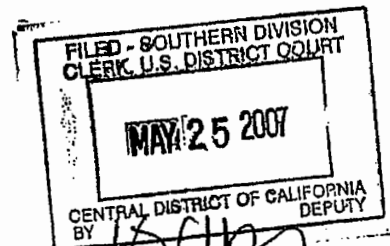


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12 HARDEE'S FOOD SYSTEMS, INC.



13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 SOUTHERN DIVISION

SACV07-603 AG(JTLx)

16 CKE RESTAURANTS, INC., a
17 Delaware Corporation,
18 CARL KARCHER ENTERPRISES,
19 INC., a California Corporation, and
20 HARDEE'S FOOD SYSTEMS, INC., a
21 North Carolina Corporation,

Case No.

**COMPLAINT FOR UNFAIR
COMPETITION AND FALSE
ADVERTISING UNDER THE
LANHAM ACT, 15 U.S.C. 1051, et
seq. AND CALIFORNIA BUSINESS
AND PROFESSIONS CODE §§
17200 and 17500**

Plaintiffs,

v.

22 JACK IN THE BOX, INC, a Delaware
23 Corporation,

Defendant.

24 Plaintiffs, CKE RESTAURANTS, INC., CARL KARCHER
25 ENTERPRISES, INC. and HARDEE'S FOOD SYSTEMS, INC. (hereinafter
26 referred to as "CKE" and/or "Plaintiffs"), for their complaint against JACK IN THE
27 BOX, INC. (hereinafter "Defendant"), state as follows:
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NATURE OF THE ACTION

1. In this action, Plaintiffs seek injunctive and monetary relief for acts of unfair competition and false advertising. This action arises under the Lanham Act, Title 15, United States Code §1051 *et seq.* and the laws of the State of California.

PARTIES

2. CKE is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Carpinteria, California. CKE is the parent company of the operating entities for Carl's Jr.® and Hardee's® Restaurants, namely, Carl Karcher Enterprises, Inc. and Hardee's Food Systems, Inc. Carl Karcher Enterprises, Inc. is a corporation organized and existing under the laws of the State of California, with its principal place of business in Carpinteria, California. Hardee's Food Systems, Inc. is a North Carolina corporation with its principal place of business in St. Louis, Missouri.

3. Upon information and belief, Defendant is a Delaware Corporation with its principal place of business in San Diego, California. Defendant is doing business within the State of California and within this district.

JURISDICTION AND VENUE

4. This is a civil action arising under the Lanham Act of the United States, 15 U.S.C. § 1051 *et seq.*, subject matter jurisdiction being conferred on this Court under 15 U.S.C. § 1121, 28 U.S.C. § 1331 and 28 U.S.C. § 1338(b).

5. This court has personal jurisdiction over Defendant.

6. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c).

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SECOND CAUSE OF ACTION

Unfair Competition Under California Law

26. Plaintiffs repeat and reallege the allegations of paragraphs 1-25 of the Complaint as though fully set forth herein.

27. Defendant has committed acts of unfair competition and false advertising, as defined by Business and Professions Code §§ 17200 and 17500, by its dissemination of false and misleading advertising claims.

28. The acts described above were and are likely to deceive and/or mislead the general public and are unfair, fraudulent and/or misleading within the meaning of Business and Professions Code §§ 17200 and 17500.

29. Defendant's conduct, as alleged above, was deliberate, willful, or intentional.

30. Defendant's acts, as complained of herein, have caused irreparable injury and damage to Plaintiffs and, unless restrained, will continue to do so. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand that this Court enter judgment against Defendant as follows:

A. An Order preliminarily and permanently enjoining Defendant, and its officers, agents, servants, employees, attorneys and those persons, firms or corporations acting in concert and participation with it who receive actual notice of this order by personal service or otherwise, from further dissemination of the Sirloin Commercials and/or any advertising which falsely claims or implies that Defendant's Sirloin Burger is superior to CKE's 100% Angus Beef Hamburgers and/or that the meat in CKE's 100% Angus Beef Hamburgers emanates from the rear-end and/or anus of cattle;

