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

BUC-EE'S, LTD.	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:15-CV-03704**
	§	
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.	§	**JURY TRIAL DEMANDED**

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION IN *LIMINE* TO EXCLUDE DEFENDANTS' SURVEY EVIDENCE OF DR. KIM ROBERSON

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I. INTRODUCTION

Plaintiff's *in limine* requests should be denied because Defendants' likelihood of confusion survey used the prover universe.

II. SUMMARY OF THE ARGUMENT AND ISSUES TO BE RULED UPON

Defendants' expert, Dr. Kim Robertson ("Dr. Robertson"), conducted a likelihood of confusion survey to offer proof, beyond one's common sense, that there is no likelihood of confusion between the Choke Canyon alligator and Buc-ee the beaver. The survey, as would be expected, showed essentially zero confusion because the marks are not remotely similar. Plaintiff is not entitled to the monopoly it is seeking on all cartoonish animals for a logo.

Plaintiff seeks to exclude Dr. Robertson's expert testimony based on an alleged defective universe. Dr. Robertson's surveyed a universe which included 18 and older Texas residents with a drivers license from North Texas, South/Central Texas, and East Texas. Incredibly, Plaintiff claims this universe is not adequate to measure likelihood of confusion. However, this is entirely incorrect. Dr. Robertson's universe accounted for travelers in the state of Texas traveling to or through San Antonio, the number one travel destination in Texas according to the Texas Department of Transportation. Plaintiff also ignored the expansion of Choke Canyon into these areas, and blatantly ignored evidence, from literature it cited itself, which states including respondents in a universe in likely expansion areas is acceptable, exactly what Dr. Robertson did. Moreover, assuming for the sake of argument that Dr. Robertson's universe is not optimal, which Defendant's' firmly believe it is, this affects the weight not admissibility as this court has stated. Moreover, Plaintiff's own literature and cases, which it cited in its motion, clearly states an improper universe affects the weight, not admissibility, of surveys.

In sum, Dr. Robertson's survey meets the *Daubert* reliability standard as well as Federal Rule of Evidence 702. Further, because the survey universe was correct it cannot, and will not, be unduly prejudicial to Plaintiff under Federal Rule of Evidence 403. Therefore, Dr. Robertson's testimony should be admitted to evidence and allow the jury the opportunity to hear just how baseless and ridiculous Plaintiff's claims are.

III. NATURE AND STAGE OF PROCEEDINGS

Amwad Panjwani immigrated to the United States in the 1980s and through his hard work and dedication has opened the gas station/convenience store brand, "Choke Canyon." Plaintiff filed a lawsuit against Mr. Panjwani alleging trademark infringement because Plaintiff believes it has the sole right to use a smiling, friendly, cartoon animal logo for its travel centers and for its restaurants. Trial was set for August 21, 2017. Plaintiff has filed a motion to exclude the likelihood of confusion survey testimony by Dr. Robertson. However, Plaintiff ignores and misrepresents literature which it cites in an attempt to exclude the surveys. Defendants' survey should not be excluded because the universe was proper, and, in any event, an improper universe affects the weight not admissibility of evidence.

IV. ARGUMENT AND AUTHORITIES

Plaintiff seeks to exclude Defendants' counsel and witnesses from making any reference to any evidence relating to the likelihood of confusion survey of Dr. Kim Robertson. Plaintiff claims the survey is inadmissible under *Daubert*, and Federal Rules of Evidence 702 and 403. (Dkt. 149 at p. 1-2).

A. The Universe Surveyed by Dr. Robertson Was Relevant Because It Included Travelers from Texas Who Are Likely to Stop at a Gas Station/Convenience Store and All Possible Expansion Areas of Choke Canyon

Plaintiff contends that Dr. Robertson's survey should be excluded because the wrong universe was surveyed. Dr. Robertson's survey included the following "Relevant Universe to be Sampled:"

> 7. The relevant consuming public for the survey was identified as persons residing in three general areas of Texas: North Texas (includes Ft. Worth, Dallas, Abilene, Wichita Falls and Longview), South/Central Texas (includes Waco, Temple, Austin and San Antonio) and East Texas (includes Houston, Galveston, Beaumont and Port Arthur) who had a current driver's license and who were over the age of 18. This area covers more than 80% of the population of Texas and covers the vast majority of drivers in Texas who could reasonably be expected to use the services of the sort offered by the parties in this litigation.

