

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO.: _____

TIM HORTONS USA INC.,

Plaintiff,

vs.

PANAGG CAFÉ INCORPORATED,
GURVINDER SINGH, ASHNA WALIA
and ADARSH WALIA,

Defendants.

_____ /

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff Tim Hortons USA Inc. (“THUSA”) sues Defendants Panagg Café Incorporated (“Company”), Gurvinder Singh (“Singh”), Ashna Walia and Adarsh Walia (Singh, Ashna Walia and Adarsh Walia are hereinafter collectively referred to as “Guarantors”) (Guarantors and Company are hereinafter collectively referred to as “Defendants”) and states:

1. This is an action to enjoin Defendants’ unauthorized use of THUSA’s valuable trademarks and service marks in connection with the unlawful operation of a store located in New York as an authorized TIM HORTONS® Store, as well as for Lanham Act damages. Additionally, this is an action for money damages against Defendants for breaches of written agreements between THUSA and Defendants.

I. THE PARTIES

2. Plaintiff THUSA is a Delaware corporation with its principal place of business in Miami, Florida.

3. Defendant Company is a New York corporation with its principal place of

business in Irondequoit, New York.

4. Upon information and belief, Defendant Singh is a citizen and resident of the state of New York.

5. Upon information and belief, Defendant Ashna Walia is a citizen and resident of the state of New York.

6. Upon information and belief, Defendant Adarsh Walia is a citizen and resident of the state of New York.

II. JURISDICTION AND VENUE

7. THUSA, the franchisor of the TIM HORTONS® brand, franchises stores in the United States that are involved in, among other things, the sale of selected foods and beverages. THUSA's franchise operations are conducted and supervised from its headquarters located in Miami, Florida. THUSA and Defendants have carried on a continuous course of direct communications by mail, e-mail and by telephone through THUSA's headquarters in Miami, Florida.

8. The course of dealing between THUSA and its franchisees, including Defendants, shows that decision-making authority is vested in THUSA's headquarters in Miami, Florida.

9. Defendants voluntarily entered into franchise relationships with THUSA which envisioned continuing and wide-reaching contacts with THUSA, the business of which is regulated from THUSA's headquarters in Miami, Florida.

10. Defendants have breached contracts which were to be performed in Florida due to their failure to make payments to THUSA in Miami, Florida and to cease use of the TIM HORTONS® Marks and System after their franchise agreement terminated. These breaches have caused damage to THUSA at its headquarters in Miami, Florida.

11. This Court has jurisdiction over this action based upon:

(a) Section 39 of the Lanham Act, 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331, 1337, and 1338(a), for the claims arising out of Defendants' violations of Sections 32 and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114 and 1125(a); and,

(b) 28 U.S.C. § 1338(b), and the doctrine of supplemental jurisdiction as codified in 28 U.S.C. § 1367, for the claims arising out of Defendants' breaches of contracts and common law unfair competition.

12. Venue is proper in the Southern District of Florida pursuant to 28 U.S.C. § 1391 and the forum selection clause agreed to by the parties in their written agreements.

13. Defendants have agreed in writing that in any litigation to enforce the terms of the agreements between THUSA and Defendants, THUSA, as the prevailing party, shall be paid by Defendants all costs, including attorneys' fees, incurred as a result.

14. THUSA has engaged undersigned counsel and has agreed to pay counsel reasonable attorneys' fees for all services rendered in this action and otherwise in connection with enforcing the agreements between THUSA and Defendants.

15. All conditions precedent to the institution of this action have been satisfied, discharged, excused, and/or waived.

III. THE THUSA MARKS

16. To identify the source, origin and sponsorship of THUSA's facilities, products, and services, THUSA has extensively employed, caused to be advertised and publicized throughout the United States certain distinctive symbols as trademarks and service marks (the "THUSA Marks"). THUSA owns, and was the first to adopt and use, the THUSA Marks as trademarks and service marks and all right, title and interest in and to the THUSA Marks and the

design, decor and image of TIM HORTONS® stores remains vested solely in THUSA.

17. THUSA franchises TIM HORTONS® stores using the THUSA Marks on signs, menu boards, posters, translights, uniforms, plates, cups, tray liners and other items and in advertising to the public through television, radio and print media and the internet.