1 B. An Order finding Defendant liable for acts of unfair competition;

2
3 C. An Order ordering an accounting by Defendant to Plaintiffs of
4 Defendant's profits resulting from the dissemination of the Sirloin Commercials;

5
6 D. An Order awarding damages to Plaintiffs in an amount yet to be
7 determined, including damages for injury to Plaintiffs' business reputation and
8 goodwill and all other damages arising from the acts of Defendant complained of
9 herein;

10
11 E. An Order directing that Defendant deliver up for destruction all
12 advertisements and any other materials of any kind in its possession or custody or
13 under its control that contain false advertising claims and/or constitute unfair
14 competition;

15
16 F. An Order directing that Defendant file with the Court and serve
17 upon counsel for Plaintiffs within thirty (30) days after the entry of such Order or
18 Judgment, a report in writing and under oath setting forth in detail the manner and
19 form in which it has complied with the injunction;

20
21 G. An Order awarding to Plaintiffs prejudgment and post judgment
22 interest;

23
24 H. An Order awarding three times the amount of Plaintiffs'
25 damages or Defendant's profits, whichever is greater;

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1 I. An Order awarding Plaintiffs all of their costs, disbursements
2 and reasonable attorneys' fees due to the exceptional nature of this case, pursuant to
3 15 U.S.C. § 1117 and under the laws of California;

4
5 J. An Order for corrective advertising in a form, manner and
6 frequency that is reasonably acceptable to Plaintiffs; and

7
8 L. An Order awarding Plaintiffs other such relief, in law or in
9 equity, as this Court deems just and appropriate.

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12 Dated: May 25, 2007

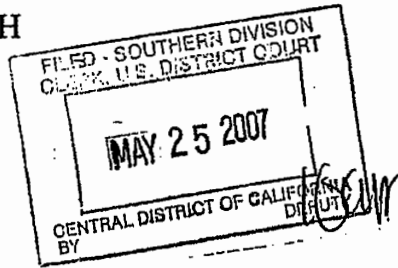
13 Jan P. Weir, Esq.
14 Jennifer A. Trusso, Esq.
15 STRADLING YOCCA CARLSON & RAUTH

16
17 By: 

18 Jan P. Weir
19 Jennifer A. Trusso
20 Attorneys for Plaintiffs
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22 CARL KARCHER ENTERPRISES, INC. and
23 HARDEE'S FOOD SYSTEMS, INC.
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8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SOUTHERN DIVISION

12
13 CKE RESTAURANTS, INC., a
14 Delaware Corporation,
CARL KARCHER ENTERPRISES,
15 INC., a California Corporation, and
HARDEE'S FOOD SYSTEMS, INC., a
16 North Carolina Corporation,

17 Plaintiffs,

18 v.

19 JACK IN THE BOX, INC, a Delaware
Corporation,

20 Defendant.

Case No. SACV07-603 AG(JTLx)

NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION

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DATE: June 18, 2007
TIME: 10 am
CTRM: 106

23 TO DEFENDANT AND ITS ATTORNEYS OF RECORD:

25 NOTICE IS HEREBY GIVEN that on June 18, 2007, at 10 a.m., or as
26 soon thereafter as counsel may be heard in Courtroom 106 of the above-entitled
27 Court, located 411 West Fourth Street, Santa Ana, CA 92701-4516, pursuant to Rule
28

