

DUPLICATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

JUN 10 1999

LUTHER E. THOMAS, Clerk
By: *O.T.E.* Deputy Clerk

ALAN WEISS,

Plaintiff,

-against-

NATIONAL FOOTBALL LEAGUE
PROPERTIES, INC. and LOGO
ATHLETICS, INC.,

Defendants.

Civil Action File

No. 1 99-CV-0928-TWT

DEFENDANTS' COUNTERCLAIMS AND ANSWER

Defendants National Football League Properties, Inc. ("NFL Properties") and Logo Athletic, Inc. ("Logo"), by their counsel, Kilpatrick Stockton LLP and Debevoise & Plimpton, for their counterclaims against plaintiff Alan Weiss ("Weiss") and their answer to the Complaint herein, allege as follows:

DEFENDANTS' COUNTERCLAIMS

Preliminary Statement

1. Sports fans have long been familiar with the famous trademarks that identify various NFL football teams. These marks include, inter alia, team names and logos, which not only possess strong secondary meaning among consumers but also are federally registered with the United States Patent and

Trademark Office.¹ Moreover, in addition to these team identifiers, football fans also have come to identify other words, slogans and phrases with various NFL teams. Recent examples include "Pewter Power," a reference to the Tampa Bay Buccaneers, and "Mile High Salute," a reference to the Denver Broncos. By virtue of the strong public association of such words, slogans and phrases with various NFL teams, those teams also have acquired trademark rights in these team identifiers.

2. During the 1998-1999 NFL season, football fans from across the country identified yet another slogan, the "Dirty Bird", with the NFL and one of its teams the Atlanta Falcons ("Falcons"). This counterclaim is based on the unauthorized distribution by Weiss of T-shirts, hats and other products bearing the Atlanta Falcons' DIRTY BIRD® trademark in a deliberate effort to capitalize on the goodwill of the Falcons and the NFL.

3. As has been widely reported in the media, "Dirty Bird" began to be used as the name of a novel, celebratory dance performed by certain members of the Falcons football club. Upon scoring a touchdown, certain Falcons players did the "Dirty

¹Team names, logos, symbols, slogans, and other indicia identifying the National Football League and its Member Clubs -- including "Falcons," "NFL," and "Super Bowl" -- are registered trademarks of the National Football League and the respective Member Clubs. For convenience, however, the registered trademark symbol "®" has been omitted from the Answer and Counterclaims in connection with those trademarks, except with respect to the DIRTY BIRD® mark.

Bird" dance, hopping back and forth and flapping their arms as if to take flight. By virtue of their stunning success during the recent 1998-1999 season, Falcons players have been doing the "Dirty Bird" dance with great frequency, making the dance -- and its name -- popular and famous with countless football fans in Georgia and across the country. As a result, the public now associates the DIRTY BIRD® mark with the Falcons team itself.

4. On January 31, 1999, the Falcons team made its first-ever appearance in the Super Bowl game, battling the defending champion Denver Broncos for the NFL championship. To satisfy the public demand for T-shirts and other souvenirs bearing the DIRTY BIRD® and other NFL trademarks occasioned by the Falcons' success, the Falcons, through its exclusive licensee, NFL Properties, and other sublicensees, manufactured and distributed a variety of T-shirts and other souvenirs bearing the DIRTY BIRD® and other NFL trademarks.

5. Weiss wrongfully has exploited the Falcons' DIRTY BIRD® mark by adopting it for use on competing products, including t-shirts, hats and other items, without the permission, authorization or approval of the Falcons or NFL Properties, and with the intention that such products be perceived as being authorized or sponsored by the Falcons. This conduct is likely to cause and has caused sports fans and others to mistakenly believe that Weiss' products are endorsed by and affiliated with the Falcons and/or the NFL.

6. Unless enjoined by this Court, Weiss' distribution of unauthorized DIRTY BIRD® products will cause the NFL, the Falcons and NFL Properties irreparable harm.

Jurisdiction and Venue

7. This Court has original jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338, and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). Personal jurisdiction is proper by virtue of Weiss residing and transacting and doing business in this district.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to these claims arose in this district.

The Parties

9. NFL Properties is a corporation incorporated under the laws of the State of California, with its principal place of business at 280 Park Avenue, New York, New York. NFL Properties is the exclusive representative of the National Football League ("NFL") and its thirty-one (31) Member Clubs, each of which owns and operates a professional football team, for the commercial licensing and protection of the marks of the NFL and its Member Clubs.

10. Logo Athletic, Inc. (inaccurately named in the Complaint as "Logo Athletics, Inc.") is a corporation incorporated under the laws of the State of Delaware, with its

principal place of business at 8677 Logo Athletic Court,
Indianapolis, Indiana.