(Ex. 1, Robertson Survey at p 5-6).

Both Plaintiff and Defendants have large travel centers on Texas' interstate highways. While both parties have typical small convenience stores, about 3000 sq. ft., these stores are insignificant to the issues in this case which involve stores 4-20 times larger with much higher revenues.

The survey's universe was relevant because it included travelers through Texas who may stop at Choke Canyon locations on Interstate 37 between San Antonio and Corpus Christi, on Interstate 35 between San Antonio and Laredo, and a future location in progress on Interstate 10 between San Antonio and Houston. Defendants also have a Choke Canyon Barbeque restaurants at the two travel centers and just off North Loop 1604 in the fastest growing part of San Antonio between Interstate 35 and Interstate 10 to El Paso. Loop 1604, also known as the Charles W. Anderson Loop, is a highway loop that encircles San Antonio, Texas, spanning approximately 95.6

miles. It is the most congested road in San Antonio, Bexar County Texas, and is the link between Interstates 10 and 35.

It was unnecessary for all respondents to live in the exact locations where Choke Canyon is present because Choke Canyon travel centers are located in areas where travelers are likely to encounter it. They are travel centers on the Texas interstate highways so an overwhelmingly majority of the customers are drivers over 18 that travel the interstate highways. A large majority of the travelers from North Texas, South/Central Texas, and East Texas would pass Choke Canyon locations on the way to the coast or other travel through Texas and on the way to Mexico.

Additionally, San Antonio was named the top travel Destination by *Texas Highways*, a magazine published by the Texas Department of Transportation, for 2014. This confirms a large number of Texans are traveling to and through San Antonio and would encounter Choke Canyon's mark—Dr. Robertson's universe accounted for all of these potential customers. (Ex. 2, *Texas Highways* page). Further, a number of gulf coast destinations on the Texas coast also made the Top 40 list by *Texas Highways*. (Ex. 2, *Texas Highways* page). All are destinations that Texans, which Dr. Robertson surveyed, would travel to and consequently would pass through areas Choke Canyon is located.

i. Dr. Robertson's Universe Accounts For Future Expansion of Choke Canyon

Moreover, Plaintiff completely ignores the in progress expansion by Choke Canyon into the areas surveyed by Dr. Robertson. Defendants' expansion makes all consumers in those geographic areas "potential customers" of Choke Canyon. In addition, literature which Plaintiff cited as "Exhibit 3" confirms it is appropriate to survey in areas where geographic expansion can be anticipated, even in the absence of concrete plans:

> "In such instances, the author as found it useful to define the geographic component of the universe broadly and conduct a portion (typically, half) in geographic locales where the second comer might reasonable be anticipated to expand. In this way, the survey provides an indication of what is likely to happen should the second comer expand its operations into other locales."

(Ex. 3, Jacoby at 327). Plaintiff not only ignores the expansion by Choke Canyon, but also the literature it cited. Dr. Robertson did not ignore either and created a universe which correctly includes these potential consumers.

Choke Canyon also has a large online presence on websites such as "Yelp," "Facebook," "TripAdvisor," "Foursquare," and "Zomato." (Ex. 4, 5, 6, 7 and 8). These profiles can be found by simply searching the internet for phrases such as "Choke Canyon BBQ" or "Choke Canyon Travel Centers." The various internet profiles are another instance where actual and potential consumers will see Choke Canyon's logo, all consumers which Dr. Robertson's survey included.

Furthermore, if Buc-ee's mark was as famous as it claims, and the Choke Canyon logo confused consumers to the extent claimed by Plaintiff, any time a potential consumer viewed these profiles the consumer would be unable to distinguish between the Buc-ee's and Choke Canyon marks. The public themselves has refuted the confusion between the two marks, as a number of respondents to a "Tex Ags" forum, as well as respondents to a Houston Chronicle article about this lawsuit, touted the lawsuit as baseless, among other colorful comments. (Ex. 9, "Tex Ags"; Ex. 10, Houston Chronicle article and comments). The de minimis likelihood of confusion results from Dr. Robertson's survey coincides with the publics own thoughts regarding this frivolous lawsuit, as well as many major news outlets. (Ex. 10, Houston Chronicle article; Ex. 11 San Antonio Express; Ex. 12, ABC13).

It is ironic Plaintiff would criticize a survey which tests for the likelihood of confusion for an in progress location when the entire case is based upon this future confusion between the Buc-ee's Beaver Logo and Choke Canyon Alligator Logo as follows.

