

NO. _____

THE STATE OF TEXAS, § IN THE DISTRICT COURT
Plaintiff §

v. §

BAILEY BROTHERS CIRCUS, INC. § HIDALGO COUNTY, TEXAS
D/B/A BAILEY BROS. CIRCUS, §

JUDY KAYE D/B/A BAILEY BROS. §
CIRCUS, §

JUAN DAVENPORT D/B/A BAILEY §
BROS. CIRCUS, AND §

SOFIA DAVENPORT D/B/A BAILEY §
BROS. CIRCUS §

Defendants § _____ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND APPLICATION
FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION**

COMES NOW, the STATE OF TEXAS, hereinafter referred to as Plaintiff, acting by and through Attorney General of Texas GREG ABBOTT, complaining of BAILEY BROTHERS CIRCUS, INC., JUDY KAYE, JUAN DAVENPORT, AND SOFIA DAVENPORT doing business as BARNES AND BAILEY BROS. CIRCUS, hereinafter referred to as Defendants, and for cause of action would respectfully show:

DISCOVERY CONTROL PLAN

1. The discovery in this case is intended to be conducted under Level 2 pursuant to TEX. R. Civ. P. 190.2(b)(3).

NATURE OF THIS SUIT

2. The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit in the name of the State of Texas through his Consumer Protection Division against Defendants for

violations of the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41, *et seq.* (Vernon 2002) (hereinafter “DTPA”). The DTPA grants authority to the Attorney General to seek injunctive relief and civil penalties for violations of its provisions. TEX. BUS. & COM CODE ANN. § 17.47.

DEFENDANT

3. Defendant BAILEY BROTHERS CIRCUS, INC. D/B/A BAILEY BROS. CIRCUS, is a business, and may be served with process by serving Judy Kaye, its purported agent for service of process, at her residence, 704 S. Weaver St., Gainesville, Texas 76240.

4. Defendant JUDY KAYE, an individual, may be served with process at her residence, 704 S. Weaver St., Gainesville, Texas 76240.

5. Defendant JUAN DAVENPORT, an individual, may be served with process at his place of business, 4195 South Miami Trail #168, Venice, Florida 34293.

6. Defendant SOFIA DAVENPORT, an individual, may be served with process at her place of business, 4195 South Miami Trail #168, Venice, Florida 34293.

JURISDICTION

7. This Court has jurisdiction over this action pursuant to § 17.47(b) of the DTPA.

VENUE

8. Venue of this suit lies in Hidalgo County, Texas, for the following reasons:

a. Under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1) (Vernon Supp. 2004), venue is proper because all or a substantial part of the events or omissions giving rise to the claim occurred in the county of suit; and

b. Under DTPA § 17.47(b), venue is proper because Defendants have done business

in the county of suit.

PUBLIC INTEREST

9. Plaintiff STATE OF TEXAS has reason to believe that Defendants are engaging in, have engaged in, or are about to engage in, the unlawful acts or practices set forth below, that Defendants have, by means of these unlawful acts and practices, caused damage to and acquired money or property from persons, and that Defendants adversely affects the lawful conduct of trade and commerce, thereby directly or indirectly affecting the people of this State. Therefore, the Consumer Protection Division of the Office of the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

10. Defendants have, at all times described below, engaged in conduct which constitutes “trade” and “commerce,” as those terms are defined by § 17.45(6) of the DTPA.

ACTS OF AGENTS

11. Whenever in this petition it is alleged that Defendants did any act, it is meant that Defendants performed or participated in the act, or that the officers, agents or employees of Defendants performed or participated in the act on behalf of and under the authority of Defendants.

NOTICE BEFORE SUIT NOT GIVEN

12. There is good cause to believe that immediate and irreparable injury, loss, or damage would occur as a result of a delay in obtaining a temporary restraining order to enjoin Defendants from continued violation of the DTPA. If Defendants are not immediately restrained, they will continue to engage in unlawful deceptive trade practices and thereby cause immediate and irreparable injury, loss, or damage to persons who purchase admission tickets to Defendants’ business. Defendants

frequently change their location and business name, which will make it difficult to address wrongs perpetrated against consumers. As such, the Consumer Protection Division filed this lawsuit without notice to Defendants, as authorized by § 17.47(a) of the DTPA.

NATURE OF DEFENDANTS' OPERATIONS

13. Defendants collectively operate a circus show that travels and offers shows in different states and throughout the state of Texas.

FACTUAL ALLEGATIONS

14. Defendants collectively operate a circus show under the names of “Kings Royal Circus,” “The Great Circus of China,” “Bailey/ Wallace and Bros. Circus, Inc.,” “Barnes and Bailey Bros. Circus, Inc.,” “Bailey Bros. Circus,” “Barnes & Bailey Circus,” and “Barnes and Bailey Bros. Circus.”

15. Defendants have distributed tickets calling themselves “Bailey Bros. Circus” and “Barnes & Bailey Circus” for a show that will be held at the Zone Action Park, 2500 West Expressway 83, McAllen, Texas, on January 27, 28, and 29, 2006. Defendants advertise that there will be two shows held on January 27, and three shows held on both January 28 and 29.

16. While Defendants have distributed a large number of tickets claiming to admit families and children for free, Defendants charge a surcharge ranging from \$5.00 to \$20.00 per adult.

17. Defendants have distributed a “Free Family Ticket” that will admit “2 Adults/2 Kids under 14.” A copy of this ticket, marked State’s Exhibit 1, is attached to this petition and is hereby incorporated by reference. The ticket states in large letters “GRATIS!” (“FREE!” in Spanish). However, there is a disclaimer in small print at the bottom of the ticket, in English, that states “\$5.00 Service fee per Adult.”

