IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

DIEGO'S BURRITOS, INC. OF SAN ANGELO, TEXAS	§	
Plaintiff,	§	
vs.	§	**CIVIL ACTION NO.:** 1-10CV-275-C
CHRISTIAN TAYLOR GOMEZ d/b/a DIEGO'S	§	
Defendant.	§	

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW PLAINTIFF DIEGO'S BURRITOS, INC. OF SAN ANGELO, TEXAS complaining of DEFENDANT CHRISTIAN TAYLOR GOMEZ D/B/A DIEGO'S and complains as follows:

I.

PARTIES

1. Plaintiff, Diego's Burritos, Inc. of San Angelo, Texas ("Plaintiff") is a corporation with its principal place of business in Tom Green County, Texas.

2. Defendant, Christian Taylor Gomez is an individual doing business as Diego's in Big Spring, Howard County, Texas ("Gomez") which is in the Northern District of Texas, Abilene Division.

II.

JURISDICTION

3. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1338, and 15 U.S.C. § 1121.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

5. Plaintiff's claims arise in this Judicial District.

6. This Court has pendant jurisdiction over all of the claims asserted herein, these claims being necessarily determinable together with the federal claims.

III.

FACTS

7. Plaintiff has made its DIEGO'S BURRITOS trademark known throughout West Texas by continuously using it since as least as early as 1985 to identify its restaurants and associated goods and services.

8. Plaintiff's consistent delivery of great restaurant services and quality foods, sustained over many years, has created a positive reputation for its DIEGO'S BURRITOS mark in West Texas and has made the mark into a valuable asset.

9. Numerous people drive between towns in West Texas, including the 100 mile radius between San Angelo and Big Spring.

10. Plaintiff's trademark, DIEGO'S BURRITOS, and its reputation is known within a West Texas trade area which is at least as large as the area within a 100 mile radius of San Angelo, Texas ("San Angelo Trade Area").

11. Upon these facts under Texas trademark law and federal trademark law, Plaintiff's investment of its time and effort to successfully create a good impression and favorable goodwill in the mark has vested in DIEGO'S BURRITOS an exclusive trademark property right in its DIEGO'S BURRITOS mark.

12. Plaintiff has become aware of Gomez's use of DIEGO'S to identify a restaurant and associated restaurant goods and services at her business location of 1703 South Gregg Street, Big Spring, Texas 79720-4523.

13. Gomez uses DIEGO'S as a trademark to identify the business and not merely as a personal name to identify a person.

14. In about 2009 – 2010, Gomez began using the mark DIEGO'S to identify a restaurant and associated restaurant goods and services at her business located at 1703 South Gregg Street, Big Spring, Texas 79720-4523.

15. Before Gomez opened her restaurant in Big Spring, she was aware of Plaintiff's restaurants and their trademark DIEGO'S BURRITOS.

16. Before Gomez opened her restaurant in Big Spring, people in Big Spring knew of Plaintiff's DIEGO'S BURRITOS in San Angelo, Texas.

17. Both restaurants are in the same line of commerce with both selling Mexican food and with both having sit down capability.

18. Gomez uses the mark of DIEGO'S at her restaurant and in advertising to identify her restaurant and associated goods and services.

19. Because of the similarity of the marks, Plaintiff's DIEGO'S BURRITOS and Gomez's DIEGO'S and the similarity of the Plaintiff's and Gomez's goods and services and Plaintiff's and Gomez's businesses being within the San Angelo Trade Area, Gomez's use of DIEGO'S as a trademark to identify her restaurant is likely to create confusion or a mental association with Plaintiff's DIEGO'S BURRITOS restaurant business.

20. Additionally, Gomez's use of DIEGO'S to indentify her restaurant is likely to dilute the distinctive quality of the Plaintiff's mark, DIEGO'S BURRITOS, in the minds of at least some of Plaintiff's current and potential customers.

21. Instances of actual confusion as between Plaintiff's DIEGO'S BURRITOS mark and Gomez's DIEGO'S mark have already occurred. The confusion will continue to occur unless Gomez's complained of acts are enjoined by this Court.

22. Plaintiff is legally entitled to be free of the risks and the loss of distinctiveness in good will caused by Gomez's use of a mark which dilutes and is confusingly similar to Plaintiff's mark, DIEGO'S BURRITOS.

23. Plaintiff is legally obligated to stop Gomez's use of DIEGO'S as a trademark or Plaintiff will lose its exclusive trademark right to its DIEGO'S BURRITOS mark.

24. On information and belief, Gomez's above described acts of copying Plaintiff's DIEGO'S BURRITOS trademark has been committed knowingly and willfully and will continue unless enjoined by this Court.

25. Gomez's acts have injured and are likely to injure the business reputation and to dilute the distinctive quality of Plaintiff's DIEGO'S BURRITOS trademark.

26. Gomez's acts have injured Plaintiff.

27. Unless Gomez's acts are enjoined Plaintiff will suffer great incalculable and irreparable harm.

IV.

CAUSES OF ACTION

A. Federal Trademark Infringement.

28. Gomez has, without the consent of Plaintiff, used in commerce a reproduction, counterfeit, copy, or colorable imitation of Plaintiff's registered mark in connection with the sale, offering for sale, distribution, or advertising of goods and services in connection with which such use is likely to cause confusion or to cause mistake or to deceive and has reproduced, counterfeited, copied or colorably imitated a registered mark and applied such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake or to deceive, all in violation of 15 U.S.C. § 1115(a).

B. Federal Unfair Competition.

29. Gomez has been and is continuing to use a false description of origin, false or misleading description of fact, or false or misleading representation of fact which is 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 and, in commercial advertising or promotion, has misrepresented and is misrepresenting the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, all in violation of 15 U.S.C. § 1125(a).