> 24. Defendants also utilize a trade dress purposely similar to and reminiscent of the Buc-ee's Trade Dress, which will be confusingly similar to or likely to cause confusion with the Buc-ee's Trade Dress. Moreover, a convenience store Defendants plan to open is within close proximity of a Buc-ee's store located in New Braunfels, Texas and Luling, Texas and will share the same client base, leading to further consumer confusion.

(Dkt. 1 at ¶ 24).

The only store planned to open in December of 2015 was on Interstate 10 at a Luling, Texas exit. While the frivolous trade dress claim was subsequently dropped, the allegations regarding the infringement of Buc-ee the beaver remain the same.

> 25. The Buc-ee's Trade Dress is the overall look and feel of the Buc-ee's retail locations. The Buc-ee's Trade Dress includes the overall look and feel of the exterior areas (including but not limited to the fuel-filling stations), and the various interior areas of the Buc-ee's retail locations. Features of the Buc-ee's Trade Dress that help distinguish the Buc-ee's convenience stores (and thereby help to identify and distinguish the Buc-ee's convenience stores from the stores of others) include, but are not limited to, the following:
>
> (a) Use of a logo including an animal with humanlike characteristics throughout the store;
>
> (b) Use of a logo including an animal inside a yellow circle throughout the store;
>
> (c) Use of a logo including an animal with humanlike characteristics and a red tongue throughout the store;
>
> (d) Use of a logo including an animal with humanlike characteristics and wearing a hat throughout the store;

(Dkt. 13 at ¶ 25).

> 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).

(Dkt. 65 at ¶ 25).

Defendants began using its Alligator Logo in May of 2012. Plaintiff incredibly did not produce a single business record referring to Defendants prior to December 23, 2015, when this suit was filed. This was about a month after Defendants purchased 40 acres of land on Texas Interstate 10 just 4 miles west of Luling, Texas. Plaintiff incredibly denies knowing about this now so the jury will have to determine the truth of the facts of Para. 24 of the Original Complaint. It is unbelievable that Defendants could open two large travel centers on Interstate 37 and Interstate 35 using an alleged blatantly infringing Alligator Logo on billboards and 50 feet plus high Interstate signs and three restaurants on Interstate 37 and 35 and Loop 1604 in San Antonio and operate them for about 3 ½ years, without Plaintiff's being aware within a day. Another explanation is that Defendants' Alligator Logo bears no resemblance whatsoever to the BUC-EE Beaver Logo, as the below signed attorney's four year old granddaughter can determine, and this suit is really Plaintiff being a bully and continuing to sue any competitor who dares to compete with Plaintiff on Plaintiff's Interstate Highways.

Moreover, it is undisputed that the parties' principal stores are geographically separate. Defendants' two large stores and restaurants are located on Interstate 37 and the other is located on Interstate 35 with a standalone restaurant on Loop 1604. While Plaintiff's closest relevant stores are in Lulling on Interstate 10 and New Braunfels, Texas on Interstate 35. Plaintiff's and Defendants' travel centers and restaurants depend on drivers on the interstate highways stopping at these roadside locations, making it even more incredible Plaintiff's would question a universe which included drivers on the Texas interstate highways.

Plaintiff's fame survey measured fame for the entire state of Texas, so it is plainly obvious Texans, 18 or over, with a driver's license, travel on Interstates 37, 35, and 10 and Loop 1604 are the proper universe. Indeed, Plaintiff's Texas State Dilution claim is based on these same drivers on the Texas interstate highways.

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. (Ex. 13, Tabberone Hall of Shame). It is inevitable that these interstate drivers would come into contact with the Choke Canyon logo because *Texas Highways* determined San Antonio is the number one travel destination in Texas, followed closely by cities on the Texas Gulf Coast. (Ex. 2, *Texas Highways* page). These areas are traveled to by respondents in Dr. Robertson's survey so they would undoubtedly come into contact with the Choke Canyon logo. The Court may also find it humorous that Plaintiff claims travelers on the Texas Interstate highways would see Defendant's billboards as follows and think it was Buc-ee the Beaver:

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ii. The Universe Was Proper Because Both Parties Sell the Same Services and Products

Additionally, when both parties sell the same services and products a proper universe includes potential customers of both the senior and junior mark. *See* (Ex. 14, 3-8 Gilson on Trademarks n. 468) ("Where both parties sell the same type of product, however, the appropriate universe may include potential customers of both"); *Citizens Banking Corp. v. Citizens First Bancorp, Inc.*, No. 07-10985, 2007 LEXIS 88325, at *13 (E.D. Mich. Dec. 3, 2007) (holding it is not an absolute rule that the proper universe is from the junior users customers, but where the products sold are the same kind, "the population of consumers is the same"). Choke Canyon and Buc-ee's are in the same business and sell the same type of services and products, as they are both travel centers.