11. Upon information and belief, Alan Weiss resides
at 1403 Sylvan Circle, Atlanta, Georgia.

The NFL Trademarks

12. The NFL has long presented professional football
to fans throughout the United States. The NFL is the world's
foremost provider of (i) high quality sports entertainment in
the form of professional football games and (ii) football-themed
consumer goods, services and merchandise.

13. The NFL brand of professional football, and the
symbols associated with it, are enormously popular with both
sports fans and the general public. NFL football is, and for
many years has been, the most popular spectator sport in the
United States.

14. Based on the NFL's advertising, promotional and
marketing efforts, which have resulted in widespread and
favorable public acceptance and recognition for its brand of
professional football, the names, logos, symbols and other
indicia, such as uniform designs and slogans, identifying the
NFL and its Member Clubs (collectively, the "NFL Trademarks")
have become famous and highly valuable marks, possessing strong
secondary meaning among consumers.

15. Among the NFL's Member Clubs is the Atlanta Falcons, which this past season, for the first time in its 33-year history, played in the NFL's championship game.

16. The NFL Trademarks are famous because of their widespread use, the great popularity of NFL football and the extensive media coverage of the NFL and its Member Clubs. The NFL Trademarks embody substantial goodwill and have achieved fame and secondary meaning as identifiers of the NFL and its Member Clubs. The marks associated with the Atlanta Falcons have been and remain extremely popular.

17. The NFL and NFL Properties have established an extremely successful business in the commercial licensing -- across a wide range of product and service lines -- of the NFL Trademarks. NFL Properties has successfully marketed and promoted the NFL Trademarks on and in connection with a wide variety of goods and services through its licensees, sponsors and other business partners. Given the enormous popularity of NFL football, a license to use any of the NFL Trademarks, including any marks associated with the Falcons, is one of the most coveted and valuable merchandising arrangements available in the United States.

18. Logo is one of the NFL's primary licensees. NFL Properties has authorized Logo to use the NFL Trademarks in connection with a variety of apparel products.

The DIRTY BIRD® Trademark

19. On December 5, 1995, the United States Patent and Trademark Office issued registration number 1,940,075 for a trademark for the term "DIRTY BIRD" for use on clothing, namely t-shirts and sweatshirts. (Exhibit A) The original registrant of that trademark, Douglas Patterson, used the trademark on those items of apparel beginning in or about November 1994 and continuously thereafter. Mr. Patterson's use of the trademark included sale of DIRTY BIRD® products to consumers across the country, advertising in magazines distributed nationwide, and the distribution in all fifty states of brochures promoting his use of the mark.

20. During the 1998-1999 season, because the "Dirty Bird" dance was performed repeatedly by members of the Atlanta Falcons, the term "Dirty Bird" and "Dirty Birds" was used repeatedly by journalists, radio and television announcers, sports fans and others to refer to the dance and to identify the Falcons team itself. (Hereinafter, the term "Dirty Bird" shall include both "Dirty Bird" and "Dirty Birds.") Examples of the public's association of the DIRTY BIRD® mark with the team include the following:

- "The Dirty Birds are taking wing and have more than a prayer of making the playoffs."

Falcons Flying Toward Unexpected NFC Perch,
Chicago Tribune, November 19, 1998, at N1.

- "Suddenly, the stinkin' Birds have become the Dirty Birds, a term of endearment now used to describe the Falcons." *In Atlanta, Dan's The Man*, The New York Post, December 8, 1998, at 78.
- "They've dubbed themselves the 'Dirty Birds,' and running back Jamal Anderson created a touchdown dance to fit the name, complete with flapping arms. . . . Falcons merchandise -- anything bearing the official team logo or the unofficial 'Dirty Bird' emblem -- is selling fast." *"Dirty Birds" Spreading Falcon Fever*, The Atlanta Journal and Constitution, January 3, 1999, at 1A.
- "The Dirty Birds nearly ate crow yesterday, but in the end they ate up the 49ers instead." *A Rout, A Bout: Falcons Have To Claw Their Way Past 49ers*, The Boston Globe, January 10, 1999, at E1.
- "The Dirty Birds are migrating to Miami for a date with the Denver Broncos." *Falcons Vanquish Vikings, Reeves' Veterans Win Heart-Stopper*, The Denver Post, January 18, 1999, at D-12.
- "Intriguing Super Bowl matchup: The Atlanta Falcons have their own dance to go with a catchy nickname - - the 'Dirty Birds' - - as well as their first trip to the Super Bowl." *The Week in Review*, The Indianapolis Star, January 24, 1999, at B2.
- "The fact that the Falcons have made it this far after so many hopeless seasons makes it that much sweeter for fans of the Dirty Birds." *Finally, Late January Means Fun for*

Falcons' Fan, Asheville Citizen-Times,
January 31, 1999, at C1.