1 65(a), Federal Rules of Civil Procedure, Plaintiffs CKE Restaurants, Inc., Carl
2 Karcher Enterprises, Inc, and Hardee's Food Systems, Inc. (hereinafter collectively
3 referred to as "Plaintiff's and/or "CKE") will and hereby does move the Court to
4 issue an Order granting CKE a Preliminary Injunction, enjoining Defendant Jack in
5 the Box, Inc. (hereinafter "Defendant"), its officers, agents, servants, employees,
6 and attorneys and those persons, firms or corporations acting in active concert and
7 participation with Defendant who receive actual notice of this Order by personal
8 service or otherwise, pending the final hearing and determination of this action,
9 from further dissemination of the Sirloin Commercials, as defined in Plaintiff's
10 Complaint, and/or any advertising which falsely claims or implies that Defendant's
11 Sirloin Burger is superior to CKE's 100% Angus Beef Hamburgers and/or that the
12 meat in CKE's 100% Angus Beef Hamburgers emanates from the rear-end and/or
13 anus of beef cattle.

14 The grounds for the motion are further set forth in the supporting
15 memorandum filed simultaneously with this motion, the affidavits filed therewith,
16 and as shown by the pleadings.

17 If Defendant is not enjoined from such acts of false advertising and unfair
18 competition, CKE will continue to suffer irreparable injury, loss and damage to
19 CKE reputation and good will. The issuance of the Preliminary Injunction will not
20 cause undue inconvenience or loss to Defendant.

21 WHEREFORE, CKE respectfully requests that this Court issue an Order
22 granting its Motion for Preliminary Injunction.

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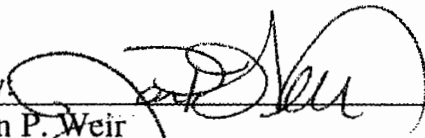
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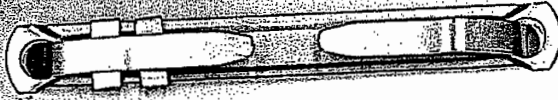
Dated: May 25, 2007

Jan P. Weir, Esq.
Jennifer A. Trusso, Esq.
STRADLING YOCCA CARLSON & RAUTH

By: 
Jan P. Weir
Jennifer A. Trusso
Attorneys for Plaintiffs
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CARL KARCHER ENTERPRISES, INC. and
HARDEE'S FOOD SYSTEMS, INC.



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5 Attorneys for Plaintiffs
6 CKE RESTAURANTS, INC.
CARL KARCHER ENTERPRISES, INC. and
7 HARDEE'S FOOD SYSTEMS, INC.

FILED - SOUTHERN DIVISION
CLEFK, U.S. DISTRICT COURT
MAY 25 2007
CENTRAL DISTRICT OF CALIFORNIA
BY [Signature]

8
9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SOUTHERN DIVISION

SACV07-603 AG(JTLx)

14 CKE RESTAURANTS, INC., a
Delaware Corporation,
15 CARL KARCHER ENTERPRISES,
INC., a California Corporation, and
16 HARDEE'S FOOD SYSTEMS, INC., a
North Carolina Corporation,
17 Plaintiffs,

Case No.

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION

18 v.

19 JACK IN THE BOX, INC, a Delaware
20 Corporation,
21 Defendant.

DATE: JUNE 18, 2007
TIME: 10:00 AM
CTRM: [Signature]

22
23
24 I. INTRODUCTION

25 Plaintiffs, CKE Restaurants, Inc., Carl Karcher Enterprises, Inc. and Hardee's
26 Food Systems, Inc. (hereinafter collectively referred to as "Plaintiffs" and/or
27 "CKE") hereby submit this Memorandum of Law in Support of their Motion for
28

1 “Defendant”) for acts of unfair competition and false advertising under federal and
2 state laws.

3 **II. BACKGROUND**

4 Plaintiffs operate some of the most popular U.S. brands in quick-service and
5 fast-casual dining, including the Carl’s Jr.® and Hardee’s® Restaurant brands. The
6 CKE system includes more than 3,100 locations in 43 states and in 13 countries.