18. Set forth below is an abbreviated listing of the THUSA Marks registered to THUSA in the United States Patent and Trademark Office:

Country	Mark Name	Status	Owner	Registration No.
United States	ALWAYS FRESH TIM HORTONS & Design (Color)	Registered	TIM HORTONS USA INC.	2433796
United States	ALWAYS FRESH TIM HORTONS & Design	Registered	TIM HORTONS USA INC.	2457618
United States	TIM HORTONS	Registered	TIM HORTONS USA INC.	2025251
United States	TIM HORTONS Script Design (B&W)	Registered	TIM HORTONS USA INC.	1690691
United States	TIM HORTONS ALWAYS FRESH CAFE & BAKE SHOP EST. 1964 & Design (color)	Registered	TIM HORTONS USA INC.	4069662
United States	TIM HORTONS ALWAYS FRESH COFFEE & BAKE SHOP EST 1964 & Design (B&W)	Registered	TIM HORTONS USA INC.	4065879
United States	TIM HORTONS CAFE & BAKE SHOP & Design (B&W)	Registered	TIM HORTONS USA INC.	4415127
United States	TIMBITS	Registered	TIM HORTONS USA INC.	2026723
United States	TIM'S OWN	Registered	TIM HORTONS USA INC.	2527878

19. The registrations of the THUSA Marks are currently in full force and effect, and THUSA has given notice to the public of the registration of the THUSA Marks as provided in 15 U.S.C. § 1111.

20. Pursuant to franchise agreements between THUSA and its franchisees, including Defendants, THUSA grants its franchisees a limited license and authority to use and display the THUSA Marks, but only in such manner and at such locations and times as are expressly authorized by THUSA. In no event is a franchisee authorized to use the THUSA Marks after the expiration or termination of its franchise. Such unauthorized use is expressly prohibited under the terms of all THUSA franchise agreements, including Defendants' agreements with THUSA.

21. THUSA's products bearing the THUSA Marks are offered and sold in interstate commerce.

22. THUSA and its franchisees have spent many millions of dollars advertising and promoting THUSA's stores, services and products.

23. The substantial investment made in the THUSA Marks has resulted in valuable good will for the THUSA Marks and for the stores, products and services bearing those marks. THUSA products and services have met with popular approval and, as a result of THUSA's extensive sales, advertising, promotion and publicity, the public is familiar with the THUSA Marks. The products and services associated with the THUSA Marks are understood by the public to be produced, marketed, sponsored, supplied by and/or affiliated with THUSA.

IV. THE THUSA SYSTEM

24. THUSA has developed a comprehensive operating system for all THUSA franchisees in order to protect the image of TIM HORTONS® stores and to ensure uniform, high quality standards. The detailed specifications and procedures of the "TIM HORTONS System" are set forth in THUSA's Confidential Operating Manual (the "OPS Manual").

25. Every THUSA franchisee is required by its franchise agreement to operate its franchise in accordance with the specifications and procedures contained in the OPS Manual. The OPS Manual sets forth in detail the mandatory THUSA store operating standards, specifications and procedures, including rules governing areas such as food preparation and handling, cleanliness, health, sanitation, quality and speed of service. In addition to these strict quality, service and cleanliness requirements, the OPS Manual prescribes specified training procedures to ensure that these requirements are met. The OPS Manual is a confidential THUSA document which a franchisee is permitted to have only during the term of the franchise

agreement.

26. THUSA offers a broad range of services to its franchisees in order to monitor and assist a franchisee's compliance with these standards, including regional and local training and instructional programs. This enables THUSA to safeguard the integrity of TIM HORTONS® Store, the TIM HORTONS System and the THUSA Marks.

27. Integral to THUSA's compliance and assistance program are periodic inspections and consultations undertaken by THUSA personnel specially trained to observe and advise in all areas of store operating procedure. Pursuant to THUSA's store visitation process, action plans are issued after a store inspection is conducted. These action plans serve as a training opportunity for the franchisee and as a quality assurance process for THUSA to ensure that critical quality, service and cleanliness standards are being met by the franchisee. Each TIM HORTONS® store franchise agreement confers upon THUSA the right to enter the store premises to perform this vital function.

28. As a result of its substantial expenditures of money and effort in developing and implementing the TIM HORTONS System, THUSA has established a high reputation and a positive image with the public as to the quality of products and services available at TIM HORTONS® stores, which reputation and image have been, and continue to be, valuable assets of THUSA. THUSA strives to maintain that reputation through its careful selection of authorized franchise owners, facilities and locations, and its careful supervision over the manner and quality of its store service.

V. THUSA'S WRITTEN AGREEMENTS WITH DEFENDANTS

29. Company owned and operated a franchised TIM HORTONS® store (the "Store") using THUSA's systems and names, including service marks and trademarks, in accordance with

the terms and conditions of a TIM HORTONS® Franchise Agreement, as amended (the “Franchise Agreement”).

