

3. This unique combination has led to Zaxby's popularity and to Zaxby's being one of the fastest growing franchises in the United States, one that continues to expand across the United States.

4. Zaxby's is recognized not only by its name, but also by its federally registered logos:



5. Defendant, a direct competitor of Zaxby's, has begun using logos that are confusingly similar to Zaxby's trademarked logos. Defendant's logos are used in connection with the exact same goods and services as those offered by Zaxby's. Defendant's goods and services are marketed to the same consumers that Zaxby's markets to and in overlapping geographic regions, including Georgia.

6. Defendant's goods and services are not Plaintiff's good and services nor are they associated with Plaintiff in any way. Consumers would not, however, know that based on Defendant's use of its confusingly similar logos.

7. Defendant's unfair activities—confusing to consumers and harmful to Plaintiff—must be stopped.

THE PARTIES

8. Plaintiff is a Georgia limited liability company with a principal place of business at 1040 Founder's Blvd, Suite #100, Athens, GA 30606.

9. Defendant is a Kentucky limited liability company with its principal place of business at 2000 High Wickham Place, Suite 300, Louisville, KY 40245.

JURISDICTION

10. This is an action for trademark infringement and false designation of origin under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a); violation of Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370; trademark infringement and unfair competition under the common law of the State of Georgia. This Court has subject matter jurisdiction over this action under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338 as well as supplemental jurisdiction under 28 U.S.C. § 1367.

11. This Court has personal jurisdiction over Defendant under Georgia's long arm statute, O.C.G.A. § 9-10-91(1)-(3), and the Due Process Clause of the Constitution of the United States. First, Defendant transacts business within the State. It operates four Joella's restaurants in Georgia. (Ex. A.) Each of these Georgia restaurants utilizes the allegedly infringing logos in connection with its restaurant services offered to Georgia consumers and in connection with the goods and services sold in those restaurants to Georgia consumers. Second, personal

jurisdiction over Defendant is also proper because; through offering and sales of goods and services under the infringing logo, it has engaged in a tortious act—trademark infringement—within the State of Georgia. To the extent Defendant’s trademark infringement involved actions outside of Georgia, the Defendant also committed tortious acts outside of the State that caused injury to Plaintiff (which is headquartered in and offers and sells its goods and services in Georgia) within the State. Defendant purposefully directed its activities toward the State of Georgia through its operation of at least four restaurants in Georgia and its marketing, offering, and sales of goods and services in Georgia.

12. Venue is proper in the Northern District of Georgia pursuant to 28 U.S.C. § 1391(b)(1)-(2). Defendant operates restaurants that utilize the infringing logos in this District and is subject to personal jurisdiction in this District. In particular, Defendant operates restaurants located in Woodstock, Georgia (Cherokee County); Newnan, Georgia (Coweta County); Kennesaw, Georgia (Cobb County); and Atlanta, Georgia (Cobb County), and these restaurants offer and sell goods and services under the infringing logos. (Ex. A.) Defendant further promotes, offers, and sells its goods and services under the infringing logos to consumers in this District. Plaintiff has suffered injury in this District as a result of Defendant’s acts of trademark infringement, false designation of origin, deceptive trade practices, and unfair competition.

BACKGROUND

Plaintiff's Distinctive Trademarks

13. Plaintiff is a franchise system of independently owned and operated Zaxby's. Zaxby's focuses on meals featuring primarily chicken, including items such as chicken wings and tenders, chicken sandwiches, salads, and various dipping sauces, and, as described above, does so in a manner that offers consumers a fun environment in which to enjoy their meals.

14. Zaxby's are located primarily in the South with locations in Texas, Louisiana, Alabama, Mississippi, Georgia, Florida, South Carolina, North Carolina, Virginia, Tennessee, Missouri, Oklahoma, Kansas, Arkansas, Kentucky, Indiana, and Utah. (Ex. B.) Plaintiff continues to expand, regularly opening new restaurants.

15. Plaintiff offers and sells its goods and services under the ZAXBY'S trademark and the distinctive ZAXBY'S logos. Plaintiff is the owner of U.S.

Registration No. 4090478 for  in connection with restaurant services featuring meals primarily consisting of prepared chicken and U.S. Registration No.

 5055428 for  in connection with restaurant services. (Ex. C.)

16. U.S. Registration Nos. 4090478 and 5055428 are incontestable by operation of law and thus conclusive evidence of the validity of, Plaintiff's ownership of, and Plaintiff's exclusive right to use the claimed trademarks or any confusingly similar variation thereof in connection with restaurant services.