- "[T]he Broncos (17-2) grounded the Dirty Birds." *Broncos Make It 2 In A Row*, The Washington Times, February 1, 1999, at A1.
- "The greatest year in Falcons history came to a disappointing end, but not before the Dirty Birds took their fans on a season-long joy ride." *Atlanta Falcons; A Super Season!*, The Atlanta Journal and Constitution, February 2, 1999, at 1F.
- "[T]he Saints [have suffered] eight consecutive losses to the Dirty Birds from Atlanta." *Fans Applaud Williams, Ditka Braggadocio*, The Times-Picayune, April 19, 1999, at D3.

21. Upon information and belief, Weiss first began to distribute products bearing a version of the DIRTY BIRD® mark in December 1998. That same month, counsel for Mr. Patterson informed counsel for Weiss of Patterson's exclusive and prior rights in the federally registered DIRTY BIRD® trademark used in connection with apparel.

22. Apparently recognizing the priority of Mr. Patterson's trademark rights with respect to the use of the mark on T-shirts and related items, counsel for Weiss responded by seeking to negotiate a license agreement that would permit Weiss to use the DIRTY BIRD® mark in connection with the distribution of such goods.

23. On information and belief, Weiss also contacted Mr. Patterson directly seeking a license to use the DIRTY BIRD® mark.

24. Mr. Patterson did not grant Weiss a license to use the DIRTY BIRD® mark.

25. In order to ensure that the Falcons and the NFL would not violate the rights of anyone with any possible legitimate and prior claim of right to use the "Dirty Bird" mark in connection with apparel, NFL Properties sought to acquire all of the rights in and to the mark from Mr. Patterson. Mr. Patterson agreed, and on January 19, 1999, assigned the federally registered DIRTY BIRD® trademark and the goodwill therein to NFL Properties.

26. It is NFL Properties' usual practice to assign any marks it owns that are associated with a particular NFL Member Club to the relevant club. In accordance with this practice, on May 11, 1999, NFL Properties assigned the DIRTY BIRD® trademark and the goodwill therein to the Falcons.

27. The DIRTY BIRD® mark has become inextricably associated with the Falcons team. It is highly distinctive and possesses strong secondary meaning among consumers. Thus, in addition to its federal registration, the Falcons also has acquired common law rights in the mark as a result of the public's association of the DIRTY BIRD® mark with the Falcons and the NFL.

28. The NFL markets, through Logo and other licensees, a variety of products bearing the popular DIRTY BIRD® mark and other NFL Trademarks. These products include, inter alia, T-shirts, pennants, towels and mugs. They have been distributed throughout the country, with the focus of their distribution in Atlanta, Georgia and Miami, Florida, the site of the Super Bowl XXXIII game.

29. With the appearance of the Falcons team in the Super Bowl XXXIII game, demand for officially-licensed DIRTY BIRD® consumer products was extremely strong, particularly in Atlanta and Miami. It is expected that demand for such products will remain strong during the upcoming NFL Season, which culminates in the Super Bowl XXXIV game in Atlanta on January 30, 2000.

Distribution by Weiss of Infringing Products

30. Seeking to capitalize on the excitement generated by the Falcons' success, Weiss distributed T-shirts, hats, and other products that wrongfully use a version of the DIRTY BIRD® trademark. These products bear, in addition to the word "Dirtybird," the image of a bird drawn in a style similar to that of the Atlanta Falcons team logo, including in Falcons team colors.

31. Upon information and belief, Weiss distributed products bearing a version of the DIRTY BIRD® trademark through approximately 900 stores located in the Atlanta area.

32. Weiss has never been authorized to use the DIRTY BIRD® mark. To the contrary, both NFL Properties and counsel for Mr. Patterson, the original registrant of the mark, informed Weiss of their exclusive and prior rights in the federally registered DIRTY BIRD® trademark used in connection with apparel.

33. On or about November 19, 1998, Weiss filed with the Georgia Secretary of State an application for registration of the mark "Dirtybird." In that application, Weiss stated that he believed "no other person" had the right to use the mark in the State of Georgia.

34. The Secretary of State issued a Georgia State certificate of registration to Weiss for the mark "Dirtybird."

35. On or about November 20, 1998, Weiss filed with the United States Patent and Trademark Office an application for registration of the mark "Dirtybird" for use on many of the very same goods and services marketed by NFL Properties: "Clothing; namely tee-shirts, sweatshirts, and caps," and "Advertising and business; namely, concession stands featuring sporting event souvenirs; promoting sports competitions and events of others." As part of that application, Weiss submitted a declaration

stating that he believed "no other person, firm, corporation, or association has the right to use the . . . mark in commerce[.]"

36. On or about January 19, 1999, NFL Properties advised Weiss of its exclusive ownership of the federally registered DIRTY BIRD® mark, as well as its common law rights.

