

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

The J.M. Smucker Company
One Strawberry Lane
Orville, Ohio 44667

Plaintiff,

v.

Pierre Foods, Inc.
9990 Princeton Road
Cincinnati, Ohio 45246

and

CJ5 Foods, Inc.
2530 Vista Way, Suite F-224
Oceanside, California 92054

and

Cloverdale Farms, Inc.
1833 Cooper Foster Park Road
Amherst, Ohio 44001

Defendants.

Civil Action No.:

Judge:

**COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW, Plaintiff, The J.M. Smucker Company, and for its Complaint against Defendants Pierre Foods, Inc., CJ5 Foods, Inc. and Cloverdale Farms, Inc. states and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action against Defendants for their ongoing and continued acts of trademark infringement, trademark dilution, unfair competition and deceptive trade practices.

PARTIES, JURISDICTION AND VENUE

2. At all relevant times Plaintiff, The J.M. Smucker Company (“Smucker”), is and was a corporation organized and existing under the laws of the State of Ohio, with its principal place of business located at One Strawberry Lane, Orville, Ohio 44667.
3. Upon information and belief, Defendant, Pierre Foods, Inc. (“Pierre”), is a corporation existing under the laws of the State of Delaware, located and doing business at 9990 Princeton Road, Cincinnati, Ohio 45246.
4. Upon information and belief, Defendant, Cloverdale Farms, Inc. (“Cloverdale”), a wholly-owned subsidiary of Pierre, is a corporation existing under the laws of the State of Ohio, located and doing business at 1833 Cooper Foster Park Road, Amherst, Ohio 44001.
5. Upon information and belief, Defendant, CJ5 Foods, Inc. (“CJ5”), is a corporation existing under the laws of the State of California, located and doing business at 2530 Vista Way, Suite F-224, Oceanside, California 92054.
6. Defendants manufacture, distribute, supply and/or sell goods into and/or from the State of Ohio. Defendants derive a financial benefit from the commercial activities they conduct in the State of Ohio.
7. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1338 and 2201 because it arises, in part, pursuant to 15 U.S.C. §§ 1114, 1116-1118 and 1125. This Court also has jurisdiction over Plaintiff’s common law and state law claims pursuant to 28 U.S.C. § 1367.
8. Venue is proper in this Judicial District pursuant to 28 U.S.C. §§ 1391(b)(1), 1391(b)(2) and 1391(c). Defendants are corporations subject to personal jurisdiction in this District, a substantial part of the acts and omissions giving rise to the claims set forth below

occurred in this District and the intellectual property that is the subject of this action is located and maintained in this District.

FACTS COMMON TO ALL COUNTS

The Plaintiff

9. Smucker is a leading marketer and manufacturer of fruit spreads, peanut butter, shortening and oils, ice cream toppings, baking mixes, pancake mixes and syrup, potato mixes, sweetened condensed milk and health and natural foods and beverages in North America.

10. For over 108 years, Smucker has been a family-run business headquartered in Orrville, Ohio. The founder of Smucker, Jerome Monroe Smucker, sold his products from the back of a horse-drawn wagon with each jar of product bearing his hand-signed seal as his personal guarantee of quality. Today, his great-grandsons, Mr. Richard K. Smucker and Mr. Timothy P. Smucker, the Co-Chief Executive Officers of Smucker, continue to guide the company by applying their great-grandfather's solid, Midwestern values.

11. Smucker is the quintessential family-founded and consumer-oriented American manufacturing company. In addition to its facilities in Orville, Ohio, it also manufacturers product across the United States in Toledo Ohio, Cincinnati Ohio, Lexington Kentucky, Scottsville Kentucky, Seneca Missouri, Memphis Tennessee, New Bethlehem Pennsylvania, Chico California, Havre de Grace Maryland, Ripon Wisconsin and El Paso Texas.

12. In order to ensure that its founder's personal commitment to its customers is maintained, Smucker operates from its core "Basic Beliefs" of Quality, People, Ethics, Growth and Independence.

