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., HARLOW FOOD, INC., MARIAM, INC., S.W. RETAIL INC., FALFURRIAS HIGHWAY FOODS, INC., AND HIGHWAY 46 RETAIL, INC.** **Defendants.**	**CIVIL ACTION NO. 4:15-CV-03704** **JURY TRIAL DEMANDED**

BUC-EE'S OPPOSED MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM PRESENTING, REFERENCING, OR INTRODUCING ANY EVIDENCE, ARGUMENT, OR MATERIAL RELATED TO BUC-EE'S PRIOR ENFORCEMENT MATTERS AGAINST THIRD-PARTIES OR RELATED TO ALLEGED ANTICOMPETITIVE CONDUCT

The Court should preclude Defendants from—in the presence of the jury (either directly or indirectly), upon voir dire, statement of the case, examination of witnesses, argument, objections, or in any other manner—presenting, referencing, or introducing the existence of, or evidence, argument, or material from, any prior Buc-ee's enforcement matters against third-parties, including but not limited to Defendants' proposed trial exhibits D-41-47, D-182, and D-339-340, and from suggesting that Buc-ee's engages in a pattern of anticompetitive conduct through alleged frivolous lawsuits, bullying of competitors, or any other conduct.

I. Introduction and Brief Background

Buc-ee's sued Defendants here to stop them from trading on Buc-ee's valuable intellectual property rights and customer goodwill through the use of an alligator logo that infringes and dilutes Buc-ee's famous and distinctive beaver logo trademarks.

Because of Buc-ee's popularity and fame, this is not the first time that Buc-ee's has had to enforce those logo trademark rights against an infringer or to protect those rights from competing trademark applicants. A few examples include:

- *Buc-ee's, Ltd. v. Ray V. Hansen, et al (D/B/A Chicks)*, Civil Action No. 4:J 3-CV-640 (S.D. Tex.).
- *Buc-ee's, Ltd. v. Field Store, Inc. (D/B/A Irv's), et al.*, Civil Action No. 4:13-CV-3346 (S.D. Tex.).
- *Buc-ee's, Ltd. v. B & B Grocery (D/B/A Frio Beaver), et al.*, Civil Action No. 4:14-cv-01844 (S.D. Tex.).
- *Buc-ee's, Ltd v. Beaver Water, Inc., et al*, Civil Action No. 4:13-CV-2080 (S.D. Tex.).
- *Buc-ee's, Ltd v. LSAA, LLC (In the Matter of Trademark Applicant LSAA, LLC)*, Opp. No. 91233434 (TTAB) (pending trademark opposition to trademark application by "Sam's Mart").

Defendants have signaled that they intend to reference one or more of these or other "prior enforcement matters" in an effort to cast Buc-ee's as "anticompetitive"—as a "bully" that files "frivolous" trademark lawsuits against its competitors—through statements Defendants have made to the Court in recently-filed briefs:

- "Plaintiff has also become known as the ***Texas Interstate Bully***, indicating the critical importance of the interstate highways to Plaintiff's business and ***its many frivolous lawsuits against competitors***." (ECF 151 at 8 citing Exhibit 13, Tabberone Hall of Shame (emphasis added));
- "Unfortunately 'Chicks,' like so many other competitors Buc-ee's sues, could not afford to defend agaisnt [sic] the ***frivolous lawsuit and was forced out of business by Buc-ee's***." (ECF 157 at 11 (citing *Buc-ee's v. Chicks* complaint (emphasis added));

- "Despite there be [sic] no possibility of confusion Irv's could not afford to defend themselves and it too was forced out of business ***by the bullying tactics Buc-ee's so often uses***." (*Id*. at 11 citing *Buc-ee's v. Irv's* complaint (emphasis added));
- "Buc-ee's has a well-documented history of using the federal court system to ***extinguish competitors*** and to ***bully*** those who oppose it." (*Id*. at 13 (emphasis added));
- "It also demonstrates Buc-ee's ***pattern of anticompetitive behavior***." (*Id*. at 20 (emphasis added)); and
- "There can be no doubt that Buc-ee's is attempting to utilize the same ***intimidation*** and ***bullying tactics for which it has become known*** …." (*Id*. at 21 (emphasis added))

(*see also* ECF 153 at Exhibits 15 and 16; *see, e.g.*, Ex. 1, Defendants' excerpted trial exhibit list at D-41-47; D-182; D-339-340).[1]

Defendants' slanderous assertions are of course unsupported and untrue. But more importantly, they are plainly an attempt to inflame and bias the Court against Buc-ee's. And there is no reason to think Defendants won't try to do the same to the jury.