37. Weiss has used the DIRTY BIRD® mark with the intention to trade on the goodwill of the Falcons and the NFL.

FIRST COUNTERCLAIM

(Trademark Infringement Under Section 32
of the Lanham Act, 15 U.S.C. § 1114)

38. Defendants repeat and reallege the allegations set forth in paragraphs 1 through 36 above as if fully set forth herein.

39. Weiss' actions described above have caused and are likely to cause confusion and mistake and to deceive customers and potential customers as to the source, origin or sponsorship of the DIRTY BIRD® products sold by Weiss.

40. Weiss' actions described above, including the unauthorized use of the DIRTY BIRD® mark in interstate commerce, have caused, and unless restrained will continue to cause, great and irreparable injury to defendants, the DIRTY BIRD® mark and to the business and goodwill represented thereby, and unless restrained by this Court, will cause further irreparable injury, leaving defendants with no adequate remedy at law.

41. The unauthorized use of the federally registered DIRTY BIRD® mark infringes the Falcons' famous trademark, with consequent damages to defendants and the substantial business and goodwill symbolized by the DIRTY BIRD® mark, in an amount that cannot presently be ascertained, in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

SECOND COUNTERCLAIM

(False Representations Under Section 43(a)
of the Lanham Act, 15 U.S.C. § 1125(a))

42. Defendants repeat and reallege each and every allegation in paragraphs 1 through 41 as if fully set forth herein.

43. Weiss' actions including, but not limited to, his unauthorized use of the DIRTY BIRD® mark in commerce, constitute a false designation of origin, false and misleading descriptions of fact and false and misleading representations of fact, which have caused, and are likely to cause, confusion, mistake and deception, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

44. Weiss' actions, including his unauthorized, false and misleading use of the DIRTY BIRD® mark in commerce, have caused and unless restrained will continue to cause, great and irreparable injury to defendants and to the business and goodwill represented by the DIRTY BIRD® mark, in an amount that

cannot presently be ascertained, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

THIRD COUNTERCLAIM

(Common Law Unfair Competition)

45. Defendants repeat and reallege the allegations of Paragraphs 1 through 44 above as if fully set forth herein.

46. Weiss' actions as described above constitute trademark infringement and unfair competition under the common law.

FOURTH COUNTERCLAIM

(Trademark Dilution Under the Federal Trademark Dilution Act, 15 U.S.C. § 1125(c))

47. Defendants repeat and reallege the allegations in paragraphs 1 through 46 above as if fully set forth herein.

48. The DIRTY BIRD[®] mark is famous. Among other things: (a) the trademark is inherently distinctive and also has acquired a high degree of distinctiveness; (b) the trademark has been associated with the Falcons and the NFL for several months; (c) the trademark has been extensively publicized in news media reports and promoted by NFL Properties' licensees as a reference to the Falcons; (d) NFL football games are played in major cities across the United States and viewed in all of the states and territories of the United States, and the trademark has been associated with the NFL and the Falcons throughout the United States; (e) the trademark is a predominant mark in

professional sports and entertainment; (f) the trademark has an extremely high degree of recognition among football fans and consumers of sports paraphernalia; (g) there is no similar authorized use of the trademark by third parties in connection with sports paraphernalia and souvenirs; and (h) the trademark is the subject of a valid and subsisting registration under the Lanham Act on the Principal Register.

49. Weiss' conduct described above is likely to dilute and detract from the distinctiveness of the famous DIRTY BIRD® mark, with consequent damage to defendants, and to the substantial business and goodwill symbolized by the DIRTY BIRD® mark, in violation of the Federal Trademark Dilution Act, 15 U.S.C. § 1125(c).

50. Weiss' acts of trademark dilution have caused and unless restrained will continue to cause great and irreparable injury to defendants, and to the DIRTY BIRD® mark and to the substantial business and goodwill represented thereby, in an amount that cannot be presently ascertained, leaving defendants with no adequate remedy at law.

51. Weiss' conduct has been undertaken with a willful intent to trade on the reputation of the NFL and the Falcons and to cause dilution of the famous DIRTY BIRD® trademark, and this conduct entitles defendants to damages and the other remedies available pursuant to 15 U.S.C. § 1125(c)(2).

FIFTH COUNTERCLAIM

(Trademark Dilution Under Ga. Code Ann. § 10-1-451(b))

52. Defendants repeat and reallege the allegations of Paragraphs 1 through 51 above as if fully set forth herein.

53. Weiss' acts as described above dilute and detract from the distinctiveness of the DIRTY BIRD® mark, resulting in damage to defendants and the substantial business and goodwill symbolized by the DIRTY BIRD® mark, in violation of Ga. Code Ann. § 10-1-451(b).

