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**

BUC-EE'S OPPOSED MOTION FOR ENTRY OF POST TRIAL INJUNCTION AND REQUEST FOR EXPEDITED BRIEFING

I. INTRODUCTION

On May 22, the jury ruled in favor of Buc-ee's and against the Choke Canyon Defendants on every count: trademark infringement, trademark dilution, unfair competition, and unjust enrichment. Yet Defendants refuse to accept the verdict. Defendants agree that the entry of an injunction is proper. However, Defendants seek an injunction that conflicts with jury's verdict.

Buc-ee's has diligently tried to reach agreement with Choke Canyon on a joint proposed injunction. In doing so, it has offered to compromise on the form of the injunction. But the parties have not reached any agreement.

Buc-ee's proposed injunction is consistent with the trial evidence and the jury's findings that Defendants' use of the Choke Canyon Logos infringes and dilutes the Buc-ee's Logo and constitutes unfair competition and unjust enrichment. Buc-ee's proposed injunction (1) identifies the specific Choke Canyon Logos that the jury found to infringe and dilute Buc-ee's Logo, and (2) enjoins Defendants from use of those logos. Buc-ee's proposed injunction is attached as Exhibit A.

In contrast, Defendants proposed to Buc-ee's an injunction that is contrary to the trial evidence and the jury's verdict. Defendants' proposed injunction fails to enjoin several of the Choke Canyon Logos that the jury found infringing and diluting at trial. And they ask the Court to find certain logos non-infringing that are contrary to the jury-verdict. Defendants' proposed injunction also asks the Court to rule on issues that were not before the Court or jury at trial.

Defendants' only rationale for their inappropriate injunction is their misrepresentation of a single statement in closing argument from Buc-ee's attorney. They argue this statement in closing trumps the jury charge (which Defendants agreed to), the trial evidence, and the jury's ultimate findings that Defendants' use of the Choke Canyon Logos violate Buc-ee's rights. Put simply, the jury's findings support an injunction for all versions of the Choke Canyon Logo at issue in the

trial. Finally, Defendants wrongly seek to include terms in the injunction that would impose a stay of that very injunction pending Defendants' appeal, to the prejudice of Buc-ee's.

It has now been four weeks since the jury found in favor of Buc-ee's. With each passing day without an injunction, Buc-ee's is being prejudiced. Defendants know this, and have done all they can to delay entry of the injunction. Buc-ee's thus requests that the Court enter Buc-ee's Proposed Order (Exhibit A) and permanently enjoin Defendants from infringing, diluting, unfairly competing, and unjustly enriching themselves.[1]

II. BUC-EE'S PROPOSED INJUNCTION IS BASED ON THE TRIAL EVIDENCE AND THE JURY'S FINDINGS

Defendants cannot genuinely dispute which Choke Canyon Logos were at issue at trial. In the Jury Charge, the Court defined for the jury the Choke Canyon Logo as "the Choke Canyon logos at issue in this case." (ECF No. 341, p. 10). The Jury Charge further defined how the jury was to determine infringement, dilution, unfair competition, and unjust enrichment as it related to the Choke Canyon Logos. (*Id*. at Instructions 3.5 through 3.8, pp. 14-24). Thus, the Choke Canyon Logos at issue in this case include all variations of the logos used by the Choke Canyon Defendants. These logos are shown in at least the illustrative admitted trial exhibits attached in Exhibit B to this motion. Below are excerpts of some of the admitted trial exhibits showing examples of the various versions of the Choke Canyon Logo that were at issue in this case and must be enjoined:

[1] Buc-ee's also requests that the Court order expedited briefing on this motion.