C. State Unfair Competition.

30. Gomez's acts complained of herein comprise unfair competition against Plaintiff under the laws of the State of Texas.

D. State Dilution.

31. Gomez's acts complained of herein dilute the distinctive quality of Plaintiff's trademark in violation of Texas Business & Commerce Code § 16.29.

E. State Trademark Infringement.

32. Gomez's acts complained of herein comprise trademark infringement against Plaintiff under the laws of the State of Texas.

F. Unjust Enrichment and Misappropriation

33. Gomez's acts complained of herein have unjustly enriched Gomez and have misappropriated Plaintiff's property.

G. Declaratory Judgment

34. Gomez is irrevocably committed to pursuing in the future the above-described courses of conduct to Plaintiff's great immediate and incalculable harm.

35. Plaintiff seeks declaratory judgment that Gomez's above-described courses of conduct are unlawful.

36. Plaintiff seeks permanent injunctive relief ordering the Gomez to cease the described unlawful courses of action.

V.

CONSOLIDATED ALLEGATIONS

37. Each of the facts alleged above is alleged with regard to each and every cause of action herein.

VI.

PRAYER FOR RELIEF

NOW, THEREFORE, Plaintiff prays for the following relief:

1. A permanent injunction enjoining Gomez, her agents, servants, employees, attorneys, or anyone acting in concert with Gomez from:

   a. Representing to anyone or committing any acts calculated to cause members of the public to believe that Gomez's goods or services have any authority, sponsorship, affiliation, or any connection with Plaintiff or Plaintiff's goods and services.

   b. Using as a trademark identifying a restaurant the mark DIEGO'S or any other words similar thereto that may cause, or may be likely to cause, confusion, mistake, or deception to the public, alone or in combination with any other word or words.

   c. Diluting the distinctive qualities of Plaintiff's DIEGO'S BURRITOS trademark by using DIEGO'S as a trademark to identify a restaurant.

   d. Continuing Gomez's unlawful acts as complained of herein.

2. Gomez be required to pay the Plaintiff such damages, together with prejudgment interest and post judgment interest as Plaintiff has sustained as a consequence of Gomez's wrongful acts.

3. Gomez be required to account for and return to Plaintiff all monies, gains, and profits and advantages obtained by Gomez due to Gomez's wrongful acts.

4. Gomez be required to pay to Plaintiff, Plaintiff's costs of this action, including, without limitation, Plaintiff's attorney's fees.

5. A judgment that Gomez's courses of conduct set forth hereinabove are unlawful.

VII.

JURY DEMAND

Plaintiff Diego's Burritos, Inc. of San Angelo, Texas respectfully requests a trial by jury.

Respectfully submitted,

JACKSON WALKER L.L.P.
301 W. Beauregard Avenue, Suite 200
San Angelo, Texas 76903
(325) 481-2566
(325) 481-2574 - Facsimile

By: Don W. Griffis
Don W. Griffis
State Bar No. 08476000
Mark H. Miller
State Bar No. 14099200

ATTORNEYS FOR PLAINTIFFS

5967907v.1

1-10CV-275-C

JS 44 (TXND Rev. 2/10)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
Diego's Burritos, Inc. of San Angelo, Texas

(b) County of Residence of First Listed Plaintiff Tom Green County, TX
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Mark H. Miller and Don W. Griffis, Jackson Walker LLP, 301 W. Beauregard, Suite 200, San Angelo, TX 76903

DEFENDANTS
Christian Taylor Gomez d/b/a Diego's

County of Residence of First Listed Defendant Howard County, TX
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)
R. Shane Seaton, Law Offices of R. Shane Seaton, 1301 South Gregg Street, P.O. Box 2211, Big Spring, TX 79721-2211

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☒ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:
28 USC Section 1338 and 15 USC Section 1121
Brief description of cause:
Trademark infringement

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23
DEMAND $ Permanent Injunction
CHECK YES only if demanded in complaint:
JURY DEMAND: ☑ Yes ☐ No

VIII. RELATED CASE(S) PENDING OR CLOSED: **(See instructions)**
JUDGE _____ DOCKET NUMBER _____

DATE 11/17/2010
SIGNATURE OF ATTORNEY OF RECORD Don W. Griffis

FOR OFFICE USE ONLY
RECEIPT # AB2104 AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

JACKSON WALKER L.L.P.
ATTORNEYS & COUNSELORS

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November 17, 2010

Ms. Marsha Elliott
Deputy-In Charge
United States District Court
Northern District of Texas
Abilene Division
2008 U.S. Post Office Building
341 Pine Street
Abilene, Texas 79604

1-10CV-275-C

Re: Civil Action No. _____; *Diego's Burritos, Inc. of San Angelo, Texas v. Christian Taylor Gomez d/b/a Diego's*; In the United States District Court for the Northern District of Texas, Abilene Division

Dear Ms. Elliott:

Enclosed for filing is an original and two copies of the *Original Complaint of Diego's Burritos, Inc. of San Angelo, Texas v. Christian Taylor Gomez d/b/a Diego's* (a request for a jury trial is included in the complaint). Our firm's check in the amount of $350.00 is enclosed for the applicable filing fee.

Please affix your file-stamp and civil action number to the extra copies of the complaint provided and return to me in the enclosed, self-addressed, postage paid envelope. Also enclosed is the required *Civil Cover Sheet* and *Certificate of Interested Persons* together with a *Summons* to be served on the Defendant.

Sincerely,

JACKSON WALKER LLP

Don W. Griffis

Don W. Griffis

DWG:dlr
Enclosures