SIXTH COUNTERCLAIM

(Deceptive Acts and Practices Under the Uniform Deceptive Trade Practices Act, Ga. Code Ann. § 10-1-372)

54. Defendants repeat and reallege the allegations of Paragraphs 1 through 53 above as if fully set forth herein.

55. Weiss' conduct has been undertaken with a willful intent to trade on the reputation of the Falcons, the NFL and the DIRTY BIRD® trademark.

56. Weiss' acts as described above constitute deceptive acts and practices in violation of the Uniform Deceptive Trade Practices Act, Ga. Code Ann. § 10-1-372.

DEFENDANTS' ANSWER

The Parties

1. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 1 of the Complaint.

2. Defendants deny the allegations contained in the first sentence of paragraph 2 of the Complaint. The second sentence of paragraph 2 states a legal conclusion to which defendants need not respond.

3. Defendants deny the allegations contained in the first sentence of paragraph 3 of the Complaint. The second sentence of paragraph 3 states a legal conclusion to which defendants need not respond.

Jurisdiction

4. Defendants deny the allegations contained in paragraph 4 of the Complaint, except admit that the Complaint purports to state various claims of trademark infringement, false designation of origin and false description, unfair competition, trademark dilution, injury to business reputation, deceptive trade practices, false advertising, and violation of the Fair Business Practices Act of Georgia.

5. Paragraph 5 of the Complaint states a legal conclusion to which defendants need not respond.

6. Paragraph 6 of the Complaint states a legal conclusion to which defendants need not respond.

7. Paragraph 7 of the Complaint states a legal conclusion to which defendants need not respond.

Controversy

8. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 8 of the Complaint.

9. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 9 of the Complaint.

10. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 10 of the Complaint.

11. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 11 of the Complaint, except admit that Weiss has advertised, promoted, distributed, offered for sale and sold products bearing an unauthorized version of the Falcons' DIRTY BIRD® trademark in violation of the Falcons' and NFL Properties' rights.

12. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 12 of the Complaint, except deny that Weiss owns valid trademark rights in the term DIRTYBIRD.

13. Defendants deny the allegations contained in paragraph 13 of the Complaint.

14. Defendants deny the allegations contained in paragraph 14 of the Complaint.

15. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 15 of the Complaint.

16. Defendants deny the allegations contained in paragraph 16 of the Complaint.

17. Defendants admit the allegations contained in paragraph 17 of the Complaint.

18. Defendants deny the allegations contained in paragraph 18 of the Complaint, except admit that the Atlanta Falcons are often referred to by the media, fans, and players as the "Dirty Birds" and that the DIRTY BIRD® mark is recognized by the public as identifying the NFL and the Atlanta Falcons and the goods or services associated with the NFL and the Atlanta Falcons.

19. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 19 of the Complaint, except deny that Weiss owns valid trademark rights in the term DIRTYBIRD.

20. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 20 of the Complaint, except

admit that Georgia State registration number T-17494 was issued to Weiss on or about November 19, 1998.

21. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 21 of the Complaint.

22. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 22 of the Complaint, except deny that Weiss owns valid trademark rights in the term DIRTYBIRD and deny the allegations contained in the second sentence of paragraph 22 of the Complaint that "customers associate plaintiff's DIRTYBIRD™ trademark with plaintiff's quality products and merchandise."

23. Defendants deny the allegations contained in paragraph 23 of the Complaint, except admit that Weiss has advertised, promoted, distributed, offered for sale and sold products bearing an unauthorized version of the Falcons' DIRTY BIRD® trademark that violate the Falcons' rights in that mark.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

25. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 25 of the Complaint.

26. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the

allegations contained in paragraph 26 of the Complaint, except deny that Weiss owns valid trademark rights in the term DIRTYBIRD.

27. Defendants admit the allegations contained in paragraph 27 of the Complaint, except aver that Patterson's prior use of the trademark DIRTY BIRD®, including his notification of Weiss of his superior rights in the mark, inure to the benefit of NFL Properties and the Falcons.

28. Defendants deny the allegations contained in paragraph 28 of the Complaint.

29. Defendants admit the allegations contained in paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Complaint, except admit that Douglas Patterson applied for registration of the mark DIRTY BIRD® with the United States Patent and Trademark Office on January 26, 1995 in connection with "clothing, namely T-shirts and sweatshirts," based upon a first use in commerce as of November 29, 1994, that registration number 1,940,075 was issued to Mr. Patterson on December 5, 1995, that NFL Properties lawfully acquired the federally registered DIRTY BIRD® trademark and the goodwill therein from Mr. Patterson on January 19, 1999, and that NFL Properties assigned that mark and the goodwill therein to the Falcons on May 11, 1999.

31. Defendants deny the allegations contained in paragraph 31 of the Complaint, and respectfully refer the Court to the certificate of registration, which is attached hereto as Exhibit A, for its true contents.