17. Plaintiff also has common law rights in the  and  trademarks in connection with restaurant services and apparel.

18. Plaintiff has used the  trademark in connection with restaurant services and apparel since at least as early as January 31, 2007, and the  trademark in connection with restaurant services and apparel since at least as early as January 2014. Hereinafter, Plaintiff's  and  trademarks in connection with restaurant services and apparel will be referred to as the ZAXBY'S Logos.

19. Plaintiff has advertised and promoted its ZAXBY'S Logos extensively, including on television, online, via social media, and at high-profile events such as branded college bowl games, and it has made substantial sales of its services and goods under the ZAXBY'S Logos.

20. The result of these activities is that the ZAXBY'S Logos have achieved widespread consumer recognition, making them strong marks entitled to broad protection against infringement.

21. The ZAXBY'S Logos are inherently distinctive. In addition and in light of the above described advertising and promotion, the ZAXBY'S Logos have gained such widespread consumer recognition and secondary meaning that they have also acquired distinctiveness. Indeed, consumers have come to know, rely upon, and recognize the ZAXBY'S Logos as identifying Plaintiff and its goods and services.

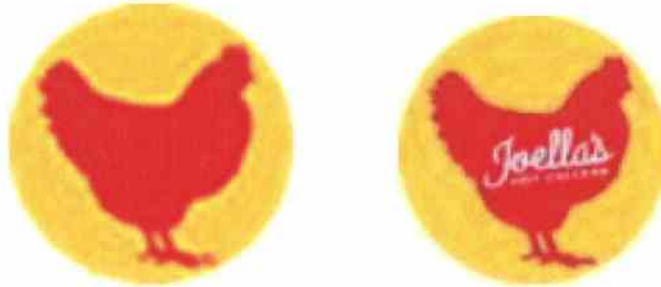
22. As a result of substantial promotional, advertising, publicity, and public relations activities, the ZAXBY'S Logos have acquired substantial goodwill and are extremely valuable commercial assets.

23. Plaintiff regularly enforces its trademark rights against unauthorized third party users by sending cease and desist letters. Through these efforts, Plaintiff has successfully maintained the commercial strength of its ZAXBY'S Logos in and throughout the United States.

Defendant's Confusingly Similar Trademarks

24. Despite Plaintiff's rights in its ZAXBY'S Logos, Defendant has and continues to infringe upon Plaintiff's exclusive trademark rights through its

advertising, promotion, use, and sale of its goods and services under the below logos:



Indeed, Defendant filed U.S. Application Serial No. 88354577 for the  trademark in connection with restaurant, bar, and catering services and shirts and t-shirts and U.S. Application Serial No. 88354824 for  in connection with restaurant, bar, and catering services. (Ex. D.) Hereinafter, Defendant's  trademark in connection with restaurant, bar, and catering services and shirts and t-shirts and  trademark in connection with restaurant, bar, and catering services will be referred to as the JOELLA'S Logos.

25. Defendant is a direct competitor of Plaintiff. Defendant operates restaurants under the name Joella's, and, like Plaintiff, it focuses primarily on meals featuring chicken. Further, like Plaintiff, Defendant offers items such as chicken wings and tenders, chicken sandwiches, salads, and various dipping sauces.

26. Defendant's Joella's restaurants are located in Georgia, Florida, Indiana, Kentucky, and Ohio. These restaurants utilize the JOELLA'S Logos in connection with their restaurant, bar, and catering services as well as, upon information and belief, their apparel.

27. Defendant began using the infringing JOELLA'S Logos after Plaintiff had already used the ZAXBY'S Logos in commerce in the United States.

28. Defendant's use of the infringing JOELLA'S Logos and promotion and sale of its goods and services under those trademarks is without Plaintiff's authorization or consent.

Defendant's JOELLA'S Logos are Likely to Cause Confusion with Plaintiff's ZAXBY'S Logos

29. Defendant is offering the same goods and services as Plaintiff, as well as related goods and services, under confusingly similar trademarks.

30. Defendant and Plaintiff both use their respective logos identified above in connection with the same goods and services—restaurant services and apparel. Moreover, Defendant uses its JOELLA'S Logos in connection with bar and catering services. Bar and catering services are related to restaurant services. Consumers would expect restaurants services and bar and catering services to be provided by the same source. Indeed, numerous nonparty businesses offer restaurant, bar, and catering services under the same trademarks. (*See, e.g., Ex. E.*)

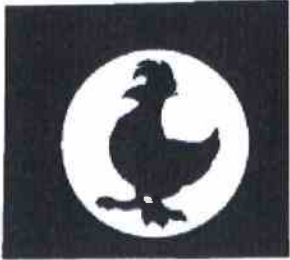
31. Plaintiff's goods and services offered under its ZAXBY'S Logos and Defendant's goods and services offered under its JOELLA'S Logos are marketed, promoted and sold in the same geographic areas. For example, both parties have restaurants in Georgia (including the Atlanta area), Kentucky (including the Louisville and Lexington area), Florida (including the Largo area), and Indiana (including the Indianapolis area). Moreover, both Plaintiff and Defendant continue to expand their restaurant locations.