18. Defendants have distributed another “Free” Family Ticket which states “YOUR ENTIRE FAMILY TICKET TOTALLY FREE” “Admit 2 Adults/2 Kids under 12.” A copy of this ticket, marked State’s Exhibit 2, is attached to this petition and is hereby incorporated. At the bottom of the ticket in small print, the ticket reads “\$7.00 service charge per adult.”

19. The names Defendants use in their advertisements, “Bailey Bros. Circus” and “Barnes & Bailey Circus,” is very similar to the well-known “Ringling Brothers and Barnum and Bailey Circus.”

20. Defendants submitted to the City of McAllen an “Application for Carnival, Circus, or Mass Gathering.” As a part of this application, Defendants submitted a certificate of insurance. A copy of this application, marked State’s Exhibit 3, is attached to this petition and is hereby incorporated by reference. On this certificate of insurance, Defendants identify their business as Bailey Brothers Circus, Inc. There is no such corporation incorporated under the laws of the State of Texas or the State of Florida (the home state of the business entity).

DTPA VIOLATIONS

21. Defendants, as alleged above, have in the course of trade and commerce engaged in false, misleading and deceptive acts and practices declared unlawful in §§ 17.46(a) and (b) of the DTPA as follows:

a. By advertising in Spanish that a family will gain entrance “free” while including a disclaimer in small print in English that there is a \$5.00 “Service Fee per Adult,” Defendants have advertised goods or services without the intent to sell them as advertised in violation of DTPA §17.46(b)(9);

b. By advertising that a Family Ticket is “free” or “totally free” while charging a \$5.00

or \$7.00 surcharge per adult, Defendants have advertised goods or services without the intent to sell them as advertised in violation of DTPA §17.46(b)(9);

c. By promoting their show as the “Barnes and Bailey Circus,” a name deceptively similar to the well-known “Barnum and Bailey Circus,” Defendants have caused confusion or misunderstanding as to affiliation, connection, or association with, or certification by another in violation of DTPA §17.46(b)(3);

d. By using the name Bailey Bros. Circus, Inc., while not being incorporated in any state, Defendants have used an abbreviation of the word “incorporated” in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction in violation of DTPA §17.46(b)(25);

INJURY TO CONSUMERS

22. Defendants has, by means of these unlawful acts and practices, obtained money or other property from persons to whom such money or property should be restored or, in the alternative, has caused damages to identifiable persons who are entitled to an award of damages.

23. Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated the law as alleged in this petition. Unless restrained by this Honorable Court, Defendants will continue to violate the laws of the STATE OF TEXAS and cause damage to the general public.

PRAYER

24. WHEREFORE, Plaintiff prays that Defendants be cited according to law to appear and answer herein; that before notice and hearing a TEMPORARY RESTRAINING ORDER be issued; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing

a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, their officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants from engaging, directly or indirectly, in the following acts or practices:

- a. Operating or conducting a circus at 2500 W. Expressway 83, McAllen, Hidalgo County, Texas or any other location in the State of Texas;
- b. Soliciting or accepting money in exchange for the attendance of or admission to an entertainment event in the State of Texas;
- c. Advertising, offering for sale, selling, or providing an entertainment event under the name of “Barnes and Bailey Circus”;
- d. Representing or holding itself out, by any means, as a corporation or by any name or designation incorporating the word “corporation,” “incorporation,” or an abbreviation thereof;
- e. Representing, directly or by implication, that this Court or the Office of the Attorney General has approved any good or service sold or offered for sale by Defendants, or has approved any business practice of Defendants.

25. Plaintiff, STATE OF TEXAS, further prays that this Court grant leave to conduct telephone, oral, written, and other depositions of witnesses prior to any scheduled Temporary Injunction Hearing and prior to Defendants’ answer date, with reasonable shortened notice to Defendants and its attorney, if known.

26. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court will:

- a. Adjudge against Defendants civil penalties in favor of Plaintiff STATE OF TEXAS in the amount of \$20,000 per violation of the DTPA;

- b. Order Defendants to restore all money or property acquired by means of any unlawful act or practice, or in the alternative, award judgment for damages to compensate identifiable persons for such losses;
- c. Adjudge against Defendants reasonable attorney's fees and court costs pursuant to TEX. GOV'T. CODE ANN. § 402.006 (Vernon 1990);
- d. Adjudge against Defendants prejudgment and postjudgment interest at the highest lawful rate; and
- e. Adjudge that all fines, penalties or forfeitures payable to and for the benefit of the State are not dischargeable under bankruptcy pursuant to 11 U.S.C. § 523(a)(7).

Further, Plaintiff STATE OF TEXAS respectfully prays for all other relief to which Plaintiff STATE OF TEXAS may be justly entitled.

Respectfully submitted,

GREG ABBOTT
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VERIFICATION

STATE OF TEXAS §
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COUNTY OF HIDALGO §

BEFORE ME, the undersigned authority, on this day personally appeared affiant Rozanne N. Lopez, who proved to me through current Texas Driver License to be the person whose name is subscribed to this Verification and who acknowledged to me that she executed the same, and after she was duly sworn, upon her oath, she deposed and said that the affiant is an investigator for the Office of Attorney General, and is authorized to make this affidavit, that the affiant has carefully read the factual allegations in the foregoing PLAINTIFF’S ORIGINAL PETITION, and has reason to believe that each and all said factual allegations are true and correct; and affiant sign this Verification, pursuant to Rule 682 of the TEXAS RULES OF CIVIL PROCEDURE.

ROZANNE LOPEZ
INVESTIGATOR

SUBSCRIBED AND SWORN TO before me on the _____ day of January, 2006.

NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