32. Defendants deny the allegations contained in paragraph 32 of the Complaint, except admit that Douglas Patterson properly assigned the federally registered DIRTY BIRD[®] trademark and the goodwill therein to NFL Properties.

33. Defendants deny the allegations contained in paragraph 33 of the Complaint, except admit that representatives of NFL Properties have contacted a variety of persons and/or entities and informed them of NFL Properties' and the Falcons' rights in the mark DIRTY BIRD[®].

34. Defendants admit the allegations contained in paragraph 34 of the Complaint as to Logo, except deny as to NFL Properties, to whose benefit Mr. Patterson's prior use of the federally registered DIRTY BIRD[®] mark, in Georgia and elsewhere, inures.

35. Defendants deny the allegations contained in paragraph 35 of the Complaint, except admit that defendants never attempted to license rights in the mark DIRTY BIRD[®] or the purported mark DIRTYBIRD from either Weiss or Patterson prior to January 17, 1999.

36. Defendants admit the allegations contained in paragraph 36 of the Complaint, except deny as to NFL Properties,

whose assignor, Mr. Patterson, informed plaintiff that he was not entitled to exploit and use the trademark DIRTY BIRD® in December 1998 and whose use of the trademark, including his notification of Weiss of his superior rights in the mark, inures to the benefit of NFL Properties.

37. Defendants deny the allegations contained in paragraph 37 of the Complaint.

38. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 38 of the Complaint.

39. Defendants deny the allegations contained in paragraph 39 of the Complaint.

40. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 40 of the Complaint, except deny that defendants or their representatives threatened retailers or distributors of Weiss' merchandise.

41. Defendants deny the allegations contained in paragraph 41 of the Complaint, except admit that NFL Properties has authorized certain of its licensees to produce merchandise bearing the Falcons' DIRTY BIRD® trademark and that such merchandise was sold in the Atlanta area and in Miami during the Super Bowl event.

42. Defendants deny the allegations contained in paragraph 42 of the Complaint, except admit that since being

notified of Weiss' claim of trademark rights in the term "DIRTYBIRD" defendants have continued to distribute merchandise bearing the Falcons' DIRTY BIRD® trademark.

43. Defendants deny the allegations contained in paragraph 43 of the Complaint, except admit that defendants and/or their agents have contacted a variety of retailers and notified those retailers of NFL Properties' and the Falcons' rights in the DIRTY BIRD® trademark.

44. Defendants deny the allegations contained in paragraph 44 of the Complaint.

45. Defendants admit the allegations contained in paragraph 45 of the Complaint, except deny that Weiss owns any right in the DIRTY BIRD® mark for which he could grant defendants consent, permission or authorization to use.

COUNT ONE

Claim for Common Law Trademark Infringement

46. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-45 of the Complaint as if fully set forth herein.

47. Defendants deny the allegations contained in paragraph 47 of the Complaint.

48. Defendants deny having knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 48 of the Complaint, except

admit that Weiss has marketed merchandise bearing an infringing version of the Falcons' DIRTY BIRD® mark.

49. Defendants deny the allegations contained in paragraph 49 of the Complaint, except admit that Weiss has marketed merchandise bearing an infringing version of the Falcons' DIRTY BIRD® mark.

50. Defendants deny the allegations contained in paragraph 50 of the Complaint.

51. Defendants deny the allegations contained in paragraph 51 of the Complaint.

52. Defendants admit that Weiss purports to allege that "defendants have advertised, promoted, distributed, offered for sale their goods in association with marks which are confusingly similar to plaintiff's trademark, with full knowledge of plaintiff's trademark, that defendants' sale of their goods were and are for the willful and calculated purpose of infringing upon plaintiff's good will and business reputation." Defendants deny that they have engaged in the alleged conduct.

53. Defendants deny the allegations contained in paragraph 53 of the Complaint.

54. Defendants deny the allegations contained in paragraph 54 of the Complaint.

55. Defendants admit that Weiss purports to aver "that defendants have and continue to commit the acts alleged

hereinabove in Paragraphs One through Fifty-Four with the intent and desire to cause confusion, mistakes and confusion to the public," and that "[d]efendants' aforementioned acts are therefore, intentional, willful, and maliciously calculated to cause confusion, mistakes or to deceive the public." Defendants deny that they have engaged in the alleged conduct.

56. Defendants deny the allegations contained in paragraph 56 of the Complaint.

57. Defendants deny the allegations contained in paragraph 57 of the Complaint.

58. Defendants deny the allegations contained in paragraph 58 of the Complaint.

COUNT TWO

Federal Claim for False Designation of Origin and False Description

59. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-58 of the Complaint as if fully set forth herein.