Example Image(s) from Trial Evidence	
 **PTX 147**	 **PTX 146**
 **PTX 142**	 **PTX 152**
 **Excerpt of PTX101**	 **Excerpt of PTX101**
 **Excerpt of PTX 101**	

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<tr><th colspan="2">Example Image(s) from Trial Evidence</th></tr>
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PTX 135</td><td rowspan="2"> 
Excerpt of PTX101</td></tr>
<tr><td> 
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<tr><td> 
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Excerpt of PTX228</td></tr>
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PTX150</td></tr>
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Example Image(s) from Trial Evidence	
 **PTX 275**	 **PTX158**
 **PTX271**	 **Excerpt of PTX101**
 **Excerpt of D-19**	 **Excerpt of D-692**

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Excerpt of PTX102</td><td> 
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PTX 272</td></tr>
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In short, Buc-ee's proposed injunction—which enjoins all the Choke Canyon Logos at issue in this case (Exhibit A at Exhibit 1)—is supported by the evidence presented at trial, the jury-charge Choke Canyon agreed to, and the jury-verdict itself.

III. DEFENDANTS' INJUNCTION IS ILLOGICAL, CONTRARY TO THE TRIAL EVIDENCE, AND PREJUDICIAL TO BUC-EE'S

The injunction Defendants proposed to Buc-ee's is improper for three reasons:

1. It fails to enjoin the use of all the logos that the jury found infringe and dilute Buc-ee's Logo;
2. It improperly asks the Court to make a finding that various logos are non-infringing; and
3. It improperly seeks to stay the injunction by the terms of the proposed Order.

A. Defendants' Injunction Excludes Enjoining Variations of the Choke Canyon Logo the Jury Found Violate Buc-ee's Rights

Defendants' attempt to rewrite the jury's findings and exclude some of the Choke Canyon Logos the jury found to violate Buc-ee's rights fails. As explained above in Section II, the Choke Canyon Logos at issue in this case are clear. The Jury Charge defined the Choke Canyon Logos for the jury, (ECF No. 341 at Instruction 3.1(5), p. 10 and Instructions 3.5 through 3.8, pp. 14-24), and the trial record, including the exemplary admitted exhibits in Exhibit B, support the scope of the injunction as including all of the Defendants' usages of their logo. Defendants have no support for excluding variations of their logo that are in the trial record and were considered and found by the jury to infringe and dilute Buc-ee's Logo. The Court should reject Defendants' attempts to limit the scope and enter an injunction that restrains and enjoins Defendants' use of all variations of the logo at issue in the case.

B. Defendants' Improperly Ask The Court To Find Certain Logos Non-Infringing As Part of the Injunction

Defendants attempt to seek a finding of non-infringement in the injunction for certain logos is contrary to the trial record and the jury's verdict. In particular, the injunction Defendants provided to Buc-ee's included the following term: "For the purposes of this Order, the term Choke Canyon Logo does not include or cover any of the logos shown in Exhibit 2 to this order which Plaintiff admitted and represented to the jury in closing arguments were not an infringement or illegal, and with or without words or with or without circles, with black or brown lettering or without any grass or other back ground, and on any goods or services." In attempt to support this, Defendants incorrectly allege that Buc-ee's attorney, Mr. Richardson, admitted in closing arguments that certain logos are not infringing. But Defendants' reasoning is unavailing.

In Buc-ee's closing argument that Defendants rely on, Mr. Richardson merely argued that the Defendants had "initial drawings" in the development of their logo and "[t]hey could go back to [a] multitude of those logos and not have the confusion" caused by the Choke Canyon Logos at issue in this case. (Exhibit C, rough transcript of May 21, 2018 closing argument, p. 195, ll. 17-18). This statement does not support Defendants' proposed injunction for multiple reasons. First, this attorney argument was not an admission of non-infringement nor a disavowal of Buc-ee's rights. Second and more importantly, this attorney argument was not evidence in this case and cannot support the Court making new findings of non-infringement in the injunction that the jury never made. Indeed, Mr. Richardson almost immediately afterward explained that the jury should base their findings on the evidence, not statements of the attorneys. (*Id*. at p. 195, ll. 23-24). Nothing in Mr. Richardson's closing argument changes the Choke Canyon Logos the jury found infringing: the logos that Defendants' actually use and that were therefore at issue in the case.

But Defendants don't just ask the Court to go beyond the jury's verdict—incredibly, they want the Court to now expressly ***overturn*** aspects of that verdict. In seeking a finding of non-infringement for certain logos, Defendants are now trying to save one of their trademark registrations—and contradict the jury verdict—by having that logo version included in the section of their proposed injunction where they ask the Court to make post-trial findings of non-infringement. This argument fails at the outset because, as illustrated above, this exact black and white logo, among other versions, including other black and white logo versions, were at issue in the case, were considered by the jury, and were found to be infringing and diluting.