30. The Store’s number, location and commencement date of the Franchise Agreement is set forth below:

Restaurant No.	Restaurant Location	Date of Franchise Agreement	Date of Lease
# 7472	1517 E. Ridge Road Irondequoit, NY 14621	November 2011	December 28, 2011

31. Defendant also leased the premises for the store from THUSA pursuant to a lease agreement (“Lease”).

32. Pursuant to a written guarantee (the “Guarantee”), the Guarantors jointly, severally, absolutely and unconditionally personally guaranteed the payment and performance of each and every obligation of Company under the Franchise Agreement and Lease.

B. Relevant Terms of the Franchise Agreement and Lease

33. Under the terms of the Franchise Agreement, Company is obligated to make payments to THUSA for royalties, advertising and other fees. Specifically, the Franchise Agreement requires Company to pay THUSA a royalty of a certain percentage of weekly gross sales in return for the use of the TIM HORTONS System and the THUSA Marks. Additionally, the Franchise Agreement obligates Company to pay THUSA an amount equal to a certain percentage of Company’s monthly gross sales for the preceding calendar month in return for advertising, sales promotion and public relations expenditures made by THUSA on behalf of the entire TIM HORTONS System. All royalty and advertising payments are required to be made to THUSA in Miami, Florida. The Franchise Agreement provides that the failure to make such payments constitutes an act of default under the Franchise Agreements.

34. Under the terms of the Lease, Company is obligated to make monthly payments to

THUSA's affiliate as rent for the Store premises. Company is also obligated to pay all taxes, assessments, and charges imposed in connection with the ownership, occupancy, or possession of the Store.

35. The Franchise Agreement, Lease and Guarantees (collectively the "Agreements") contain provisions regarding default and establishing the parties' rights and obligations in the event of a default by Defendants thereunder.

36. The relevant terms of the Franchise Agreement provides that Company's failure to comply with any provision of the Franchise Agreement is a default thereunder. The Franchise Agreement further provides that if an act of default occurs and Company fails to cure the default after any required notice and within the cure period applicable, if any, THUSA may, at its option and without prejudice to any other rights or remedies provided for hereunder or by law, terminate the Franchise Agreement.

37. Defendants have breached the Agreements by failing to make payments for royalty, advertising, rent and other amounts due under the Franchise Agreement, Lease and Guarantees.

38. Specifically, by letter dated July 7, 2016, THUSA notified Defendants that they had breached the Agreements by failing to make payment the payments due for the past due charges under the Franchise Agreement, Lease and Guarantees as enumerated therein (the "Notice of Default").

39. The Notice of Default stated that if Defendants failed to pay the amounts past due in full within five (5) days of receipt of the Notice of Default, the Franchise Agreement would terminate upon written confirmation to Defendants.

40. Despite the Notice of Default, Defendants failed to cure the defaults.

41. Accordingly, by letter dated July 13, 2016, THUSA notified Defendants that the Franchise Agreement for the Store terminated effective July 13, 2016 (the Confirmation of Termination”).

VI. TERMINATION

42. Terminated franchisees, such as Defendants, are prohibited from identifying themselves as either a current or former TIM HORTONS® franchisee, from using any of THUSA’s trade secrets, promotional materials, the THUSA Marks, or any mark confusingly similar. Terminated franchisees are further required, upon termination of their TIM HORTONS® Franchise Agreement(s), to immediately make such removals or changes in signs and the building as THUSA shall request so as to effectively distinguish the building and premises from its former appearance and from any other TIM HORTONS® store.

43. In light of these obligations under the Franchise Agreement, Defendants cannot continue to hold themselves out to the public as operating a genuine and authorized TIM HORTONS® Store by continuing to use the THUSA Marks at the Store subsequent to the Franchise Agreement’s termination. In so doing, Defendants are infringing upon the THUSA Marks and breaching their explicit obligations under the Agreements.

44. Additionally, Defendants have not returned their OPS Manuals and other operational manuals to THUSA as required by the Franchise Agreement.

VII. LIKELIHOOD OF CONSUMER CONFUSION AND DECEPTION

45. Despite the termination of the Franchise Agreement, Defendants have not tendered to THUSA or removed all TIM HORTONS® signs, logos, menu boards, posters, translights, uniforms, plates, cups, tray liners and other items bearing the THUSA Marks, name, symbols, or slogans, or which are otherwise identified with TIM HORTONS® Store and are

located at the Store.