32. Plaintiff's goods and services offered under its ZAXBY'S Logos and Defendant's goods and services offered under its JOELLA'S Logos are also marketed, promoted and sold to the same consumers through overlapping channels of trade. Both Plaintiff and Defendant market, promote, and sell their goods and services to the entire general public, including those consumers that seek and enjoy fast food. And both Plaintiff and Defendant promote their goods and services online and via social media, including via Facebook, Instagram, and Twitter.

33. The JOELLA'S Logos are confusingly similar to Plaintiff's ZAXBY'S Logos. Both the JOELLA'S and ZAXBY'S Logos are used in conjunction with restaurant services and apparel and are sold to the same consumer base via the same channels of trade. The JOELLA'S Logos, like the ZAXBY'S Logos, include silhouettes of full chickens (as opposed to, *e.g.*, simply a chicken head) placed against a coin background. Although Plaintiff's U.S. Registration

4090478 is not limited to any particular color, the color schemes of Plaintiff's and Defendant's Logos are similar, prominently utilizing red.

34. A comparison of the ZAXBY'S Logos and the infringing JOELLA'S Logos highlights the confusingly similar appearance of the marks:

ZAXBY'S Logos	JOELLA'S Logos
 	 

When viewed in the ordinary market setting, Plaintiff's ZAXBY'S Logos and Defendant's JOELLA'S Logos are highly similar and create the same overall commercial impression.

35. Defendant's use of the JOELLA'S Logos, in connection with the same type of goods and services targeted to the same consumers through the same

trade channels as Plaintiff, constitutes false designation of origin, trademark infringement, deceptive trade practices, and unfair competition, as such use is likely to confuse the relevant consuming public into believing the goods and services being offered under the JOELLA'S Logos are the same as, offered by, affiliated with, sponsored by, or otherwise associated with Plaintiff. This is particularly true given the market context in which consumers are viewing the logos and the fact that a purchaser's recollection of design marks is often of a general, rather than specific, nature, such that the marks may be confusingly similar despite any alleged differences between them.

36. Defendant is and has been aware of Plaintiff's prior rights in its ZAXBY'S Logos and the likelihood of confusion created by use of the JOELLA'S Logos, yet it continues to infringe. Indeed, since at least as early as October 7, 2019, Defendant has had actual notice of Plaintiff's rights in its ZAXBY'S Logos and the likelihood of confusion created by use of the JOELLA'S Logos.

37. On October 7, 2019, Plaintiff sent Defendant a cease and desist letter regarding Plaintiff's rights in its ZAXBY's Logos and Defendant's infringement of the same. (Ex. F at 1-10.) Plaintiff sent a follow up letter on October 31, 2019 (Ex. F at 11-23), but Defendant refused to cease use of the JOELLA'S Logos (Ex. F at 24-56) and continues to sell its goods and services under its infringing logos.

38. Defendant's use of the JOELLA'S Logos and sale of goods and services under the same has been and is willful and in reckless disregard of Plaintiff's rights.

39. On information and belief, Defendant is deriving and will continue to derive substantial revenue from its goods and services provided under the JOELLA'S Logos. As a result of Defendant's unauthorized use of logos that are confusingly similar to the ZAXBY'S Logos, Defendant is being unjustly enriched at Plaintiff's expense.

40. The likely confusion caused by Defendant's use of the infringing JOELLA'S Logos has and will continue to harm Plaintiff. Specifically, Plaintiff has developed a reputation for providing high-quality goods and services under the ZAXBY'S Logos. Due to the confusingly similar nature of the JOELLA'S Logos, consumers are likely to wrongly associate Plaintiff and its goods and services with the Defendant and its goods and services which may not be of the same quality as Plaintiff's goods and services offered under its ZAXBY'S Logos.

41. Moreover, through its unauthorized use of logos that are confusingly similar to the ZAXBY'S Logos, Defendant (a) has traded upon and threatens to further trade upon the significant and valuable goodwill in Plaintiff's ZAXBY'S Logos; (b) is likely to cause public confusion as to the source, sponsorship, or affiliation of Defendant's goods and services vis-à-vis Plaintiff and its brand; (c)

has damaged and threatens to further damage Plaintiff's significant and valuable goodwill in its ZAXBY'S Logos; (d) has injured and threatens to further injure Plaintiff's right to use its ZAXBY's Logos as the exclusive indicia of origin of Plaintiff's restaurant services and apparel in Georgia and throughout the United States; and (e) has lessened the capacity of Plaintiff's ZAXBY's Logos to indicate that its goods and services originate from Plaintiff.

