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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AT AUSTIN

CLERK US DISTRICT COURT WESTERN DISTRICT OF TEXAS

BY [Signature] DEPUTY

Hey Cupcake!, Inc.
Plaintiff,

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§
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v.

Civil Action No. **A10CA 101LY**

The Cupcake Camper, LLC, and
Matthew Brereton, an Individual
Defendants.

JURY TRIAL DEMAND

PLAINTIFF'S ORIGINAL PETITION

A. Parties

1. Plaintiff Hey Cupcake!, Inc. ("Hey Cupcake") is a corporation organized under the laws of the State of Texas.

2. Defendant The Cupcake Camper, LLC ("Cupcake Camper") is a limited liability company organized under the laws of the State of Illinois. Defendant Matthew Brereton ("Brereton"), an individual is a citizen of the State of Illinois. Defendant Cupcake Camper may be served with process through its agent, Matthew Brereton at 311 South West Water Street, Suite 304, Peoria, Illinois 61602. Defendant Brereton may also be served with process at 311 South West Water Street, Suite 304, Peoria, Illinois 61602.

B. Jurisdiction

3. The Court has jurisdiction over the lawsuit under 28 U.S.C. §1338 because the suit arises under 15 U.S.C. § 1121 (Lanham Act) and 17 U.S.C. § 101 et seq. (Copyright Act). The Court has jurisdiction over the lawsuit under 28 U.S.C. § 1332 because the matter in controversy exceeds the sum or value of \$75,000 and is between citizens of different states.

C. Venue

4. Venue is proper in this district under 28 U.S.C. §1391(b)(2) because a substantial part of the events or omissions giving rise to this claim occurred in this District in that Defendants targeted or focused activities in this district.

D. Conditions Precedent

5. All conditions precedent have been performed or have occurred.

E. Facts

6. Plaintiff Hey Cupcake is in the business of selling cupcakes and supporting merchandise under the Hey Cupcake brand, and has done so since on or about March 2007.

7. Hey Cupcake operates several iconic retail locations in the area of Austin, Texas. The original Hey Cupcake location comprises a customized Airstream trailer bearing Plaintiff's distinctive trade dress and/or trademarks. See Exhibit A, attached.

8. Since opening, Hey Cupcake has prospered commercially and now also possesses a fixed retail location situated at 5530 Burnett Road in Austin. The Burnett Road location also bears the distinctive Hey Cupcake trade dress and/or trademarks, and pays homage to the Airstream trailer theme displayed at the remaining Hey Cupcake Airstream trailer locations. See Exhibit B, attached.

9. Each and every Hey Cupcake location prominently displays a three-dimensional cupcake on its roof for marketing purposes. Said cupcake is comprised of a base that resembles a large paper cupcake wrapper possessing about 20 triangular folds each separated equidistantly. The top portion of the cupcake possesses five ascending layers of pink frosting ridges culminating in a frosting point. The pink frosting cap further possesses approximately 25 sprinkle ornamentations, and the cupcake has a diameter of approximately four-feet. See Exhibits A and B.

10. Since opening for business in Spring 2007, Hey Cupcake has received substantial media coverage both nationally and internationally. Such media coverage includes, but is not limited to: CNN; British Airways *Highlife* magazine; AOL (America Online) "Next Big Chain" feature; *Airstream Life* magazine, etc. All of the above-described media coverage was publicly distributed at a date no later than on or about February 2009.

11. Hey Cupcake maintains and has maintained an internet website at heycupcake.com featuring detailed photographs of its trade dress, trademarks and goods. The heycupcake.com website has been available to all browsers of the internet since on or about April 2007. See Exhibit C, attached.

12. On or about March 2009, Defendant Cupcake Camper came into existence as a legal entity, an Illinois LLC. Defendant Matthew Brereton is identified as the sole manager of Cupcake Camper. Upon information and belief, Matthew Brereton is also the sole shareholder of Cupcake Camper LLC.

13. On or about March 2009 the Cupcake Camper began selling cupcakes in the State of Indiana from a customized Airstream trailer bearing trade dress and/or

trademarks that are almost identical to Hey Cupcake's. *See Exhibit D*, attached. The level, extent and details of copying employed by the Cupcake Camper are facially apparent. *See Exhibit E*, attached.

14. The Cupcake Camper's copying of Hey Cupcake has been extensive, systematic and purposeful. For example, Hey Cupcake created and distributed a shirt that says, "Real Men Love Cupcakes"; at a date thereafter Cupcake Camper created a "Real Men Eat Cupcakes" shirt. *See Exhibit E*.

15. Upon information and belief, on at least one occasion on a date prior to March 2009, the period when the Cupcake Camper came into existence, Defendant Brereton visited one or more of the several Hey Cupcake locations in Austin, Texas.