Defendants fought tooth and nail to enter their trademark registrations into evidence and cannot change history on a whim now that they lost. And even setting this aside, Defendants made their bed long ago, frequently arguing to this Court and the Trademark Trial and Appeal Board

("TTAB") that the jury findings in this case would control the validity of their registrations because a finding of infringement would be binding on the TTAB. (*See, e.g.,* ECF 189 at 2 ("the USPTO always defers to U.S District Court lawsuits"); ECF 89 Ex. A ("Resolution of the claims in the pending civil action has a bearing on the issues in the pending Opposition [and] will be dipositive and binding upon the USPTO.")).[2] Defendants' sudden remorse on this ground does not change the jury verdict that found the exact registration logos were infringing and diluting.

And if this were not enough, Defendants also previously argued that the registration logos are effectively the same as all the other versions of the logos that were unquestionably at issue in the case. (*See, e.g.*, ECF 189 at 3, 16 ("[T]here are no material difference in the few versions of the Alligator Logos … Defendants' are not using a different version of its Alligator Logo. It is the identical Alligator Logo as in the registration only the words are removed …"). As another example, before the Trademark Office, Shepherd Retail exclusively provided colorized versions of the logo to show use in commerce when obtaining a registration for a black and white logo. (D-19 at 4, 40-50). All this further shows that until they lost at trial, Defendants treated all their logos the same—which perfectly comports with how the Choke Canyon Logo was defined in the agreed jury charge. Defendants' attempt to now carve their black and white registration logo back out and have the Court find it non-infringing in the injunction is nothing more than a self-serving attempt to circumvent and overturn the jury verdict.

[2] The Court has acknowledged the same. (ECF 212 at 6 ("The jury's findings regarding likelihood of confusion will be determinative of the validity of Shepherd Retail's registrations") (denying in part Defendants' summary judgment motion)). *See also* ECF 166 at 11 (recommending denial in part of Defendants' summary judgment motion) ("[I]f Buc-ee's succeeds on its infringement claims in the trial court based on a likelihood of confusion, the TTAB will have no choice but to cancel the two Alligator Logo registrations. Defendants acknowledge as much [and have] argued that the district court's judgment will 'be dipositive and binding upon the PTO.'")

In short, there can be no genuine dispute that the jury found the registration logos to infringe. Defendants cannot retroactively attempt to save its registrations through the terms of their proposed injunction. The jury found the versions of the Choke Canyon Logo in the registrations to be infringing. As a result, the TTAB will cancel the Defendants' registrations. Defendants cannot prevent this with creative drafting of an injunction that is contrary to the trial evidence and the jury's verdict.

C. Defendants' Seeking To Stay The Injunction Within The Terms of The Injunction Is Improper

Defendants' proposed injunction seeks to stay the Order by the very terms of the injunction. In particular, Defendants seek to include that the injunction that all required actions happen "no later than 60 days after the entry of a final injunction or after a final mandate, whichever is later." Including such a stay in the terms of the injunction is not proper.

IV. CONCLUSION

Because nearly four weeks have passed since the jury's verdict finding in favor of Buc-ee's on all counts, and because Buc-ee's is being prejudiced each day that passes without an injunction in place, Buc-ee's respectfully requests that the Court enter the proposed Order attached as Exhibit A that is consistent with the trial record and the jury verdict. In addition, Buc-ee's requests the Court schedule a status conference for as soon as is convenient for the Court to set the case schedule for the damage phase of this case which was previously bifurcated.

Respectfully submitted

Dated: June 18, 2018

By: */s/ Janice V. Mitrius*

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ATTORNEYS FOR PLAINTIFF BUC-EE'S, LTD.

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, a true and correct copy of BUC-EE'S MOTION FOR ENTRY OF POST TRIAL INJUNCTION will be served upon counsel via electronic mail through the United States District Court's CM/ECF system.

/s/ Janice V. Mitrius

FOR BUC-EE'S, LTD.