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FILE: G-1039

May 22, 1990

TERLINGUA INTERNATIONAL  
CHAMPIONSHIP CHILI COOKOFF, INC.  
P.O. Box 617  
Corsicana, TX 75110

Dear Sirs:

I represent the Chili Appreciation Society, Inc. (CASI).

A copy of a recent Terlingua International Championship Chili Cookoff, Inc. (the Tolbert group) advertisement is enclosed which describes and represents the Tolbert group's Terlingua chili cookoff as being the "original," "the 23rd annual," and "since 1967," and identifies the Tolbert group as "Original Terlingua International Championship Chili Cookoff, Inc."

Chief Judge Lucius Bunton's final Order of April 21, 1988 in C.A.S.I.--Chili Appreciation Society International, Inc. vs. Kathleen Ruth Tolbert, Frank N. Tolbert, Jr., Kathleen Tolbert Ryan, Cause No. SA-86-CZ-1403, filed in the United States District Court for the Western District of Texas, Pecos Division, contains in part the following Findings of Fact:

"Thus, though Frank Tolbert was a compelling personality, a good administrator, and a knowledgeable resource of chili lore, his name was not synonymous from the first or at any time relevant to this suit with the Terlingua event or the Chili Appreciation Society or the marks at issue in this suit.

Undeniably, Tolbert was a strong member of the association. However, the association, no matter its relative informality in the early years, existed apart from Tolbert and was the agent promoting the Terlingua cookoff and using the trademark Chili Appreciation Society International.

In 1983, Frank Tolbert began to conduct a separate Terlingua cookoff on the same day as the one which had its roots in 1967. Defendants did not demonstrate by the preponderance of the evidence that the Tolbert cookoff was promoted under the auspices of the same association which operated a cookoff continually from 1967. There were two cookoffs in 1984 and every year since."

Terlingua International  
Championship Chili Cookoff, Inc.  
May 22, 1990  
Page 2

The Lanham Act, the Federal Trademark Act, makes "any false description or representation" of goods or services in commerce an unlawful act (Title 15, United States Code, Section 1125(a)). The Tolbert group's description and representation to the public that it and its current chili cookoff as the "original", "the 23rd annual" and "since 1967" are contrary to Chief Judge Bunton's April 21, 1988 Findings of Fact that "the association [CASI] . . . existed apart from Tolbert and was the agent promoting the Terlingua cookoff and that in 1983, Frank Tolbert began to conduct a separate Terlingua cookoff . . ."

The Tolbert group no doubt still believes that it is the successor to the original 1967 organization and original Terlingua cookoff and that it's Terlingua Chili Cookoff is therefore the 23rd Annual. Nevertheless, the Tolbert group spent tens of thousands of dollars on attorneys, presented its best case in court and lost in a fair fight. If the Tolbert group will not honor the Court's findings, CASI may have to go back before Judge Bunton. Judge Bunton, on comparing the Tolbert group's advertising with his Findings of Fact, is unlikely to find that the Tolbert group's current advertising is truthful.

The Tolbert group was incorporated under the corporate name of "Terlingua International Championship Chili Cookoff, Inc" on July 1, 1983. The Texas Business Corporation Act, article 2.05(c), states, in part, "The filing of articles of incorporation under Part 3 of this Act, . . . does not authorize the use of a Corporate name in this State in violation of the rights of another under the federal Trademark Act of 1946 (15 U.S.C., Section 1051 et seq.), the Texas trademark law (Chapter 16, Business & Commerce Code) . . . or the common law." The Tolbert group's recent addition of "Original" to its corporate name is also a deliberate affront to Judge Bunton's Findings of Fact. It has the effect of further confusing the public into believing that your corporation is the original 1967 organization. The Tolbert group's use of this name and mark has caused confusion between it and CASI's name and marks.

A second related problem is that the Tolbert group is systematically sending Tolbert cookoff packages to promoters who have their names published in the Goat Gap Gazette after they sign up to run CASI sponsored cookoffs. The Tolbert group is aware that promoters published in the Goat Gap Gazette as promoting "CASI" cookoffs or under "CASI Rules" have agreed with CASI to conduct their cookoff under CASI rules. The literature the Tolbert group sends these new CASI promoters is confusing because it describes and represents the Tolbert group and its services as "original," "23rd annual," and "since 1967." The Tolbert group's cookoff package includes "Tolbert Rules" which are largely copied from CASI Rules, further making the Tolbert group's cookoff package confusingly similar to the local promoter.

These activities of the Tolbert group have caused improper rules to be applied at CASI sponsored events, improper results sent in by promoters to CASI, results sent to the Tolbert group rather than CASI, and bad feelings being created from what should be fun events. Similar problems have occurred with respect to the Tolbert group's soliciting chili cooks for the annual Terlingua cookoff that the Tolbert group knows have already agreed to cook at the CASI cookoff on the same days.

Terlingua International  
Championship Chili Cookoff, Inc.  
May 22, 1990  
Page 3

CASI is willing to take the Tolbert group on in honest, open, free competition. If the Tolbert group honestly believes that it is different and better than CASI it is free to distinguish itself from CASI, locate and train its own cookoff promoters and have its own chili cookoffs. However, once CASI has gone to the expense and trouble of locating a cookoff promoter, educating the promoter in how to run a chili cookoff, and having the promoter agree to conduct the cookoff under CASI rules, interference by the Tolbert group with CASI's agreement and relationship with that promoter for that cookoff is unlawful.

Legally, the Tolbert group's conduct in this respect is termed "interference with beneficial contractual relationships." You may be familiar with Pennzoil vs. Texaco. Pennzoil made an oral agreement with Pennzoil. Texaco, knowing of that oral agreement, interfered with it. The resulting judgment was in favor of Pennzoil for eleven billion dollars. The lesson of that case is that in Texas an agreement is an agreement and that third parties interfere with it at their peril.

A third problem, mentioned above, is that the Tolbert group is copying CASI's cookoff rules. When CASI modifies its CASI rules the Tolbert group copies the changes. The Copyright Act of 1976, Title 17, United States Code, Section 106, makes it unlawful to infringe an author's work by copying it with a substantially similar second work. Tolbert's rules are copied from and are "substantially similar" to the CASI rules. The Tolbert group is, therefore, unlawfully infringing on the CASI's copyright rights to CASI rules.

While this firm represented CASI in its litigation with the Tolbert group, my individual representation of CASI is relatively new (although I am and have been a member of CASI). As a lover of chili and of chili cookoffs, I hope that CASI and the Tolbert group can resolve this matter without, once again, each spending tens of thousands of dollars on attorneys. That money should be spent promoting chili and the wonderful chili culture. The problems discussed above, however, are not mere technicalities. They are causing confusion and hard feelings in the chili world and damage to CASI.

CASI and the Tolbert group already fought this battle once. CASI won and is not looking for a second fight unless one is necessary. The Tolbert group, however, is renegeing on the one basic rule of a fair fight, that the loser abide by the result.

A prompt response is needed from the Tolbert group concerning these matters. I enclose a Statement which sets out what the law is and states that the Tolbert group will comply with the law. If the Tolbert group believes CASI is violating the law in some ways that injure the Tolbert group I encourage you to let me know what its complaints are. Perhaps communication between the Tolbert group and CASI may help resolve these issues.

Terlingua International  
Championship Chili Cookoff, Inc.  
May 22, 1990  
Page 4

If I do not promptly receive a satisfactory response to this letter, however, CASI will have no choice but to consider its legal alternatives.

Sincerely,



Mark H. Miller

MHM/sg  
encl.  
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