Furthermore, Plaintiff's own "Exhibit 2" attached to its motion to exclude Dr. Robertson actually supports Dr. Robertson's universe because both parties sell the same kind of products, however, Plaintiff chose to blatantly misrepresent it. *See* (Ex. 15, *McCarthy* § 32:159 n.4) (citing *OraLabs, Inc. v. Kind Group LLC*, 2015 WL 4538442, *5 (D. Colo. 2015)) (stating where the customer base of the parties is the same and the goods are competitive it is appropriate, and not an error, "to select a universe based on potential buyers of the senior user's product"). Plaintiff blatantly ignored that a universe can be appropriate when it contains potential consumers of the senior mark and junior mark, despite its own evidence supporting this. The misrepresentations to this Court were made in an attempt to conceal the evidence from Defendants. However, Plaintiff cannot choose to interpret the case law it deems fit to support its position and blatantly ignore anything to the contrary.

Dr. Robertson's universe was correct because it included areas where Buc-ee's is located as well as areas where Choke Canyon is located. Moreover, if Dr. Robertson excluded respondents who are potential customers of both Choke Canyon and Buc-ee's, the survey would have been seriously undermined and would contain a "built in bias." *See IDV N. Am. V. S & M Brands*, 26 F. Supp. 2d 815, 830 (E.D. Va. 1998) ("the failure to include in the survey persons who are in the market for both products rather seriously undercuts the credibility of the survey").

Plaintiff's insistence that Dr. Robertson's survey is irrelevant because he surveyed the wrong universe is unfounded for the multiple reasons discussed above. First, the survey respondents are all Texas residents who are likely to travel and will have to, at some point, stop at a gas station/convenience store. Second, Plaintiff completely ignores the in progress expansion of Choke Canyon into these areas, which makes the survey respondents "potential customers." Finally, Dr. Robertson avoided having his survey "seriously undermined" because he included consumers of both the senior (Buc-ee's) and junior mark (Choke Canyon) because both sell the same kind of product. *IDV M. Am.*, 26 F. Supp. 2d at 830. In light of the fact that Dr. Robertson used reliable methods which are supported by Plaintiffs own evidence, and the survey was relevant, it passes the *Daubert* reliability test and conforms to Rule 702 and will not be unduly prejudicial under Rule 403. Fed. R. Evid. 702, 403.

There is no reason to think that the results would be different if the survey universe was limited per the Plaintiff. Plaintiff's real complaint is the survey proves this was a "stupid" lawsuit as stated by the hundreds of commenters to the publicity on this lawsuit.

Plaintiff did not do a likelihood of confusion survey and did not offer any rebuttal to Dr. Robertson.

B. An Improper Universe Affects the Weight Not Admissibility of Surveys

Plaintiff alleges, in its motion to exclude survey evidence of Dr. Robertson, that the use of an improper universe bars the admissibility of the survey. (Dkt. 149). However, as the *Daubert* court stated the trial court's role as gatekeeper is not intended to replace the adversary system. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"); *see also THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 229-30 (S.D.N.Y. 2010) ("The Federal Rules of Evidence favor the admissibility of expert testimony, and [courts'] role as gatekeeper is not intended to serve as a replacement for the adversary system") (citations omitted).

In addition, this Court stated "an imperfect universe is not fatal to the surveys' admissibility." *Shell Trademark Mgmt. B. v. v. Warren Unilube, Inc.*, 765 F. Supp. 2d 884, 892-93 (S.D. Tex. 2011) (citing 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 32:162 (2010)). An inappropriate universe affects the weight not admissibility of surveys. *Id.*; *see Joules LTD. v. Macy's Merch. Grp. Inc.*, No. 15-CV-3645 KMW, 2016 WL 4094913, at *26-27 (S.D.N.Y. Aug. 2, 2016) (holding a survey which failed use a proper universe was admissible but held little weight). This Court determined a survey to have probative value and admitted the survey despite not surveying the "optimal universe." *See Shell*, 765 F. Supp. 2d at 893 (admitting a survey that did not survey the optimal universe because it was still probative to some degree). Even if the survey did not contain an optimal universe, which Defendants' believe it did, only the weight not admissibility of the survey should be affected. *Id.* at 892-93.