7 For several years, CKE has been offering a hamburger sandwich under the
8 Carl’s Jr. and Hardee’s brands that is made with 100%, USDA approved, Angus
9 beef (hereinafter “CKE’s 100% Angus Beef Hamburger”). Carl’s Jr. offers the
10 100% Angus Beef Hamburger under THE SIX DOLLAR BURGER brand while
11 Hardee’s offers the 100% Angus Beef Hamburger under the THICKBURGER
12 brand. Both brands have enjoyed tremendous success, received critical acclaim, and
13 have been the subject of substantial advertising campaigns that have been the focus
14 of much media hype and publicity. CKE’s advertisements are often referenced on
15 various television programs and THE SIX DOLLAR BURGER and
16 THICKBURGER brands have quickly become household names to millions of loyal
17 customers. See Declaration of Brad R. Haley, attached hereto as Exhibit 1.

18 The beef used in CKE’s 100% Angus Beef Hamburgers comes from U.S. fed
19 steers and heifers which meet the United States Department of Agriculture
20 (“USDA”) requirements for A Maturity and qualify as USDA Select or Choice
21 grade. See Declaration of Ron Wennerberg, attached hereto as Exhibit 2. CKE’s
22 100% Angus Beef Hamburgers are processed from beef that is fresh rather than
23 frozen. See Declaration of Ron Wennerberg. The Angus beef used in CKE’s 100%
24 Angus Beef Hamburger has been produced pursuant to a USDA certified program
25 and process verified in accordance with the Agricultural Marketing Service
26 (“AMS”) grading service and complies fully with the USDA / AMS GLA, G23 and
27 G42 Schedules. See Declaration of Ron Wennerberg.

1 Defendant operates a network of over 2,000 quick serve restaurants in 17
2 states. On or about May 17, 2007, Defendant caused the dissemination, in interstate
3 commerce, of two television commercials which refer to a new hamburger product
4 offered by Defendant (hereinafter "Defendant's Sirloin Burger") which claims to be
5 made from 100% ground sirloin beef (hereinafter referred to as the "Sirloin Burger
6 Commercials"). See Transcripts of the Sirloin Burger Commercials attached hereto
7 as Exhibits 3 and 4 and Video of the Sirloin Burger Commercials submitted hereto
8 as Exhibits 5 and 6.

9 Upon information and belief the beef used in Defendant's Sirloin Burger is
10 made from frozen Sirloin Butt meat originating from grass fed cows and bulls from
11 Australia and Uruguay that is blended with a lesser amount of U.S. sirloin fat
12 trimmings for flavor. See Declaration of John Dunion, attached hereto as Exhibit 7.
13 Upon information and belief the imported meat used in Defendant's Sirloin Burger
14 has not been graded by the USDA. See Declaration of John Dunion.

15 In the Sirloin Burger Commercials, Defendant explicitly and implicitly claims
16 that the beef used in Defendant's Sirloin Burger is of a superior quality to that of the
17 CKE 100% Angus Hamburger. See Exhibits 3 through 6. As a result, the Sirloin
18 Burger Commercials create the misleading and confusing impression that sirloin
19 beef (specifically, a particular cut of meat found on all beef cattle) is superior to
20 Angus beef (generally, meat which comes from a particular breed of beef cattle).

21 Moreover, in a subtle attempt at humor, Defendant's Sirloin Burger
22 Commercials create the false impression that the meat used in CKE's 100% Angus
23 Beef Hamburgers comes from the rear-end and/or anus of beef cattle by creating
24 phonetic and aural confusion between the words "Angus" and "anus". See Exhibits
25 3 through 6.

26 As a result of the false and misleading claims made by Defendant in the
27 Sirloin Burger Commercials, Plaintiff has suffered and continues to suffer
28

1 irreparable injury to its business reputation and the goodwill associated with its
2 well-established brands in the minds of the consuming public. As such, the issuance
3 of a preliminary injunction is proper and necessary to avoid further irreparable
4 injury to Plaintiff.