13. Smucker applies its high standard of Quality to its products, its manufacturing methods, its marketing efforts and its family of employees. For more than a century, Smucker has operated on the principle that Quality comes first. Of particular importance to Smucker, is

maintaining the same strong, ethical values upon which the Company was founded. Smucker maintains the highest standards of business ethics with its customers, suppliers, employees, and shareholders, and within the communities in which it operates.

14. As a direct result of Smucker's century-long commitment to its core beliefs and its customers, the general public and its competitors have come to associate high quality goods with the SMUCKER'S trademark and Smucker's family of related trademarks.

The Round Crustless Sandwich Brand

15. The Smucker family of marks includes *Smucker's®*, *Jif®*, *Crisco®*, *Pillsbury®* (by license), *Eagle Brand®*, *R.W. Knudsen Family®*, *Hungry Jack®*, *White Lily®*, *Martha White®*, and *Uncrustables®*, among others.

16. Consistent with its overall basic beliefs and its commitment to providing consumers with high quality goods, in 1998 Smucker began manufacturing and selling high quality sandwiches using trade dress that consists of a round crustless sandwich (the "Round Crustless Sandwich Mark"):



17. Subsequently, in 2000, Smucker began selling the same sandwich products under both the Round Crustless Sandwich Mark and the UNCRUSTABLES mark:



18. The rights of Smucker in the Round Crustless Sandwich Mark are embodied, in part, in United States Trademark Registration Numbers 2,883,529 and 2,623,577. True and correct copies of these Registrations are attached hereto as Exhibit A and are incorporated by reference herein.

19. Smucker sells its sandwich products through a wide variety of outlets such as grocery stores, food service providers and also sells these products direct to schools for inclusion in children's meal programs. Indeed, an important segment of the Smucker sandwich business comes from such sales to schools. Relevant excerpts of Smucker's website are attached hereto as Exhibit B and are incorporated by reference herein.

20. Smucker has spent tens of millions of dollars marketing sandwiches under the Round Crustless Sandwich Mark. True and correct copies of representative samples of those advertisements are attached hereto as Exhibit C and are incorporated by reference herein.

21. As a direct result of the time and effort promoting the Round Crustless Sandwich Mark, Smucker's customers, its competitors and the general public have come to associate high quality sandwiches offered by Smucker with the Round Crustless Sandwich Mark. The Round Crustless Sandwich Mark is famous and has become a very valuable asset of Smucker.

The Defendants

22. Pierre holds itself out as a company that manufactures and distributes prepackaged foods to food service providers, schools, warehouse clubs, and convenience stores.

23. In late 2006, Pierre acquired Cloverdale. Cloverdale also manufactures and distributes prepackaged foods, including sandwiches. Relevant excerpts of the Pierre and Cloverdale websites are attached hereto as Exhibit D and are incorporated by reference herein.

24. Upon information and belief, Pierre and Cloverdale manufacture and distribute prepackaged sandwich products for CJ5. CJ5 in turn sells those products through a retail store called Whole Foods.

Defendants' Willful Infringement of the Smucker Round Crustless Sandwich Mark

25. Upon information and belief, prior to being acquired by Pierre, Cloverdale manufactured and sold a square crustless sandwich named "PB Jamwich":



26. Significantly, Cloverdale recognized that even a square crustless sandwich might lead to consumer confusion with the famous Round Crustless Sandwich Mark of Smucker, and it advertised its sandwich product with the following disclaimer "*Cloverdale Farms, Inc. manufactures and distributes the PB Jamwich brand of sealed crustless sandwiches. Cloverdale Farms, Inc. is not affiliated, connected or associated with, or sponsored, approved or licensed by the J.M. Smucker Co., which manufactures and sells the UNCRUSTABLE brand of sealed crustless sandwiches.*" See Exhibit D.