The Court should prevent Defendants from doing so for at least two reasons. First, supposed evidence of anticompetitive conduct is not relevant here: this is a trademark infringement and dilution case, not an antitrust case. The Court should thus preclude Defendants under Federal Rules of Evidence 401 and 402 from referencing or introducing evidence or argument related to Buc-ee's prior enforcement matters or from suggesting that Buc-ee's engages in anticompetitive conduct. Second, any possible relevance of such evidence or argument is substantially outweighed by the dangers of unfairly prejudicing Buc-ee's, distracting and confusing the jury, and creating unnecessary delay. The Court should therefore also preclude Defendants under Rule 403 from referencing or introducing Buc-ee's prior enforcement matters or from suggesting that Buc-ee's engages in anticompetitive conduct.

[1] Defendants have also signaled that they plan to use evidence, argument, or material from Buc-ee's proceedings involving third-party Bucks, Inc. Buc-ee's has filed a separate Motion *in Limine* (ECF 155) addressing those particular proceedings.

II. ARGUMENT: The Court should preclude Defendants from referencing or introducing evidence or argument related to Buc-ee's prior enforcement matters or related to alleged anticompetitive conduct

a. Buc-ee's prior enforcement activities are irrelevant to Defendants' defense here

The "purpose of a motion *in limine* is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence …." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (citations and internal quotations omitted). Under Federal Rule of Evidence 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FED. R. EVID. 401. Under Rule 402, "[i]rrelevant evidence is not admissible." FED. R. EVID. 402. The Court should preclude Defendants from referencing or introducing evidence or argument related to Buc-ee's prior enforcement matters or to alleged anticompetitive conduct under Rules 401 and 402 because those matters are irrelevant: they do not have "any tendency to make a fact more or less probable," let alone a "fact" that "is of consequence in determining the action."

Courts often exclude references and evidence of a party's involvement in other disputes or proceedings in part because prior proceedings are often irrelevant to a current dispute. *See, e.g., In re Homestore.com*, No. 01-11115, 2011 WL 291176, at *1 (C.D. Cal. Jan. 25, 2011) (granting motion *in limine* to exclude "reference to or evidence of Plaintiff's involvement in other litigation prior to this Action [because it] is … irrelevant"); *Arlio v. Lively*, 474 F.3d 46, 52-53 (2d Cir. 2007) (finding that district court abused its discretion in allowing evidence of prior proceedings because they were not relevant to any issue in the case); *see also EVM Sys., LLC v. Rex Medical, L.P.*, No. 13-184, 2015 WL 11089476, at *2 (E.D. Tex. Jun. 10, 2015) (granting plaintiff's motion *in limine* precluding any reference to unrelated legal proceedings involving plaintiff or referring to plaintiff as "litigious").

Buc-ee's prior enforcement matters are irrelevant here because those matters involved both different infringers and different infringing logos, and thus have no bearing on Defendants' defense in this trademark infringement and dilution case involving Defendants' infringing alligator logo. During discovery, Defendants never claimed otherwise; they never mentioned Buc-ee's prior enforcement proceeding in response to any Buc-ee's interrogatories asking Defendants to disclose their arguments and contentions in this case.

Yet now—long after contention discovery has closed—Defendants make clear that they intend to use Buc-ee's prior enforcement matters in an effort to cast Buc-ee's as an anticompetitive bully. (*See* ECF 157 at 11, 13, 20, and 21; ECF 151 at 8; ECF 153 at Exhibits 15 and 16; *see, e.g.*, Ex. 1, Defendants' excerpted trial exhibit list at D-41-47; D-182; D-339-340).

But Defendants' anticompetitive allegations are as immaterial as they are untrue: Alleged anticompetitive conduct is not relevant to any issue in this case. This, for example, is not an antitrust case. Nor could it be: Buc-ee's has a fundamental right to stop others from confusing the public and trading off Buc-ee's hard-earned goodwill. Indeed, "[t]he exercise and enforcement of one's legal [trademark] rights via a threatened lawsuit can hardly be considered a 'sham' or in 'bad faith.'" *RJ Mach. Co., Inc. v. Ca. Pipeline Accessories Co., Ltd*., No. 13-579, 2013 WL 8115445, at *4 (W.D. Tex. Nov. 22, 2013) (dismissing antitrust claims based on alleged improper enforcement of trademark rights). And so a trademark owner, like Buc-ee's, "is entitled to advise others of his trademark rights, to warn others that they or others are or may be infringing his rights, to inform others that he is seeking to enforce his rights through legal proceedings, and to threaten accused infringers and their customers with suit." *Leopold v. Henry I. Siegel Co*., No. 86-63, 1987 WL 5373, at *4 (S.D.N.Y. Jan. 5, 1987) (not tortious interference for trademark owner to advise retailer that it was infringing trademark). Put simply, "[e]forts to

protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 61 (2d Cir.1997) (affirming summary judgment of no antitrust violation based on trademarks). Thus, Buc-ee's prior enforcement matters are not anticompetitive. But even if they were, supposed anticompetitive conduct is simply not a "fact" that "is of consequence in determining th[is] action," Fed. R. Evid. 401, and therefore any evidence to show such conduct is irrelevant.