5 **III. ANALYSIS**

6 In order to obtain a preliminary injunction, CKE must show “either, (1) a
7 likelihood of success on the merits and the possibility of irreparable injury, or (2)
8 the existence of serious questions going to the merits and the balance of hardship
9 tipping in their favor.” Gilder v. PGA Tour, Inc., 936 F.2d 417 (9th Cir. 1991)
10 (preliminary injunction granted by District Court and upheld by Ninth Circuit),
11 citing Diamontiney v. Borg, 918 F.2d 793 (9th Cir. 1990) (emphasis added.) *See*
12 *also*, Nike, Inc. v. McCarthy, 379 F.3d 576 (9th Cir. 2004) (preliminary injunction
13 granted by District Court and upheld by Ninth Circuit); Goto.com, Inc. v. The Walt
14 Disney Company, 202 F.3d 1199 (9th Cir. 2000)(preliminary injunction granted by
15 District Court and upheld by Ninth Circuit); Valu Engineering, Inc. v. Nolu Plastics,
16 Inc., 732 F. Supp. 1024 (N.D. Cal. 1990) (granting preliminary injunction when
17 defendant made false statements of fact about the materials used in plaintiff’s
18 product).

19 20 **1. The Likelihood Of Success On The Merits.**

21 In order to establish a claim of unfair competition and/or false advertising
22 under Section 43(a) of The Lanham Act, 15 U.S.C. § 1125(a), a claimant must
23 prove:

- 24 1) In advertisements, defendant made false statements of fact about its
25 own or another’s product;
- 26 2) Those advertisements actually deceived or have the tendency to deceive
27 a substantial segment of their audience;

- 1 3) Such deception is material, in that it is likely to influence the
2 purchasing decision;
- 3 4) Defendant caused its falsely advertised goods to enter interstate
4 commerce; and
- 5 5) Plaintiff has been or is likely to be injured as the result of the foregoing
6 either by direct diversion of sales from itself to defendant, or by
7 lessening of the goodwill which its products enjoy with the buying
8 public.

9 Cook, Perkiss, & Liehe, Inc. v. Northern California Collection Service, 911 F.2d
10 242, 244 (9th Cir. 1990).¹

11 It is not necessary to prove that an advertising claim is literally false in order
12 to succeed on a claim under Section 43(a). Indeed, “[e]ven if an advertisement is
13 not literally false, relief is available under Lanham Act § 43(a) if it can be shown
14 that the advertisement has misled, confused, or deceived the consuming public.”
15 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134 (9th Cir. 1997) *citing*
16 Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 228-229
17 (3d Cir. 1990); American Home Products Corp. v. Johnson & Johnson, 577 F.2d
18 160, 165-166 (2d Cir. 1978); U-Haul Int’l, Inc. v. Jartran, Inc., 522 F.Supp. 1238,
19 1248-1249 (D. Ariz. 1981) (“U-Haul I”), *aff’d*, 681 F.2d 1159 (9th Cir. 1982) (“U-
20 Haul II”).

21

22 ¹ The factors under the California State Law claims are quite similar to those for §
23 43(a). “Section 17500 of the California Business and Professions Code makes it
24 unlawful for a business to disseminate any statement ‘which is untrue or misleading,
25 and which is known, or which by the exercise of reasonable care should be known,
26 to be untrue or misleading... In turn, California Business and Professions Code §
27 17200, *et. seq.* prohibits ‘any unlawful, unfair or fraudulent business act or practice
28 and unfair, deceptive, untrue or misleading advertising and any act prohibited by §
17500.’” Arizona Cartridge Remanufacturers Ass’n, Inc. v. Lexmark Int’l Inc., 421
F.3d 981 (9th Cir. 2005), *citing* Day v. AT&T Corp., 63 Cal.App.4th 325 (1998).
Indeed, a successful claim for injunctive relief under § 17500, “requires a showing
that members of the public are likely to be deceived, but does not call for a showing
of ‘actual deception or confusion caused by misleading statements.’” Id.