27. Subsequently, even though Cloverdale obviously believed that confusion would arise from its use of a *square* crustless sandwich, and even though it was long aware of the UNCRUSTABLE brand and Smucker's use of the Round Crustless Sandwich Mark, Cloverdale and its parent Pierre still elected to change the shape of its product and it began to manufacture, distribute and sell nearly identical products, in nearly identical packages:



28. Upon information and belief, sometime in late 2007 or early 2008, Defendants Pierre and Cloverdale began supplying Defendant CJ5 with the "PB Jammerz" product, and CJ5 began to distribute and sell that product.

29. Upon information and belief, sometime in 2008, Defendants Pierre and Cloverdale began to manufacture, distribute and sell the above pictured "PB Jamwich" product.

30. In a willful violation of the Lanham Act, the Defendants elected to manufacture, distribute, and/or sell such products in an attempt to deceive the public and trade off the substantial goodwill created by Smucker in connection with its Round Crustless Sandwich Mark.

31. On January 31 2008, counsel for Smucker sent a letter to CJ5 demanding that they cease and desist use of the Smucker Round Crustless Sandwich Mark. A copy of that letter is attached hereto as Exhibit E and is incorporated by reference herein.

32. On March 19, 2008, counsel for Pierre and Cloervale responded to that letter. While Cloervale had clearly in the past been well aware of the strong similarities between a square crustless sandwich and the Smucker Round Crustless Sandwich Mark, counsel for Defendants oddly contended that no infringement was occurring because the packaging for the current sandwich product included a photograph of a “sandwich sliced in half”. A copy of that letter is attached hereto as Exhibit F and is incorporated by reference herein.

33. In an effort to resolve the ongoing infringement, on June 16, 2008, counsel for Smucker responded to the March 19, 2008, noting that the mutilation of the Smucker Round Crustless Sandwich Mark (i.e. slicing it in half) does not reduce the likelihood of confusion. A copy of that letter is attached hereto as Exhibit G and is incorporated by reference herein.

34. Even in light of this clear infringement of Smucker’s rights, as indicated in counsel’s response on June 27, 2008, Pierre and Cloervale continue to sell a sandwich product using a mark similar to the Smucker Round Crustless Sandwich Mark. A copy of that letter is attached hereto as Exhibit H and is incorporated by reference herein.

35. On July 15, 2008, Pierre and Cloervale filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (Case No. 08-11480). After filing their petitions, Pierre and Cloervale have continued, and plan to continue, to infringe and misappropriate Smucker’s valuable intellectual property.

36. Specifically, upon information and belief, Defendants are about to begin their busiest season in preparation for the beginning of the school year. Smucker will be irreparably harmed if the Defendants are permitted to continue their use of the Smucker Round Crustless

Sandwich Mark in connection with their sale of sandwich products to schools and through other outlets.

37. Because Smucker's claims against Pierre and Cloverdale are for their infringement and misappropriation of Smucker's intellectual property rights post-filing of the bankruptcy petitions, Smucker's claims are not subject to the automatic stay provisions of 11 U.S.C. § 362.

COUNT I
TRADEMARK INFRINGEMENT
15 U.S.C. §§ 1114 AND 1125(a)

38. Smucker incorporates each and every allegation of Paragraphs 1-37 of this Complaint as though fully set forth herein.

39. Smucker's use of the Round Crustless Sandwich Mark predates any alleged use by Defendants in the United States.

40. Defendants' use of the Round Crustless Sandwich Mark, in connection with their sandwich product, is likely to deceive and cause confusion and mistake among customers as to the source or origin of the goods provided or offered for sale by Defendants and the sponsorship or endorsement of those goods by Smucker.

41. Defendants' use of the Round Crustless Sandwich Mark, in connection with their sandwich product, is likely to deceive and cause confusion and mistake among consumers as to the source of origin of the goods provided by Smucker and the sponsorship or endorsement of those goods by Defendants.

42. Smucker has never authorized, licensed or otherwise condoned or consented to Defendants' use of the Round Crustless Sandwich Mark.

43. Defendants have misappropriated and continue to misappropriate Smucker's substantial property rights in the Round Crustless Sandwich Mark, as well as the goodwill

associated therewith. Unless restrained and enjoined by this Court, such conduct will continue and will permit Defendants to improperly interfere with Smucker's continued promotion and expansion of the Round Crustless Sandwich Mark.