16. Upon information and belief, Defendant Brereton knowingly and intentionally made one or more business trips to Austin, Texas prior to March 2009 for purposes of capturing, and then recreating in another market, Hey Cupcake's valuable intellectual property and benefiting from Hey Cupcake's substantial goodwill.

17. Upon information and belief, while in Austin, Texas Defendant Brereton photographed the Hey Cupcake location(s) with the express intent to recreate or clone all aspects of Hey Cupcake's business including its trade dress and/or trademarks. In the alternative, Defendant Brereton extensively visited Hey Cupcake's website heycupcake.com and used the photographs posted thereon, or from numerous other publicly available sources, as a means to copy Hey Cupcake's trade dress and/or trademarks.

18. Since on or about March 2007, Hey Cupcake has vigorously protected its intellectual property rights. Such protection includes, but is not limited to, not less than three USPTO registered "Hey Cupcake!" marks in International Classes 025 (clothing: Reg. No. 348683), 030 (baked goods: Reg. No. 3642358) and 035 (retail bakery: Reg. No. 3410057). Hey Cupcake further has USPTO application(s) pending with respect to Hey Cupcake's trade dress including Hey Cupcake's large distinctive three-dimensional cupcake mark. Said mark has already attained registration status in the OHIM (covering the 27 European Union member states) on January 12, 2010, Trade Mark No. 008368052 in International Classes 025, 30 and 035.

19. Plaintiff Hey Cupcake is the owner of the trade dress and trademarks set forth herein and has continuously used these properties in connection with its trade or business since on or about March 2007.

20. Plaintiff Hey Cupcake's trade dress and marks are inherently distinctive.

21. Plaintiff Hey Cupcake has used and promoted its trade dress and or/ trademarks. As a result of Hey Cupcake's extensive use and promotion of same, Hey Cupcake's trade dress and/or trademarks have acquired a favorable reputation to consumers as an

identifier and symbol of the Plaintiff and its products, services, and goodwill. Accordingly, Hey Cupcake's trade dress and/or trademarks are strong and are entitled to broad protection.

22. Hey Cupcake continues to invest substantial sums in promoting its products and services offered under the Hey Cupcake trade dress and/or trademarks.

23. Despite the other trademarks or trade dress that Defendants could have chosen, they wrongfully appropriated a mark identical to Plaintiff Hey Cupcake's trade dress and/or trademarks, without permission or other authorization from the Plaintiff.

24. Defendants have continued to use the confusingly similar designation(s) after Plaintiff Hey Cupcake notified them of Plaintiff's prior rights to the trade dress and/or trademarks.

25. Actual consumer confusion between the Cupcake Camper and Plaintiff's trademarks and/or trade dress has already occurred and continues to occur.

F. Count 1 – DTPA Claim

26. Plaintiff Hey Cupcake is a consumer under the Deceptive Trade Practices Act ("DTPA"), Texas Statutes, Business and Commerce Code, Title 2, Chapter 17, Deceptive Trade Practices, because Plaintiff is a corporation.

27. Defendant Cupcake Camper is a business entity, an Illinois limited liability company that can be sued under the DTPA.

28. Defendant Brereton is an individual that can be sued under the DTPA.

29. Defendant(s) violated the DTPA when Defendant(s) engaged in false, misleading, or deceptive acts or practices in the conduct of trade or commerce. Such false, misleading, or deceptive acts or practices include, but are not limited to:

- (1) passing off goods or services as those of another;
- (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not.

30. Defendants are represented by counsel. Defendants' counsel has been expressly informed in detail of Plaintiff's claims and Defendants' counsel has received notice of

Plaintiff's intent to file this lawsuit. Plaintiff's and Defendants' counsel have been engaged in ongoing written correspondence regarding the matter.

31. Defendant(s) acted knowingly and/or intentionally, which entitles Plaintiff to recover treble damages under Texas Business & Commerce Code section 17.50(b)(1). Plaintiff is further entitled to recover reasonable and necessary attorney fees for prosecuting this suit under Texas Business & Commerce Code section 17.50(d).

G. Count 2 – Trademark Infringement Under the Lanham Act

32. Defendant's unauthorized use of Hey Cupcake's trade dress and/or trademarks falsely indicates to consumers that Defendant(s)' products originate from, are approved by, are sponsored by, are licensed by, or are affiliated with Plaintiff Hey Cupcake or are otherwise associated with Plaintiff Hey Cupcake.

33. Defendant's unauthorized use of Hey Cupcake's trade dress and/or trademarks in the manner described above is likely to cause confusion, to cause mistake, or to deceive customers and potential customers of the parties by suggesting some affiliation, connection, or association of defendant with Plaintiff Hey Cupcake.

