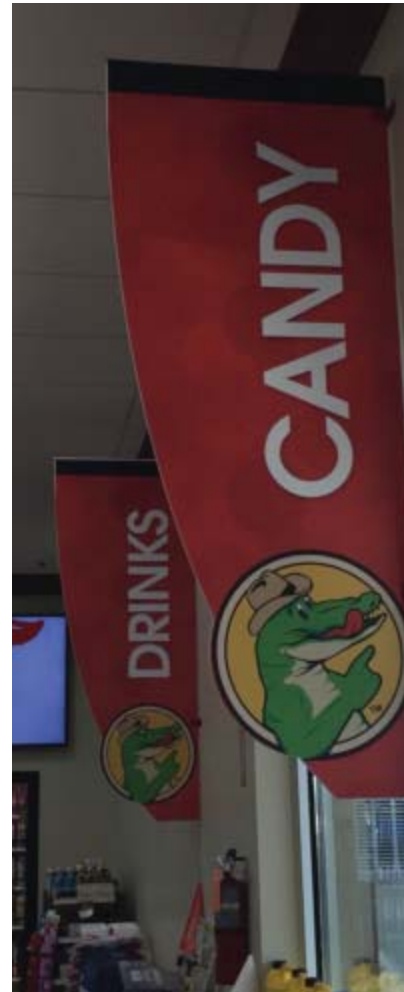


36. Below are example images of drinkware and beverage coolers offered for sale by Buc-ee's:



37. Below are example images of interior store signage used by Defendants:

CHOKE CANYON



38. Below are example images of interior store signage used by Buc-ee's:

BUC-EE'S



39. Below are example images of ice-storage containers used by Defendants and ice offered for sale by Defendants:



40. Below are example images of ice-storage containers used by Buc-ee's and ice offered for sale by Buc-ee's:

BUC-EE'S



41. Defendants' intentional and unauthorized actions further constitute infringement and dilution of the BUC-EE'S Marks, and an attempt to unfairly compete in violation of federal and state law, and constitute statutory and common law trademark infringement and dilution and unfair competition.

C. Injury to Buc-ee's

42. Defendants' unauthorized use of logos confusingly similar to the BUC-EE's Marks will allow Defendants to receive the benefit of the goodwill built up at the great labor and expense by Buc-ee's in the BUC-EE's Marks, and further will allow Defendants to gain acceptance for their convenience-store services and products based not on their own merits, but on an association with the reputation and goodwill of Buc-ee's.

43. Defendants' unauthorized use of logos confusingly similar to the BUC-EE's Marks constitutes an invasion of Buc-ee's valuable property rights in a manner that unjustly enriches Defendants.

44. Defendants' use of logos confusingly similar to the BUC-EE's Marks falsely indicates to the purchasing public that the Defendants and/or their convenience-store services and products are in some manner connected with, sponsored by, affiliated with, or related to Buc-ee's and/or its convenience store services and products.

45. Use by Defendants of logos confusingly similar to the BUC-EE's Marks places the valuable reputation and goodwill of Buc-ee's in the hands of Defendants, over whom Buc-ee's has no control.

46. Defendants' activities are likely to cause confusion, or to cause mistake, or to deceive customers or potential customers wishing to purchase services or products sponsored by, associated with, or affiliated with Buc-ee's.

47. The BUC-EE's Marks are famous and are entitled to protection under Texas and federal law. Buc-ee's has extensively and continuously promoted and used the BUC-EE's Marks for years in the State of Texas. Through that extensive and continuous use, the BUC-EE's Marks have become famous and well-known indicators of the origin and quality of Buc-ee's products and services in the United States and in the State of Texas (including in the geographic area surrounding Defendants' store locations), and the BUC-EE's Marks are widely recognized by the public throughout Texas as a designation of source. The BUC-EE's Marks have also acquired substantial secondary meaning in the marketplace, including in the State of Texas. Moreover, the BUC-EE's Marks became famous and acquired this secondary meaning before Defendants' commenced their use of the BUC-EE's Marks, and/or colorable imitations thereof.

48. This action is being brought to prevent any further infringement and dilution of Buc-ee's intellectual property rights under federal and Texas law and to compensate Buc-ee's for the harm caused by Defendants' willful actions.

V.

COUNT I - TRADEMARK DILUTION IN VIOLATION OF TEX. BUS. & COM. CODE § 16.103

49. Buc-ee's incorporates the allegations set forth in Sections I through IV.

50. Based on the activities described above, Defendants have diluted and continue to dilute the BUC-EE's Marks under §16.103 of the Texas Business & Commerce Code.