44. As a result of Defendants' ongoing unlawful activities, Smucker continues to suffer irreparable harm.

45. As a direct and proximate result of Defendants' ongoing unlawful activities, Smucker has and continues to suffer damages in an amount that is not presently ascertainable. If Defendants are permitted to continue to violate Smucker's rights, Smucker's damages will likely exceed Ten Million Dollars (\$10,000,000).

COUNT II
FEDERAL UNFAIR COMPETITION
15 U.S.C. §1125(a)

46. Smucker incorporates each and every allegation of Paragraphs 1-45 of this Complaint as though fully set forth herein.

47. Defendants' use of the Round Crustless Sandwich Mark, in connection with their sandwich product, is likely to deceive and cause confusion among consumers as to the source of origin of the goods offered by Defendants and the sponsorship or endorsement of those goods by Smucker.

48. Smucker has never authorized, licensed or otherwise condoned or consented to Defendants' use of the Round Crustless Sandwich Mark.

49. Defendants have misappropriated and continue to misappropriate Smucker's substantial property rights in the Round Crustless Sandwich Mark, as well as the goodwill associated therewith. Unless restrained and enjoined by this Court, such conduct will permit Defendants to gain an unfair competitive advantage over Smucker and allow Defendants to improperly interfere with Smucker's continued promotion and expansion of its business.

50. The acts of Defendants alleged above were committed willfully, with full knowledge of Smucker's rights and with the intention to deceive and mislead the public.

51. The acts of Defendants alleged above were committed willfully, with full knowledge of Smucker's rights and with the intention of causing harm to Smucker.

52. The acts of Defendants alleged above were committed willfully, with full knowledge of Smucker's rights and with the intention of misappropriating and wrongfully trading upon the valuable goodwill and reputation of Smucker and the Round Crustless Sandwich Mark.

53. Defendants will continue their ongoing acts of unfair competition, causing irreparable injury to Smucker, unless such activities are enjoined by this Court.

54. As a direct and proximate result of Defendants' ongoing unlawful activities, Smucker has and continues to suffer damages in an amount that is not presently ascertainable. If Defendants are permitted to continue to violate Smucker's rights, Smucker's damages will likely exceed Ten Million Dollars (\$10,000,000).

COUNT III
FEDERAL TRADEMARK DILUTION
15 U.S.C. §1125(c)

55. Smucker incorporates each and every allegation of Paragraphs 1-54 of this Complaint as though fully set forth herein.

56. The Round Crustless Sandwich Mark has become famous in accordance with the standard set forth in 15 U.S.C. § 1125(c)(1).

57. Defendants began using the Round Crustless Sandwich Mark after it became famous.

58. Smucker has never authorized, licensed or otherwise condoned or consented to Defendants' use or registration of the Round Crustless Sandwich Mark.

59. Defendants are diluting the distinctiveness of the Round Crustless Sandwich Mark.

60. Defendants' actions are disparaging the distinctiveness of the Round Crustless Sandwich Mark.

61. Defendants' actions are blurring the distinctiveness of the Round Crustless Sandwich Mark.

62. Defendants will continue their ongoing acts of dilution, causing irreparable injury to Smucker, unless such activities are enjoined by this Court.

63. As a direct and proximate result of Defendants' ongoing unlawful activities, Smucker has and continues to suffer damages in an amount that is not presently ascertainable. If Defendants are permitted to continue to violate Smucker's rights, Smucker's damages will likely exceed Ten Million Dollars (\$10,000,000).

COUNT IV
DECEPTIVE AND UNFAIR TRADE PRACTICES UNDER OHIO LAW
OHIO REV. CODE, § 4165.02

64. Smucker incorporates each and every allegation of Paragraphs 1-63 of this Complaint as though fully set forth herein.

65. Through the conduct described herein, Defendants have engaged in unfair competition and deceptive trade practices in violation of Ohio Revised Code § 4165.02.