42. Defendant's continued use of its JOELLA's Logos will continue to confuse consumers, erode the goodwill of Plaintiff and its ZAXBY's Logos, and harm the business and commercial reputation of Plaintiff.

43. Unless these infringing acts by Defendant are restrained by this Court, they will cause irreparable injury to Plaintiff and to the public, for which there is no adequate remedy at law. Defendant should be enjoined from continuing its infringing conduct.

COUNT I - FEDERAL FALSE DESIGNATION OF ORIGIN
(15 U.S.C. § 1125(a))

44. Plaintiff repeats and re-alleges paragraphs 1-43 above.

45. Defendant's promotion, use, and sale of its goods and services under its JOELLA's Logos, which are confusingly similar to Plaintiff's ZAXBY's Logos and which are used in connection with the promotion and sale of goods and services identical to and related to the goods and services of Plaintiff, is likely to cause confusion, to cause mistake, or to deceive as to the source, affiliation,

connection, or association of Defendant or its goods and services with Plaintiff or its goods and services, and/or as to the sponsorship or approval of Defendant's goods and services by Plaintiff in violation of 15 U.S.C. § 1125(a).

46. Defendant was aware of Plaintiff's rights in the ZAXBY's Logos and the likely confusion caused by its use of the JOELLA's Logos since at least as early as October 7, 2019, and Defendant chose to continue its activities. Defendant's promotion, use, and sale of goods and services under the JOELLA'S Logos from at least that date onward is willful and in reckless disregard of Plaintiff's rights.

47. In addition, upon receiving notice of this Complaint, Defendant's continued actions are willful and in reckless disregard of Plaintiff's rights.

48. Defendant's acts constitute a false designation of origin and unfair competition in violation of 15 U.S.C. § 1125(a).

49. Plaintiff has been damaged by the actions of Defendant in an amount which is as yet undetermined, and Plaintiff is entitled to actual damages, trebled damages, an accounting of Defendant's profits, and attorneys' fees and costs for Defendant's willful activities pursuant to 15 U.S.C. § 1117.

50. If the acts of Defendant are allowed to continue, Plaintiff will continue to suffer irreparable injury for which it has no adequate remedy at law. Plaintiff is entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

COUNT II – FEDERAL TRADEMARK INFRINGEMENT
(15 U.S.C. § 1114)

51. Plaintiff repeats and re-alleges paragraphs 1-50 above.

52. The acts of Defendant complained of herein are likely to cause confusion, mistake, or deception as to origin, sponsorship, approval, or affiliation as between Defendant and its goods and services under the JOELLA’S Logos on the one hand, and Plaintiff and its goods and services under the ZAXBY’S Logos, on the other.

53. Defendant’s conduct constitutes federal trademark infringement in violation of 15 U.S.C. § 1114(1).

54. As a direct and proximate result of Defendant’s infringement, Plaintiff has been, is now, and, unless Defendant is enjoined by the Court, will continue to be irreparably harmed and damaged for which Plaintiff has no adequate remedy at law.

55. By reason of Defendant’s bad faith and willful infringement, Plaintiff is entitled to recover actual damages, treble damages, an accounting for Defendant’s infringing profits, attorneys’ fees, and the costs of this litigation pursuant to 15 U.S.C. § 1117, as well as injunctive relief pursuant to 15 U.S.C. § 1116.

**COUNT III – GEORGIA UNIFORM DECEPTIVE TRADE PRACTICES
ACT (O.C.G.A. § 10-1-370 ET. SEQ.)**

56. Plaintiff repeats and re-alleges paragraphs 1-55 above.

57. Defendant's acts, as described above, constitute passing off; are likely to cause confusion or misunderstanding as to the source, sponsorship, or approval of Defendant's goods and services; are likely to cause confusion or misunderstanding as to affiliation, connection, or association with Plaintiff; and/or are likely to otherwise create a likelihood of confusion or misunderstanding in violation of O.C.G.A. § 10-1-372.