1 i. **The Statements Are Misleading And Have A Tendency**
2 **To Deceive.**

3 The purpose of the Sirloin Burger Commercials is to confuse the consuming
4 public into the misconception that sirloin cuts of beef are of superior quality to
5 Angus beef and also to create the false impression that Angus beef originates from
6 the rear-end and/or anus of cattle. Both of these statements are undeniably false and
7 are simply intended to deceive, mislead and confuse consumers.

8 Sirloin is a particular cut of meat that is found on every variety of beef cattle.
9 Moreover, the term “Angus” refers to a particular breed of cattle, and has nothing to
10 do with any specific cut of beef.

11
12 While Defendant may find humorous the aural and phonetic similarities
13 between the words “Angus” and “anus”, the impression created by the Sirloin
14 Burger Commercials is that Angus beef emanates from the rear-end and/or anus of
15 beef cattle. Again, this claim is made for the sole purpose of misleading, confusing
16 and deceiving the public into the erroneous notion that all cuts of Angus beef are
17 derived from the anus of beef cattle.

18 ii. **The Deceptions Are Material And Are Likely To Harm**
19 **CKE.**

20 Clearly, such deception is material to the purchasing decisions of consumers.
21 Obviously, one would think twice before ever again ordering a hamburger that could
22 be processed, even in part, from the rear-end and/or anus of beef cattle. Moreover,
23 the false claims made by Defendant are intended to persuade consumers into
24 misbelieving that any cut of Angus beef is inferior to sirloin beef.² Certainly, such
25

26 ² If an advertiser intentionally misleads consumers in its advertising claims, a court
27 may presume that consumers were in fact deceived and the burden of showing
28 otherwise then shifts to the advertiser. William H. Morris Co. v. Group W, Inc., 66
F.3d 255, 258 (9th Cir. 1995).

1 deceptive and misleading statements are relevant to a consumer's purchasing
2 decision, under the circumstances.

3 **iii. Defendant's Advertisements, Products And Services**
4 **Have Entered Interstate Commerce.**

5 In light of the fact that Defendant's advertising reaches at least seventeen
6 states in which it operates restaurants, it is clear that Defendant sells and advertises
7 its goods and services in interstate commerce.

8 **2. The Possibility Of Irreparable Harm.**

9 It is well-settled that in cases involving false or misleading claims in
10 comparative advertising, irreparable harm is presumed. Valu Engineering, Inc., 732
11 F.Supp at 1025.

12 When an advertisement draws an explicit comparison
13 between the competitor's product and plaintiff's, then
14 such a causative link of irreparable injury is presumed
15 because "[a] misleading comparison to a specific
16 competing product necessarily diminishes that
17 product's value in the minds of the consumer."
18 *McNeilab, Inc. v. American Home Products Corp.*,
19 848 F.2d 34, 38 (2nd Cir. 1988). Outside the context
20 of comparative advertisements (that is, those that
21 make no direct reference to a competitor's product), a
22 presumption of irreparable injury to a party is
23 unwarranted because the injury caused by such a false
24 or misleading advertisement "accrues equally to all
25 competitors; none is more likely to suffer from the
26 offending broadcasts than any other. The Lanham Act,
27 however, only authorizes actions by one 'who believes
28 that he is or is likely to be damaged.'" *Id.*; see also 4
J. THOMAS MCCARTHY, MCCARTHY ON
TRADEMARKS AND UNFAIR COMPETITION §
27:37 at 27-75 to 27-76 (4th ed. 2006) ("Where the
challenged advertising makes a misleading
comparison to a competitor's product irreparable harm
is presumed. But if the false advertising is non-
comparative and makes no direct reference to a
competitor's product, irreparable harm is not
presumed").