34. Defendant's actions, as set forth above, constitute trademark infringement in violation of the Lanham Act, 15 U.S.C. §1114(1).

H. Count 3 – Common-Law Unfair Competition Under the Lanham Act

35. Defendants' actions, as set forth above, constitute unfair competition in violation of the Lanham Act, 15 U.S.C. §1125(a).

36. Defendant's actions, as set forth above, are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or in commercial advertising or promotion, misrepresent the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

I. Count 4 – Copyright Infringement

37. Plaintiff Hey Cupcake, through its managing shareholder, Wes Hurt, a U.S. citizen, created an original three-dimensional sculpture entitled "Cupcake Trailer". This is copyrightable subject matter under the laws of the United States.

38. Plaintiff complied in all respects with the Copyright Act, 17 U.S.C. §101 et seq., and with all other laws governing copyrights. Plaintiff received from the Register of Copyrights a certificate of registration, dated and identified as follows: Registration Number VA 1-681-242, effective date of registration, August 20, 2008. Since said date,

plaintiff has been the sole proprietor of all rights, title, and interest in this copyright. See Exhibit F, attached.

39. At a time after August 20, 2008 Defendant(s) infringed Plaintiff's copyright by publishing and placing in commerce the Cupcake Camper which was copied largely from Plaintiff's copyrighted Cupcake Trailer. See Exhibit F.

40. Plaintiff notified Defendants and Defendants' counsel that Defendants had infringed Plaintiff's copyright, but defendant has continued to infringe the copyright.

J. Count 5 – Or in the Alternative, Common Law Misappropriation

37. Plaintiff realleges and incorporates all facts set forth herein.

38. Plaintiff created information or a product through extensive time, labor skill and money; specifically, the Hey Cupcake enterprise.

39. The Defendant(s) have used that information or product in competition with the Plaintiff thereby gaining a special advantage because the Defendant(s) were burdened with little or none of the expense incurred by Plaintiff.

40. The Plaintiff has experience commercial damages thereby.

J. Damages

41. As a direct and proximate result of Defendants' conduct, plaintiff suffered the following damages:

- a. Actual damages.
- b. Enhanced damages for willful infringement.

42. Defendant(s) appreciated that its unauthorized use of a mark confusingly similar to Plaintiff's would result in a benefit to Defendants.

43. Defendant's unauthorized use of Hey Cupcake's trademarks and/or trade dress unjustly enriches Defendants at the expense of Plaintiff's reputation and goodwill.

K. Attorney Fees

44. This is an exceptional case, and plaintiff is entitled to an award of attorney fees under 15 U.S.C. §1117(a).

L. Prayer

45. For these reasons, Plaintiff asks for judgment against Defendants for the following:

- a. Defendant(s), its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with any of them, be permanently enjoined from the following:
 - (1) Using Hey Cupcake's trademarks and/or trade dress or any other confusingly similar designation, in connection with the promotion, advertising, or offering of cupcake sales.
 - (2) Competing unfairly with Plaintiff in any manner, including, without limitation, unlawfully adopting or infringing on Plaintiff's trademarks and/or trade dress or adopting or using any other marks or designations that are confusingly similar to Plaintiff's.
 - (3) Conspiring with, aiding, assisting, or abetting any other person or entity in engaging in or performing any of the activities referred to in subparagraphs (1) and (2) above.
- b. Defendants, its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with any of them, deliver up for destruction, or show proof of destruction of, any and all products, labels, signs, prints, packages, wrappers, receptacles, and advertisements, and any other materials in their possession or control that depict or reference Plaintiff's trademarks and/or trade dress or any other confusingly or substantially similar mark, and any materials or articles used for making or reproducing the same, as provided by 15 U.S.C. §1118.
- c. Plaintiff Hey Cupcake recover all damages it has sustained as a result of Defendant(s)' infringement and unfair competition.
- d. Plaintiff Hey Cupcake in addition be awarded treble damages under 15 U.S.C. §1117(b).
- e. An accounting be directed to determine Defendant(s)' profits resulting from its infringement and unfair competition and that the profits be paid over to Plaintiff, increased as the Court determines as appropriate to the circumstances of this case.
- f. The Court declare this case an exceptional case and award Plaintiff its reasonable attorney fees for prosecuting this action under 15 U.S.C. §1117(a).

- g. Defendants pay Plaintiff an amount in excess of \$75,000 for actual damages, plus the amount of Defendant(s)' profits attributable to the infringement, or in the alternative, Defendants pay Plaintiff statutory damages, as authorized by 17 U.S.C. §504(c).
- h. Plaintiff Hey Cupcake be awarded all other relief the Court deems just and equitable.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: This 10th day of February 2010.

Respectfully submitted,

BY:  s/ Robert Kleinman

Robert B. Kleinman

Texas Bar No. 24055786

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