46. Defendants' use and display of the THUSA Marks or any items associated with the TIM HORTONS® name, symbols, or slogans at the Store is without THUSA's license or consent, and has caused or is likely to cause mistake, confusion and/or deception in the minds of the public as to source, affiliation and/or sponsorship. Upon seeing the familiar THUSA Marks, through Defendants' unauthorized use thereof, consumers will be deceived into concluding that the products and services sold at the Store are made or supplied by THUSA, are prepared in the prescribed THUSA manner and subject to THUSA's supervision, are sponsored or endorsed by THUSA and bear the THUSA Marks pursuant to THUSA's authority and permission. Such impressions are calculated to and will have a material influence on customers' purchasing decisions, inducing them to patronize the Store in reliance on the goodwill, reputation, and appeal of THUSA.

47. By reason of the foregoing, THUSA has suffered damages, in an amount presently unknown yet substantial. THUSA no longer is the source or sponsor of the Store and does not endorse said Store, or the products and services provided therein, has not authorized Company to use the THUSA Marks to identify the terminated franchise facilities, products, or services and has protested expressly against such use.

48. By virtue of termination of the Store, THUSA is unable to control the nature and quality of the goods and services that Defendants provide at the Store.

49. THUSA will suffer serious, immediate and irreparable harm if Defendants' use of the THUSA Marks is not immediately enjoined. THUSA's goodwill and reputation will suffer drastically by virtue of the public's identification of THUSA with the management and operation of the Store. THUSA exercises strict quality control over every phase in the marketing of TIM

HORTONS® products and services, from specification of ingredients, to the supervision of food preparation and handling, to the maintenance of strict standards as to cleanliness, health, sanitation and quality of service. The carefully nurtured image which THUSA now enjoys will be irretrievably injured by any association with the Store, which is no longer subject to THUSA's control and supervision.

50. Defendants' sale of products and services under the THUSA Marks at the Store poses an immediate threat to the distinct, exclusive image THUSA has created at great expense for its franchisees. TIM HORTONS® stores, services, and products are known by the THUSA Marks which are emblematic of their distinctive source. TIM HORTONS® stores enjoy a special appeal to consumers which will be diluted by the existence of infringing Store with products and services bearing the distinctive THUSA Marks. The intangible, but commercially indispensable, value that the TIM HORTONS® stores now enjoy will be severely undermined by the operation of the Store, which makes unauthorized use of the THUSA Marks.

51. Consumer confusion as to the source or sponsorship of the Store bearing the THUSA Marks will be attended not only by an inevitable loss of product distinctiveness, image, and goodwill, but will also cause a diversion of sales from THUSA. The economic injury to THUSA resulting from such diversion is incalculable and, as such, is an additional source of irreparable harm.

52. THUSA has performed all conditions precedent required of it under the parties' Agreements and as a matter of law.

COUNT I - LANHAM ACT INFRINGEMENT

53. THUSA re-alleges and incorporates Paragraphs 1 through 52 above as if fully set forth herein.

54. Defendants' acts constitute infringements of THUSA's registered trademarks and service marks in violation of Section 32 of the Lanham Act, 15 U.S.C. §1114.

COUNT II - LANHAM ACT FALSE DESIGNATIONS

55. THUSA re-alleges and incorporates Paragraphs 1 through 52 above as if fully set forth herein.

56. Defendants' acts constitute false designations of origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

COUNT III - COMMON LAW TRADEMARK INFRINGEMENT

57. THUSA re-alleges and incorporates Paragraphs 1 through 52 above as if fully set forth herein.

58. Defendants' acts constitute unlawful trademark and service mark infringements under the common law.

COUNT IV - COMMON LAW UNFAIR COMPETITION

59. THUSA re-alleges and incorporates Paragraphs 1 through 52 above as if fully set forth herein.

60. Defendants' acts constitute unfair competition under the common law.

COUNT V - BREACH OF FRANCHISE AGREEMENT

61. THUSA re-alleges and incorporates Paragraphs 1 through 52 above as if fully set forth herein.

62. Company has not paid when due amounts owed to THUSA under the Franchise Agreement for royalties, advertising and other amounts.

63. THUSA has made demand for payment of these past due receivables.

64. The failure of Company to pay THUSA as obligated is a breach of the Franchise

Agreement.

65. This breach has directly and proximately caused loss and damage to THUSA.

66. Likewise, the failure of Company to cease operating the Store as a TIM HORTONS® Store effective July 13, 2016 constitutes a breach of the Franchise Agreement and this breach has directly and proximately caused loss and damage to THUSA.