Moreover, literature which Plaintiff cited as "Exhibit 3" in its motion to exclude Dr. Robertson's survey, also follows the general rule that an improper universe affects weight not

admissibility. *See* (Ex. 3, Jacoby at 363) (citing *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 223 (7th Cir. 1984))) (commenting that a less than improper universe "go to the weight to be given the survey results, not the admissibility of the survey"). Further, the same literature states an overbroad universe can still have probative value, and thus be admitted. *See Id.* (citing *Ferrari S.p.A. v. McBurnie*, 11 U.S.P.Q.2d 1843, 1846 (S.D. Cal. 1989)) ("even a survey with an 'overbroad' universe may still have probative value"). This is yet another example of Plaintiff mischaracterizing literature in an effort to better its own position. Jacoby and Simonson are also experts in this case.

Plaintiff also cited a number of cases in support of barring the admission of the survey because of its alleged improper universe. However, almost all of the cases did not determine the surveys were inadmissible simply because of an improper universe, the surveys contained additional flaws which are not present in Dr. Robertson's survey. *See e.g., Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980) (barring the admission of the survey because the universe did not contain defendants' primary customer and the survey was a "word association" test which the court determined was an improper questioning procedure); *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 297 (2d Cir. 1999) (excluding the survey because it was a "memory test" and "gave no indication of whether there was a likelihood of confusion in the marketplace"); *Trouble v. Wet Seal, Inc.*, 179 F. Supp. 2d 291, 307-08 (S.D.N.Y. 2001) (refusing to admit a survey which had an improper universe, sample, lack of proper stimuli, and had no relevance to the case); *Big Dog Motorcycles, L.L.C. v. Big Dog Holdings, Inc.*, 402 F. Supp. 2d 1312, 1333 (D. Kan. 2005) (holding the survey results were irrelevant because the universe surveyed was not relevant, *among other reasons*) (emphasis added).

Furthermore, a case cited by the Plaintiff actually supports admitting a survey with an improper universe. *Joules*, No. 15-CV-3645 (KMW), 2016 LEXIS 101151, at *26-27 (admitting the survey but giving "little weight to its conclusions"). The only case which excluded a survey solely because of its universe is distinguishable. In *Jordache* the universe surveyed did not include any potential customers, Dr. Robertson's survey clearly does. *See Jordache Enters. v. Levi Strauss & Co.*, 841 F. Supp. 506, 518-19 (S.D.N.Y. 1993) (surveying a universe of respondents who had previously bought or worn jeans but not those who were going to buy jeans in the future). Dr. Robertson's survey contained respondents from areas which Choke Canyon is located and those, who through travel, would come into contact with the Choke Canyon mark. All of these respondents are "potential consumers" of Choke Canyon.

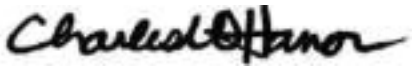
The general rule, as this Court and Plaintiff's literature has previously stated, is the weight of a survey containing an improper universe is affected, not admissibility. *See Shell*, 765 F. Supp. 2d at 890, 893 ("Flaws in a survey generally bear on weight not admissibility" . . . "an imperfect universe is not fatal to the surveys' admissibility"); *see also Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 488 (5th Cir. 2004) ("methodological flaws in a survey bear on the weight the survey should receive, not the survey's admissibility). This Court should deny Plaintiff's motion *in limine* requests and admit Dr. Robertson's likelihood of confusion survey. Admitting the survey not only follows the precedent of this Court but it is also in line with the *Daubert* Court which explained: cross-examination, contrary evidence, and instructions on burdens of proof are the correct way to "attack shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

V. Conclusion

For the foregoing reasons, Defendants respectfully request the Court deny Plaintiff's motion *in limine* request to exclude Dr. Robertson's survey.

Dated: July, 7 2017

Respectfully submitted,



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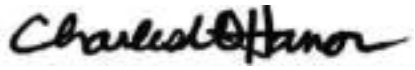
VI.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document is being served this I hereby certify that on July 7, 2017, a true and correct copy of the foregoing document will be served upon counsel of record via electronic mail through the United States District Court's CM/ECF system.

Respectfully submitted,



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