In short, the Court should preclude Defendants from referencing or introducing evidence related to Buc-ee's prior enforcement matters or from suggesting that Buc-ee's engages in a pattern of anticompetitive conduct, because neither is relevant to Defendants' case.

b. Any reference or suggestion by Defendants to Buc-ee's prior enforcement matters or alleged anticompetitive conduct would unfairly prejudice Buc-ee's, distract and confuse the jury, and create unnecessary delay

Even if Defendants could come up with an issue to which Buc-ee's prior enforcement matters or alleged anticompetitive conduct were marginally probative to Defendants' case, any reference, argument, or evidence related to them should still be excluded because any possible "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; *i4i Ltd. Partnership v. Microsoft Corp.*, 670 F.Supp.2d 568, 588 (E.D. Tex. 2009) (excluded evidence's "probative value is substantially outweighed by its prejudicial effect").

Courts routinely exclude evidence related to other proceedings to prevent those very dangers. *See, e.g., Compaq Computer Corp. v. Ergonome, Inc.,* 387 F.3d 403, 408-09 (5th Cir. 2004) (affirming exclusion of evidence of prior litigations under Rule 403 where the "true reason for seeking to introduce the evidence was to paint Compaq as a 'bad' company," and "any probative value the … evidence might hold was outweighed by its prejudicial and inflammatory

nature and by its tendency to confuse the jury with tangential litigation"); *Novartis Pharms. Corp. v. Teva Pharms. USA, Inc.*, No. 05-1887, 2009 WL 3754170, at *9 (D.N.J. Nov. 6, 2009) (granting plaintiff's motion *in limine* to exclude evidence from prior, collateral litigations because they "are likely to result in unfair prejudice, confusion and undue delay will result"); *Homestore.com*, 2011 WL 291176, at *1 (excluding "reference to or evidence of Plaintiff's involvement in other litigation prior to this Action [because it] … carries with it a high risk of prejudice"); *Arlio*, 474 F.3d at 52-53 (explaining that "[c]ourts are reluctant to cloud the issues in the case at trial by admitting evidence relating to previous litigation involving one or both of the same parties" (citations omitted)); *EVM Sys.*, 2015 WL 11089476 at *2 (granting plaintiff's motion *in limine* precluding any reference to unrelated legal proceedings involving plaintiff or referring to plaintiff as "litigious").

The Court should do the same here. For starters, allowing Defendants to reference or introduce Buc-ee's prior enforcement matters would unfairly prejudice Buc-ee's. Evidence is unfairly prejudicial where it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Notes of Advisory Committee on 1972 Proposed Rules, Fed. R. Evid. 403. And evidence that may persuade a jury to punish a party should be regarded as unfairly prejudicial. *U.S. v. Simmons*, 925 F.2d 1972 (9th Cir. 1991) ("evidence was unfairly prejudicial in that it tended to provoke the jury's instinct to punish").

Here, Defendants appear bent on using Buc-ee's prior enforcement matters to push the jury to improperly decide this case on an emotional basis and, even worse, to punish Buc-ee's by casting Buc-ee's policing and enforcement of it trademarks as somehow improper. Indeed, Defendants have already referred to some of those proceedings to argue to this Court that Buc-ee's is "anticompetitive," is a "bully," and "intimidates" competitors by filing "frivolous"

lawsuits. (*See* ECF 157 at 11, 13, 20, and 21; ECF 151 at 8 citing Exhibit 13). Defendants will doubtless try to make similar arguments to the jury. That line of argument, however, serves no other purpose than to prejudice and inflame the jury and divert it from deciding the case on the relevant evidence before it. *Compaq,* 387 F.3d at 409 (affirming exclusion of evidence of prior litigations in part because the "true reason for seeking to introduce the evidence was to paint Compaq as a 'bad' company" and the evidence was "prejudicial and inflammatory").

But even if such evidence or argument could serve some legitimate purpose for Defendants, it would still be greatly outweighed by its "prejudicial and inflammatory nature." *Id.*; s*ee also Magnivision, Inc. v. Bonneau Co*., 115 F.3d 956, 961-62 (Fed. Cir. 1997) (overturning jury verdict due to district court's failure to exclude allegations of patent prosecution irregularities). The Court should thus preclude Defendants from referencing or introducing evidence or argument related to Buc-ee's prior enforcement matters or to alleged anticompetitive conduct because it will unfairly prejudice Buc-ee's.