51. Defendants' acts complained of above are likely to injure Buc-ee's business reputation or to dilute the famous, distinctive quality of the BUC-EE's Marks, at least by eroding the public's exclusive identification of Buc-ee's famous BUC-EE's Marks with Buc-ee's, by lessening the capacity of Buc-ee's famous BUC-EE's Marks to identify and distinguish Buc-ee's

goods and services, by associating the BUC-EE's Marks with products and/or services of inferior quality, and by impairing the distinctiveness of Buc-ee's famous BUC-EE's Marks.

52. Defendants' unauthorized activities are likely to weaken or otherwise jeopardize Plaintiff's highly valuable rights. Pursuant to Texas Business & Commerce Code § 16.103, Buc-ee's is entitled to bring this action to enjoin Defendants from injuring Buc-ee's business reputation or diluting the distinctive quality of the BUC-EE's.

53. Buc-ee's will be irreparably injured unless such action is enjoined by this Court as provided by Texas law.

54. Defendants' dilution has been willful and intentional, making this case eligible for an award of enhanced profits and damages under Texas law, as well as an award of Buc-ee's attorneys' fees.

VI.
COUNT II – TRADEMARK INFRINGEMENT IN VIOLATION OF TEX. BUS. & COM.
CODE § 16.102

55. Buc-ee's incorporates the allegations set forth in Sections I through V.

56. The acts of Defendants complained of above constitute trademark infringement of Buc-ee's Texas state registrations, in violation of Texas Business & Commerce Code § 16.102. Defendants' use of a logo confusingly similar to the Buc-ee's Texas state registrations for its Beaver logo is likely to deceive or cause confusion or mistake as to the source or origin of Defendants' goods and/or services.

57. Defendants' infringing conduct has been performed with full knowledge of Buc-ee's rights, and in bad faith and with willful and deliberate intent to trade on Buc-ee's substantial recognition, reputation, and goodwill.

58. Defendants have infringed and continue to infringe the Buc-ee's Texas state registrations. Because of Defendants' infringement, Buc-ee's has been injured and damaged, and

is entitled to injunctive relief, and is further entitled to recover damages, profits, enhanced profits and damages, and its attorney's fees, pursuant to Texas Business & Commerce Code § 16.102.

VII.
COUNT III – FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. SECTION
1114

59. Buc-ee's incorporates the allegations set forth in Sections I through VI.

60. Defendants have infringed and continue to infringe the BUC-EE'S Marks, which are federally registered. Defendants' actions are in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114. Because of Defendants' infringement, Buc-ee's has been injured and damaged, and is entitled to recover damages, profits, and costs pursuant to 15 U.S.C. § 1117.

61. Defendants are using the BUC-EE'S Marks with full knowledge of Buc-ee's rights, and in bad faith and with willful and deliberate intent to trade on Buc-ee's substantial recognition, reputation, and goodwill. In view of the willful nature of Defendants' infringement and unfair competition, this is an exceptional case within the meaning of 15 U.S.C. § 1117(a).

VIII.
COUNT IV – FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. SECTION
1125(A)

62. Buc-ee's incorporates the allegations set forth in Sections I through VII.

63. The acts of Defendants complained of above constitute a false designation of origin and false representation in commerce in violation of 15 U.S.C. § 1125(a). Defendants' use of trademarks confusingly similar to the BUC-EE'S Marks falsely represents that Defendants are licensed or sponsored by Buc-ee's, or that Defendants are in some manner affiliated with Buc-ee's.

64. Defendants' infringing conduct has been willful, making this an exceptional case under 15 U.S.C. § 1117.

65. Defendants have infringed and continue to infringe the BUC-EE'S Marks, which are federally registered. Because of Defendants' infringement, Buc-ee's has been injured and damaged, and is entitled to recover damages, profits, and costs pursuant to 15 U.S.C. § 1117.

66. Defendants are using the BUC-EE'S Marks with full knowledge of Buc-ee's rights, and in bad faith and with willful and deliberate intent to trade on Buc-ee's substantial recognition, reputation, and goodwill. In view of the willful nature of Defendants' infringement and unfair competition, this is an exceptional case within the meaning of 15 U.S.C. § 1117(a).

IX.
COUNT V – UNFAIR COMPETITION AND FALSE DESIGNATION OF ORIGIN
UNDER 15 U.S.C. SECTION 1125(A)

67. Buc-ee's incorporates the allegations set forth in Sections I through VIII.

68. Defendants, in connection with goods or services or any container for goods, used in commerce words, terms, names, symbols, devices, or any combination thereof a false designation of origin, false or misleading description of fact, or false or misleading representation of fact which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Buc-ee's with Defendants, or as to the origin, sponsorship, or approval of Defendants' use of the BUC-EE'S Marks, in violation of 15 U.S.C. § 1125(a). These activities further constitute unfair competition pursuant to 15 U.S.C. § 1125(a) (Section 43(a) of the Lanham Act), as Defendants' acts have allowed them to obtain an unfair advantage as compared to Buc-ee's.