58. As fully described above, Defendant's act have been willful and were known to be deceptive.

59. Pursuant to O.C.G.A. § 10-1-373, Plaintiff is entitled to injunctive relief, costs, and attorneys' fees.

COUNT IV - COMMON LAW UNFAIR COMPETITION

60. Plaintiff repeats and re-alleges paragraphs 1-59 above.

61. Plaintiff has common law rights in the ZAXBY'S Logos in connection with restaurant services and apparel.

62. The acts of Defendant complained of herein are likely to cause confusion, mistake, or deception as to origin, sponsorship, approval, or affiliation as between Defendant and its goods and services under the JOELLA'S Logos on

the one hand, and Plaintiff and its goods and services under the ZAXBY'S Logos, on the other.

63. The above described acts, the resulting likely confusion, and Defendant's appropriation, promotion, and/or use of Plaintiff's ZAXBY'S Logos to identify and sell its goods and services constitutes unfair competition under the common law of the Georgia.

64. As a direct and proximate result of Defendant's unfair competition, Plaintiff has been, is now, and, unless Defendant is enjoined by the Court, will continue to be irreparably harmed and damaged for which Plaintiff has no adequate remedy at law.

65. Plaintiff is entitled to actual and enhanced damages as well as injunctive relief.

COUNT V - COMMON LAW TRADEMARK INFRINGEMENT

66. Plaintiff repeats and re-alleges paragraphs 1-65 above.

67. The acts of Defendant complained of herein are likely to cause confusion, mistake, or deception as to origin, sponsorship, approval, or affiliation as between Defendant and its goods and services under the JOELLA'S Logos on the one hand, and Plaintiff and its goods and services under the ZAXBY'S Logos, on the other.

68. Defendant's conduct constitutes common law trademark infringement.

69. As a direct and proximate result of Defendant's infringement, Plaintiff has been, is now, and, unless Defendant is enjoined by the Court, will continue to be irreparably harmed and damaged for which Plaintiff has no adequate remedy at law.

70. Plaintiff is entitled to actual and enhanced damages as well as injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter an Order:

A. Permanently enjoining and restraining the Defendant and Defendant's managers, members, directors, officers, agents, servants, employees, subsidiaries, affiliates, and all persons in active concert or participation with, through, or under Defendant:

1. from using in any way the JOELLA'S Logos or any trademark that is confusingly similar to the ZAXBY'S Logos in connection with restaurant services, bar, and catering services and apparel;

2. from committing any acts of unfair competition, from creating a false designation of origin, and from engaging in deceptive trade practices with respect to the ZAXBY'S Logos;

3. from using in any manner menus, packaging, labels, signs, literature, display cards, apparel, or other packaging, advertising, or

promotional materials, or other materials which include the infringing JOELLA'S Logos, and any other trademark confusingly similar to Plaintiff's ZAXBY'S Logos;

4. from making any statements on promotional materials or advertising for Defendant's goods and services which are false or misleading as to source or origin;

5. from committing any acts of trademark infringement, false designation of origin, deceptive trade practices, or unfair competition calculated to cause members of the trade or purchasing public to believe that Defendant's goods and services are the goods and services of Plaintiff or sponsored by or associated with, or related to, or connected with, or in some way endorsed or promoted by Plaintiff under the supervision or control of Plaintiff.

B. Requiring that the Defendant destroy any and all menus, packaging, containers, signs, packaging materials, printing plates, apparel, and advertising or promotional materials and any materials used in the preparation thereof, which in any way use or make reference to the infringing JOELLA'S Logos or any trademark confusingly similar to the ZAXBY'S Logos.

C. Requiring that Defendant, within thirty (30) days after service of notice in entry of judgment or issuance of an injunction pursuant thereto, file with

the Court and serve upon the Plaintiff's counsel a written report under oath setting forth details of the manner in which they have complied with the Court's order pursuant to paragraphs A - B above.

D. Awarding Plaintiff profits, actual damages, trebled or enhanced damages, attorneys' fees, and costs pursuant to 15 U.S.C. § 1117, O.C.G.A. § 10-1-373, and Georgia common law.

E. Pre- and post-judgment interest in the highest amount allowable by law.

F. Awarding Plaintiff such other relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff requests a jury on all issues so triable.

Dated: January 22, 2020

MERCHANT & GOULD P.C.



Jeffrey D. Blake
GA Bar No. 253018
191 Peachtree Street, NE
Suite 3800
Atlanta, Georgia 30303-1740
E-mail: jblake@merchantgould.com
Telephone: 404-954-5100
Facsimile: 612-332-9081

Paige Stradley (MN Attorney# 0393432)
(pro hac vice application forthcoming)
150 S. Fifth Street, Suite 2200
Minneapolis, Minnesota 55402
E-mail: pstradley@merchantgould.com
Telephone: (612) 332-5300

Attorneys for Plaintiff
Zaxby's Franchising LLC