The Court should also preclude Defendants from referencing or introducing Buc-ee's prior enforcement matters to avoid confusing the issues, misleading the jury, and causing undue delay. Again, this is not an antitrust case. Jurors hearing statements, testimony, or other evidence of prior enforcement activities are likely to be distracted, confused, and misled as to the central issues here: infringement, dilution, and misappropriation of Buc-ee's beaver logo trademarks. *See, e.g., Compaq,* 387 F.3d at 409 (affirming exclusion of evidence of prior litigations under Rule 403 in part because of "its tendency to confuse the jury with tangential litigation"); *Novartis*, 2009 WL 3754170, at *9 (granting plaintiff's motion *in limine* to exclude evidence from prior, collateral litigations because they "are likely to result in … confusion …").

And allowing any such evidence to come in will only prolong the issues at trial. Indeed, Defendants exhausted nearly 23 pages of briefing just trying to persuade this Court that Buc-ee's pending trademark litigation against Bucks is "frivolous." (ECF 157). There is no doubt they will go to similar lengths in using other prior proceedings to sway the jury. And of course, to counteract Defendants' misleading testimony or evidence, Buc-ee's would then have to offer its own evidence and argument showing the legitimacy of its enforcement activities. All this leads to the inevitable and prejudicial "trial within a trial" over matters having nothing to do with this case. *See Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 834 (8th Cir. 2005) (affirming exclusion under Rule 403 of evidence relating to a separate lawsuit that defendant used to try to show that the plaintiff was litigious, because it would have "resulted in a trial within a trial that would not have been that helpful to the jury"); *Soller v. Moore*, 84 F.3d 964, 968 (7th Cir. 1996) (affirming exclusion of allegations regarding a separate incident where a "trial within a trial could have resulted"); *Glaros v. H. H. Robertson Co.*, 797 F.2d 1564, 1572-73 (Fed. Cir. 1986) (affirming exclusion of other patents and a prior proceeding between the parties because their "[i]ntroduction … would have injected frolics and detours and would have required introduction of counter-evidence, all likely to create side issues that would have unduly distracted the jury from the main issues"); *see also Magnivision* 115 F.3d at 961 (explaining that where "evidence of marginal probative worth necessitates lengthy rebuttal, it imparts disproportionate weight to the issue").

In sum, the Court should preclude Defendants from referencing or introducing evidence related to Buc-ee's prior enforcement matters or to alleged anticompetitive conduct under Rule 403 because any alleged relevance of that evidence is substantially outweighed by a danger of

unfairly prejudicing Buc-ee's, distracting and confusing the jury, and creating unnecessary delay.[2]

III. CONCLUSION

For the foregoing reasons, the Court should grant Buc-ee's motion *in limine* to preclude Defendants from presenting, referencing, or introducing any evidence or argument related to Buc-ee's prior enforcement matters against third parties, or from suggesting that Buc-ee's has engaged in a pattern of anticompetitive conduct.

By */s/Katherine Laatsch Fink*

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[2] Preclusion is also appropriate under Rules 404 and 802. As for Rule 404, Defendants obviously want to use Buc-ee's prior enforcement matters to accuse Buc-ee's of prior "bad acts." But because the other matters bear no relationship to the matters at issue in this case, evidence of or about them is inadmissible here. *Procter & Gamble, Co. v. Nabisco Brands, Inc.*, 697 F. Supp. 1360, 1366 (D. Del. 1988) (party wishing to introduce evidence of prior bad acts bears an "extreme burden" to prove a nexus between those prior bad acts and the matter at hand). Further, much of the evidence purportedly related to Buc-ee's prior enforcement matters or alleged anticompetitive conduct consists of nothing more than hearsay statements and thus should be excluded under Rule 802. *See Johnson v. Ford Motor Co.*, 988 F.2d 573, 578-80 (5th Cir. 1993) (affirming the district court's grant of motion *in limine* to exclude evidence of other pending litigation against the defendant as inadmissible hearsay).

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CERTIFICATE OF CONFERENCE

Plaintiff's attorney, Janice V. Mitrius, communicated by email on July 12, 2017 with Charles W. Hanor, counsel for Defendants, about the motion to exclude. On July 14, 2017, Defendants indicated that they would oppose the motion.

Dated: July 14, 2017 By: /s/ Katherine Laatsch Fink

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2017, a true and correct copy of BUC-EE'S OPPOSED MOTION IN LIMINE TO PRECLUDE DEFENDANTS FROM PRESENTING, REFERENCING, OR NTRODUCING ANY EVIDENCE OR ARGUMENT RELATED TO BUC-EE'S PRIOR ENFORCEMENT MATTERS AGAINST THIRD-PARTIES OR RELATED TO ALLEGED ANTICOMPETITIVE CONDUCT will be served upon Defendants' counsel of record via electronic mail through the United States District Court's CM/ECF system.

/s/Katherine Laatsch Fink
FOR BUC-EE'S, LTD.