66. Defendants' conduct, unless enjoined by the Court, will continue to cause, irreparable injury to Smucker's business and reputation for which there is no adequate remedy at law.

67. The conduct of Defendants has been deliberate and willful and has been committed with the intent to cause confusion and mistake, to deceive the public, and/or to

misrepresent the affiliation, connection or sponsorship of the Defendants' goods and commercial activities with Smucker.

68. Defendants will continue their acts of unfair competition and deceptive trade practices, causing irreparable injury to Smucker, unless such activities are enjoined by this Court.

69. As a direct and proximate result of Defendants' ongoing unlawful activities, Smucker has and continues to suffer damages in an amount that is not presently ascertainable. If Defendants are permitted to continue to violate Smucker's rights, Smucker's damages will likely exceed Ten Million Dollars (\$10,000,000).

COUNT V
UNFAIR COMPETITION UNDER OHIO LAW

70. Smucker incorporates each and every allegation of Paragraphs 1-69 of this Complaint as though fully set forth herein.

71. Smucker's use of and rights in the Round Crustless Sandwich Mark predates Defendants' use of a similarly confusing mark.

72. Defendants' actions in connection with their sandwich products, is likely to deceive and cause confusion and mistake among consumers as to the source or origin of the goods provided by or sold by Defendants and the sponsorship or endorsement of those goods provided by or sold by Smucker.

73. Smucker has never authorized, licensed or otherwise condoned or consented to Defendants' use of the Round Crustless Sandwich Mark.

74. The conduct of Defendants, as alleged herein, constitutes unfair competition under the common law of Ohio.

75. Defendants' conduct has been deliberate and willful and has been committed with the intent to cause confusion and mistake, to deceive the public, and/or to misrepresent the affiliation, connection or sponsorship of the Defendants' commercial activities with Smucker.

76. Defendants will continue their acts of unfair competition, causing irreparable injury to Smucker, unless such activities are enjoined by this Court.

77. As a direct and proximate result of Defendants' ongoing unlawful activities, Smucker has and continues to suffer damages in an amount that is not presently ascertainable. If Defendants are permitted to continue to violate Smucker's rights, Smucker's damages will likely exceed Ten Million Dollars (\$10,000,000).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court enter an Order:

- A. Preliminarily and permanently enjoining Defendants, or anyone else acting in concert with it, or on their behalf from: Using any reproduction, copy or colorable imitation of the Round Crustless Sandwich mark or any mark confusingly similar thereto, including specifically manufacturing, producing, distributing, circulating, selling, marketing, offering for sale, advertising, promoting, renting, displaying or otherwise disposing of any products bearing any reproduction, copy or colorable imitation of the Round Crustless Sandwich mark, without the express authorization, license or consent of Smucker.
- B. Requiring Defendants to deliver up for destruction to Plaintiff all unauthorized products, advertisements or other documents in their possession or under their control bearing the Round Crustless Sandwich mark or any simulation, reproduction, copy or colorable imitation thereof, pursuant to 15 U.S.C. §1118;

- C. Awarding to Plaintiff the damages it sustained as a result of Defendants' ongoing wrongful acts;
- D. Awarding to Plaintiff Defendants' profits pursuant to 15 U.S.C. § 1117;
- E. Awarding to Plaintiff treble damages pursuant to 15 U.S.C. § 1117;
- F. Awarding to Plaintiff its costs and attorneys' fees pursuant to 15 U.S.C. § 1117;
- G. Awarding to Plaintiff punitive damages as a result of Defendants' willful and wrongful acts; and
- H. Granting Plaintiff any further relief that the Court deems to be just and proper.

JURY DEMAND

Plaintiff respectfully requests a trial by jury on all issues triable thereby.

Dated this 13th day of August, 2008.

Respectfully submitted,

/s/ Timothy P. Fraelich
Timothy P. Fraelich (Ohio No. 0062468)
James W. Walworth, Jr. (Ohio No. 0074174)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
tfaelich@JonesDay.com
jwalworth@JonesDay.com

**ATTORNEYS FOR PLAINTIFF
THE J.M. SMUCKER COMPANY**