69. Defendants' unauthorized use of the BUC-EE'S Marks have had, and unless restrained, will continue to have the consequent result of saturating and overwhelming the market, thereby causing Buc-ee's to lose the value of its trademarks, cause damage to Buc-ee's integrity, and cause Buc-ee's to lose control over its goodwill and reputation.

X.

COUNT VI – COMMON LAW INFRINGEMENT

70. Buc-ee's incorporates the allegations set forth in Sections I through IX.

71. The acts of Defendants complained of above constitute common law trademark infringement.

XI.

COUNT VII – UNJUST ENRICHMENT

72. Buc-ee's incorporates the allegations set forth in Sections I through X.

73. The acts of Defendants complained of above constitute unjust enrichment, at least because Defendants have wrongly obtained benefits at Buc-ee's expense.

XII.

COUNT VIII – COMMON LAW UNFAIR COMPETITION

74. Buc-ee's incorporates the allegations set forth in Sections I through XI.

75. The acts of Defendants complained of above constitute unfair competition under common law, at least because Defendants' acts have allowed them to obtain an unfair advantage as compared to Buc-ee's.

XIII.

COUNT IX - MISAPPROPRIATION

76. Buc-ee's incorporates the allegations set forth in Sections I through XII.

77. The acts of Defendants complained of above constitute misappropriation in violation of the common law, at least because Defendants have gained a special advantage because they were not burdened with the expenses incurred by Buc-ee's, who has developed recognition, goodwill, and intellectual property rights through significant expense and labor.

XIV.
APPLICATION FOR
PERMANENT INJUNCTION

78. Buc-ee's incorporates the allegations set forth in Sections I through XIII.

79. There is a substantial likelihood that Buc-ee's will prevail on its claims against Defendants, based on Defendants' unlawful use of the BUC-EE's Marks in connection with the promotion and sale of retail convenience store items.

80. Defendants' actions complained of above are jeopardizing, and, if allowed to proceed, will continue to jeopardize the goodwill of Buc-ee's in its valuable name, concept, and trademarks. Such acts have caused, are causing and will continue to cause, irreparable injury to Buc-ee's and the consuming public, and the threatened injury outweighs any hypothetical damage that the proposed injunction may cause Defendants. Finally, the public interest favors the issuance of an injunction in this case.

81. Unless the acts of Defendants complained of above are restrained by this Court, they will be continued and will continue to cause irreparable injury to Buc-ee's and to the public, for which there is no adequate remedy at law.

82. Buc-ee's seeks an injunction against Defendants, prohibiting them from any and all use of any of the BUC-EE'S Marks, and any other Buc-ee's marks, names and/or logos that are confusingly similar in name, typeface, font, color, or appearance to the BUC-EE'S Marks, or any other Buc-ee's marks, names and/or logos, or any derivation thereof directly or indirectly, for itself, or through, on behalf of, or in conjunction with the sale or offer of any convenience store items by Defendants until further order from this Court.

XV.
TRIAL BY JURY

83. Buc-ee's hereby requests a trial by jury.

XVI.
PRAYER

For the reasons stated above, Plaintiff prays that this Court:

(a) enter an injunction prohibiting Defendants and their respective officers, directors, agents, servants, employees, attorneys, related companies, licensees, and all persons acting for, with, by, through, and under any of them, from any and all use of the BUC-EE'S Marks, and any other Buc-ee's marks, names and/or logos, or any derivation thereof directly or indirectly, for itself, or through, on behalf of, or in conjunction with the sale or offer of any convenience-store products or services by Defendants;

(b) enter judgment in favor of Buc-ee's for actual damages in an amount to be determined by the Court, where such damages are trebled due to Defendants' willful and intentional disregard of Buc-ee's known rights, pursuant to at least 15 U.S.C. § 1117 and Texas Business & Commerce Code §§ 16.102-16.104;

(c) enter judgment in favor of Buc-ee's for Defendants' profits in an amount to be determined by the Court, where such profits are trebled due to Defendants' acts of willful and intentional disregard of Buc-ee's known rights, pursuant to at least 15 U.S.C. § 1117 and Texas Business & Commerce Code §§ 16.102-16.104;

(d) award Buc-ee's all costs of the action and reasonable attorneys' fees pursuant to the provisions of at least 15 U.S.C. § 1117 and Texas Business & Commerce Code §§ 16.102-16.104; and

(e) award such other relief as the Court deems appropriate.

Dated: October 12, 2016

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