60. Defendants deny the allegations contained in paragraph 60 of the Complaint.

61. Defendants deny the allegations contained in paragraph 61 of the Complaint.

62. Defendants deny the allegations contained in paragraph 62 of the Complaint.

63. Defendants deny the allegations contained in paragraph 63 of the Complaint.

64. Defendants deny the allegations contained in paragraph 64 of the Complaint.

COUNT THREE

Infringement of State Trademark

65. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-64 of the Complaint as if fully set forth herein.

66. Defendants deny the allegations contained in paragraph 66 of the Complaint.

67. Defendants deny the allegations contained in paragraph 67 of the Complaint.

68. Defendants deny the allegations contained in paragraph 68 of the Complaint.

69. Defendants deny the allegations contained in paragraph 69 of the Complaint.

70. Defendants deny the allegations contained in paragraph 70 of the Complaint.

COUNT FOUR

Deceptive Trade Practices

71. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-70 of the Complaint as if fully set forth herein.

72. Defendants deny the allegations contained in paragraph 72 of the Complaint.

COUNT FIVE

False Advertising

73. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-72 as if fully set forth herein.

74. Defendants deny the allegations contained in paragraph 74 of the Complaint.

75. Defendants deny the allegations contained in paragraph 75 of the Complaint.

76. Defendants deny the allegations contained in paragraph 76 of the Complaint.

77. Defendants deny the allegations contained in paragraph 77 of the Complaint.

COUNT SIX

Fair Business Practices Act of Georgia

78. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-77 as if fully set forth herein.

79. Defendants deny the allegations contained in paragraph 79 of the Complaint.

80. Defendants deny the allegations contained in paragraph 80 of the Complaint.

81. Defendants deny the allegations contained in paragraph 81 of the Complaint.

COUNT SEVEN

Georgia Common Law Infringement and Unfair Competition

82. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-81 as if fully set forth herein.

83. Defendants deny the allegations contained in paragraph 83 of the Complaint.

84. Defendants deny the allegations contained in paragraph 84 of the Complaint.

COUNT EIGHT

Fraudulent Procurement of Trademark Registration

85. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-84 as if fully set forth herein.

86. Defendants deny the allegations contained in paragraph 86 of the Complaint.

87. Defendants deny the allegations contained in paragraph 87 of the Complaint.

88. Defendants deny the allegations contained in paragraph 88 of the Complaint.

89. Defendants deny the allegations contained in paragraph 89 of the Complaint.

90. Defendants deny the allegations contained in paragraph 90 of the Complaint.

COUNT NINE

Fraudulent Procurement of Trademark Registration

91. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-90 as if fully set forth herein.

92. Defendants deny the allegations contained in paragraph 92 of the Complaint.

93. Defendants deny the allegations contained in paragraph 93 of the Complaint.

94. Defendants deny the allegations contained in paragraph 94 of the Complaint.

95. Defendants deny the allegations contained in paragraph 95 of the Complaint.

COUNT TEN

State Law Claim for Tortious Interference
with Business Relations

96. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-95 as if fully set forth herein.

97. Defendants deny the allegations contained in paragraph 97 of the Complaint.

98. Defendants deny the allegations contained in paragraph 98 of the Complaint.

99. Defendants deny the allegations contained in paragraph 99 of the Complaint.

100. Defendants deny the allegations contained in paragraph 100 of the Complaint.

COUNT ELEVEN

State Law Claim for Defamation

101. Defendants repeat and incorporate their answers to the allegations of paragraphs 1-100 as if fully set forth herein.

102. Defendants deny the allegations contained in paragraph 102 of the Complaint, except admit that they contacted persons and/or business entities who sell licensed NFL products, some of whom may or may not have been customers of Weiss, seeking to convince such persons and/or business entities to retail additional NFL licensed products.

103. Defendants deny the allegations contained in paragraph 103 of the Complaint, except admit that they informed those persons and/or business entities of NFL Properties' and the Falcons' rights in the DIRTY BIRD® trademark.

104. Defendants deny the allegations contained in paragraph 104 of the Complaint.

105. Defendants deny the allegations contained in paragraph 105 of the Complaint.

Answer to Plaintiff's Prayer for Relief

Defendants deny that Weiss is entitled to the relief requested or to any other relief.

DEFENDANTS' AFFIRMATIVE DEFENSES

First Affirmative Defense

Weiss' Complaint in whole or in part fails to state a claim or cause of action upon which relief may be granted.

Second Affirmative Defense

Weiss does not have a valid trademark in the term "DIRTYBIRD".

Third Affirmative Defense

Weiss' Complaint is barred by the equitable doctrine of estoppel.

Fourth Affirmative Defense

Weiss' Complaint is barred by the equitable doctrine of unclean hands.

Fifth Affirmative Defense

Weiss lacks standing to assert a claim under the Fair Business Practices Act.

