

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

BUC-EE’S, LTD.,

Plaintiff,

v.

SHEPHERD RETAIL, INC. ET AL,

Defendants.

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CIV. ACTION NO. 4:15-CV-03704

JURY REQUESTED

DEFENDANTS’ SHEPHERD RETAIL, INC., BLANCO RESTAURANT, INC., LIVE OAK RETAIL, INC. AND HARLOW FOOD, INC. ANSWER TO PLAINTIFF’S SECOND AMENDED COMPLAINT AND AFFIRMATIVE DEFENSES

NOW COME SHEPHERD RETAIL, INC., BLANCO RESTAURANT, INC., LIVE OAK RETAIL, INC. AND HARLOW FOOD, INC., Defendants, and file this their Answer to the Plaintiff s Second Amended Complaint and would respectfully answer as follows:

**I.
NATURE OF ACTION**

1. Defendants are not required to admit or deny Paragraph 1 of the Second Amended Complaint, but if a response is required, Defendants deny the same.

2. Defendants admit to advertising, promoting, and actively constructing a new travel center store in Atascosa, Texas and BBQ locations in the San Antonio known as “Choke Canyon.” Defendants further deny all remaining allegations of Paragraph 2 of the Second Amended Complaint.

3. Denied

**II.
JURISDICTION AND VENUE**

4. Admitted

5. Denied

III.
PARTIES

6. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

7. Omitted from Plaintiff's Second Amended Complaint Dkt. 65

8. Admitted

9. Admitted

10. Admitted

11. Defendants admit that 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. The remaining allegations of Paragraph 11 are denied.

IV.
FACTUAL BACKGROUND

12. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

13. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

14. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

15. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

16. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

17. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

18. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

19. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

20. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

21. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

22. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

23. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Admitted.

30. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

31. Admitted.

32. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

33. Admitted.

34. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

35. Admitted.

36. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

37. Admitted.

38. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

39. Admitted.

40. Defendants have insufficient information upon which to admit or deny this allegation, and therefore deny it.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

V.

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

- 49. Defendants repeat their responses to the prior paragraphs.
- 50. Denied.
- 51. Denied.
- 52. Denied.
- 53. Denied.
- 54. Denied.

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

- 55. Defendants repeat their responses to the prior paragraphs.
- 56. Denied.
- 57. Denied.
- 58. Denied.

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

- 59. Defendants repeat their responses to the prior paragraphs.
- 60. Denied.
- 61. Denied.

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

- 62. Defendants repeat their responses to the prior paragraphs.
- 63. Denied.
- 64. Denied.

65. Denied.

66. Denied.

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

67. Defendants repeat their responses to the prior paragraphs.

68. Denied.

69. Denied.

X.
COUNT VI – COMMON LAW INFRINGEMENT

70. Defendants repeat their responses to the prior paragraphs.

71. Denied.

XI.
COUNT VII – UNJUST ENRICHMENT

72. Defendants repeat their responses to the prior paragraphs.

73. Denied.

XII.
COUNT VIII – COMMON LAW UNFAIR COMPETITION

74. Defendants repeat their responses to the prior paragraphs.

75. Denied.

XIII.
COUNT IX – MISAPPROPRIATION

76. Defendants repeat their responses to the prior paragraphs.

77. Denied.

XIV.
APPLICATION FOR
PERMANENT INJUNCTION

- 78. Defendants repeat their responses to the prior paragraph.
- 79. Denied.
- 80. Denied.
- 81. Denied.
- 82. Denied.

XV.
TRIAL BY JURY

- 83. Admitted

AFFIRMATIVE DEFENSES

84. Defendants specifically plead the affirmative defense that Plaintiff's mark is not a famous mark as required by the Texas Dilution Statute.

85. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's dilution claims are barred by 15 USC § 1125.

86. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that there is no association arising from the similarity between the Beaver Logo and the Alligator Logo.

87. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that their Alligator Logo does not impair the Beaver Logo's distinctiveness

88. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that the United States Patent and Trademark Office has found that there is no likelihood of confusion between Plaintiff's marks and Defendants' marks.

89. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense of failure to state a claim upon which relief can be granted.

90. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense of statute of limitations.

91. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense of acquiescence.

92. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense of lawful purpose.

93. Alternatively, and/or in addition, Defendant specifically pleads the affirmative defense of laches.

94. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's claims are barred by the doctrine of abandonment.

95. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's claims are barred by the doctrine of waiver.

96. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's claims are barred by the doctrines of estoppel and equitable estoppel.

97. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's claims are barred by the doctrine of unclean hands.

98. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's claims are barred, in whole or in part, because Plaintiff's damages, if any, were not caused by Defendants.

99. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's claims for injunctive relief are barred, because Plaintiff cannot show that it will suffer any irreparable harm from Defendants' actions.

100. Alternatively, and/or in addition, Defendants specifically plead the affirmative defense that Plaintiff's claims are barred, in whole or in part, because of a failure to mitigate damages, if such damages exist.

101. Alternatively, and/or in addition, Defendants reserve the right to assert additional defenses based on information learned or gained during discovery.

DEFENDANTS REQUEST A TRIAL JURY.

DATED this 11th day of November, 2016.

Respectfully submitted,

/s/ Charles W. Hanor
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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

In accordance with Local Rule 5.3, I hereby certify that on the 11th day of November, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record who have registered for ECF filing.