26 Mutual Pharmaceutical Co. v. Ivax Pharmaceuticals, Inc., 459 F. Supp. 2d 925, 944-
27 45 (C.D. Cal. 2006).

1 While Defendant may attempt to hide behind the specious defense that its
2 commercials refer to various unnamed competitors, its is clear from the opening
3 scene of the second Sirloin Burger Commercial that Defendant is focusing its sights
4 on one particular competitor and product, namely CKE's 100% Angus Beef
5 Hamburger. See Exhibit 4 (*"A conference room filled with laughing employees.
6 Jack bangs his hand on the conference room table in a fit of laughter as a harried
7 employee concludes a report at the front of the room. She is standing in front of a
8 screen upon which the words "Competitor's Angus" appear with the JACK IN THE
9 BOX design mark."* Employee states, "[a]nd that completes my report on what our
10 competitor is doing with its Angus burger.") (emphasis added).

11 Indeed, CKE and Defendant are direct competitors in the quick service
12 restaurant market and frequently engage in competitive advertising to tout the
13 advantages of their products over those of competitors.³ Nevertheless, vigorous or
14 aggressive competition is quite distinct from false and misleading advertising, the
15 sole purpose of which is to divert customers away from CKE's restaurants and into
16 Defendant's restaurants. Certainly, such egregious behavior has and will continue
17 to result in irreparable harm to CKE.

18 **3. The Existence Of Serious Questions Going To The Merits.**

19 "For purposes of injunctive relief, 'serious questions' refers to questions
20 which cannot be resolved one way or the other at the hearing on the injunction and
21 as to which the court perceives a need to preserve the status quo lest one side
22 prevent resolution of the questions or execution of any judgment by altering the
23 status quo. Serious questions are substantial, difficult and doubtful, as to make them
24

25 ³ This fact further establishes standing under § 43(a) of The Lanham Act. "[F]or
26 standing...a plaintiff must show: (1) a commercial injury based upon a
27 misrepresentation about a product; and (2) that the injury is competitive, or harmful
28 to the plaintiff's ability to compete with defendant." Jack Russell Terrier Network of
Northern California v. American Kennel Club, Inc., 407 F.3d 1027 (9th Cir. 2005)
citing Barrus v. Sylvania, 55 F.3d 468, 470 (9th Cir. 1995).

1 a fair ground for litigation and thus for more deliberative investigation.” Gilder, 936
2 F.2d at 422 (internal quotation omitted), *citing* Republic of the Philippines v.
3 Marcos, 862 F.2d 1355 (9th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1035, 109
4 S.Ct. 1933, 104 L.Ed.2d 404 (1989). “Serious questions need not promise a
5 certainty of success, nor even present a probability of success, but must involve a
6 ‘fair chance of success on the merits.’” Id., *quoting* National Wildlife Federation v.
7 Coston, 773 F.2d 1513, 1517 (9th Cir. 1985).

8 Indeed, the aforementioned false and misleading advertisements disseminated
9 by Defendant raise serious legal questions that, under the factors set forth by the
10 Ninth Circuit, indicate a fair chance of success on the merits with regard to CKE’s
11 false advertising and unfair competition claims under federal and state laws.

12 **4. The Balance Of Hardship Tips In CKE’s Favor.**

13 “If the balance of harm tips decidedly toward the plaintiff, then the plaintiff
14 need not show as robust a likelihood of success on the merits as when the balance
15 tips less decidedly.” Gilder, 936 F.2d at 422, *citing* Benda v. Grand Lodge of Int’l
16 Ass’n of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), *cert.*
17 *dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979).

18 If Defendant is allowed to continue dissemination of the Sirloin Burger
19 Commercials, CKE will continue to be irreparably harmed by the false and
20 misleading claims of Defendant intended to divert customers away from CKE.
21

22 **IV. CONCLUSION**

23 Under either test adopted by the Ninth Circuit, it is clear from the record that
24 CKE is entitled to a preliminary injunction in light of the scurrilous and deceptive
25 behavior of Defendant and the irreparable harm caused to CKE. In the end, CKE is
26 not upset with being the butt of Defendant’s joke, it simply asks this Court to
27 prohibit Defendant from disseminating any false or misleading advertisements
28

1 which are likely to damage the reputation and goodwill associated with CKE's
2 brands.

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4 Dated: May 25, 2007

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