Prayer for Relief

WHEREFORE, defendants respectfully request that this Court:

1. Enter judgment dismissing the Complaint in its entirety;

2. Enter judgment that Weiss' unauthorized conduct has violated and continues to violate the rights of NFL Properties and Logo under Sections 32, 43(a) and 43(c) of the Lanham Act, the Federal Trademark Dilution Act, Ga. Code Ann. § 10-1-451(b), the Uniform Deceptive Trade Practices Act, and the common law of the State of Georgia;

3. Preliminarily and permanently enjoin Weiss and his agents, servants, employees, representatives, attorneys, successors, assigns, and all others in active concert or participation with him from:

- (a) using, in connection with any item of apparel or football-related product, the DIRTY BIRD® mark, any derivation or colorable imitation thereof, or any mark confusingly similar thereto, or likely to dilute or detract from the DIRTY BIRD® mark, or to injure the business reputation of the Falcons, the NFL, NFL Properties or Logo;
- (b) representing by any means whatsoever, directly or indirectly, that any product manufactured or distributed by Weiss or with which Weiss is associated, is licensed, endorsed, sponsored or authorized by, or

otherwise affiliated or connected with the NFL, its Member Clubs, or NFL Properties, and from otherwise taking any action likely to cause confusion, mistake or deception on the part of purchasers or consumers as to the origin, sponsorship or affiliation of such services; and

- (c) doing any other acts or things calculated or likely to cause confusion or mistake in the mind of the public or to lead purchasers or consumers into the belief that the products manufactured or distributed by Weiss comes from the Atlanta Falcons, the NFL or NFL Properties or their licensees, or are somehow licensed, sponsored, endorsed, or authorized by, or otherwise affiliated or connected with the NFL, its Member Clubs, or NFL Properties.

4. Order that

- (a) Weiss and his agents, servants, employees, representatives, attorneys, successors, assigns, and all others in

active concert or participation with him, take affirmative steps to dispel such false impressions that heretofore have been created by their distribution of the materials described above;

- (b) Weiss account to NFL Properties and Logo for his profits and any damages sustained by NFL Properties or Logo arising from the foregoing acts of trademark infringement, unfair competition, trademark dilution and that, in accordance with such accounting, NFL Properties and Logo be awarded judgment for three times such profits or damages (whichever is greater) pursuant to 15 U.S.C. § 1117;
- (c) NFL Properties and Logo have and recover their costs, including reasonable attorneys' fees and disbursements in this action, pursuant to 15 U.S.C. § 1117 and Ga. Code Ann. § 10-1-373;
- (d) Weiss deliver up for destruction all materials of an infringing, diluting, misleading or unfair nature in Weiss' possession or control and all means of

making the same in accordance with 15
U.S.C. § 1118;

- (e) NFL Properties and Logo be awarded
punitive damages pursuant to the laws of
the State of Georgia based on Weiss'
willful acts of deception and
infringement; and
- (f) NFL Properties and Logo have such other
and further relief as the Court may deem
just and proper.

Dated: June 10, 1999

Respectfully submitted,



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Int. Cl.: 25

Prior U.S. Cls.: 22 and 39

United States Patent and Trademark Office

Reg. No. 1,940,075
Registered Dec. 5, 1995

**TRADEMARK
PRINCIPAL REGISTER**

DIRTY BIRD

PATTERSON, DOUGLAS G. (UNITED STATES
PATENT AND TRADEMARK OFFICE)
1111 52ND AVENUE
OMAHA, NE 68152

FIRST USE 11-29-1994; IN COMMERCE
11-29-1994.

SER. NO. 74-625,696, FILED 1-26-1995.

FOR: CLOTHING, NAMELY T-SHIRTS AND
SWEATSHIRTS, IN CLASS 25 (U.S. CLS. 22
AND 39).

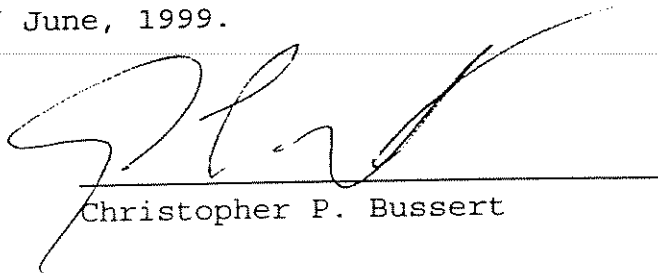
CHARLES WEIGELL, EXAMINING ATTOR-
NEY

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy
of the foregoing DEFENDANTS' COUNTERCLAIMS AND ANSWER by hand
upon:

Roger S. Sumrall, Esq.
HALL, BOOTH, SMITH & SLOVER, P.C.
230 Peachtree Street, N.W.
Suite 2500
Atlanta, Georgia 30303.

This 10th day of June, 1999.



Christopher P. Bussert