COUNT VII - BREACH OF GUARANTEE

67. THUSA re-alleges and incorporates Paragraphs 1 through 52, and 62 through 66 above as if fully set forth herein.

68. Company failed to pay amounts due to THUSA under the Franchise Agreement.

69. Pursuant to the Guarantee, Guarantors jointly, severally, irrevocably and unconditionally guaranteed the payment and performance of, inter alia, all obligations and liabilities of Company to THUSA should Company fail to perform such obligations.

70. The failure of Guarantors to pay amounts due to THUSA under the Franchise Agreement constitutes a breach of the Guarantee.

71. Additionally, Guarantors' operation of the Store after termination of the Franchise Agreement also is a breach of the Guarantee.

72. These breaches have directly and proximately caused loss and damage to BKC.

DEMAND FOR ATTORNEYS' FEES AND COSTS

The written agreements at issue in this litigation provide that the prevailing party is entitled to its attorneys' fees and costs. THUSA hereby demands that it be reimbursed by Defendants for all costs and expenses (including attorneys' fees) relating to prosecution of this action.

WHEREFORE, Tim Hortons USA Inc. demands judgment against Panagg Café

Incorporated, Gurvinder Singh, Ashna Walia and Adarsh Walia for:

1. Preliminary and permanent injunctions enjoining Defendants and all persons acting on their behalf, in concert with, or under their control, from:

(a) manufacturing, packaging, distributing, selling, advertising, displaying, or promoting any product or service bearing any of the THUSA Marks, or any colorable imitation thereof at the Store;

(b) displaying or using any of the THUSA Marks to advertise or promote the sale of, or to identify, the Store, or any product or service provided therein; and

(c) making in any manner whatsoever any statement or representation, or performing any act, likely to lead members of the public to believe that Defendants, the Store, and the products and services provided therein, are in any manner, directly or indirectly, associated, affiliated, or connected with, or licensed, sponsored, authorized, or approved by Tim Hortons USA Inc.

2. Preliminary and permanent injunctions directing Defendants and all persons acting on Defendants' behalf, in concert with Defendants, or under Defendants' control, to:

(a) recall and deliver up to Tim Hortons USA Inc. all signs, banners, labeling, packaging, advertising, promotional, display and point-of-purchase materials which bear, or make reference to, any of the THUSA Marks, or any colorable imitation of the THUSA Marks;

(b) recall and deliver up to Tim Hortons USA Inc. on all copies and editions of the OPS Manuals that are in their actual or constructive, direct or indirect, possession, custody or control, including all supplements and addenda thereto and all other materials containing restaurant operating instructions, restaurant business practices, or plans of Tim Hortons USA Inc.;

(c) allow Tim Hortons USA Inc., at a reasonable time, to enter the premises of the Store and make whatever changes, including removal of tangible assets, that are necessary to distinguish the premises from their appearance as a TIM HORTONS® Store, and;

(d) account and pay over to Tim Hortons USA Inc. all gains, profits, and advantages derived by Defendants from any trademark and service mark infringement, breach of contract, and unfair competition to the full extent provided for by Section 35 of the Lanham Act, 15 U.S.C. §1117 and by the controlling principles of common law.

3. Money damages, plus three times additional actual damages Tim Hortons USA Inc. has sustained by reason of Defendants' trademark and service mark infringement and unfair competition, pursuant to Section 35 of the Lanham Act, 15 U.S.C. §1117;

4. Punitive damages because of the willful nature of Defendants' actions;

5. Pre-judgment interest and Tim Hortons USA Inc.'s reasonable attorneys' fees incurred in protecting its rights in this action in accordance with the terms of the Franchise Agreement, and because of the willful nature of the infringement, pursuant to Section 35 of the Lanham Act, 15 U.S.C. §1117;

6. An order enjoining Defendants from operating a competing business, as defined in the respective Franchise Agreement, within a two-mile radius of the Store or any TIM HORTONS® store for a one-year period;

7. Compensatory damages, attorneys' fees and costs against Defendants due to their breaches of contracts;

8. An order directing Defendants to file with the Court, and to serve on Tim Hortons USA Inc.'s counsel within ten days after service of any injunction or order issued herein, or within such a reasonable time as the Court shall direct, a report, in writing and under oath, setting

forth in detail the manner in which Defendants have complied with such injunction or order;

9. All costs, disbursements, and expenses of this action; and

10. All such other relief as this Court may deem just and proper.

Dated: July 13, 2016.
Miami, Florida

Respectfully submitted,

s./ Michael D. Joblove

Michael D. Joblove
Florida Bar No.: 354147
mjoblove@gjb-law.com
Jessica Serell Erenbaum, Esq.
Florida Bar No. 816000
jerenbaum@gjb-law.com
GENOVESE JOBLOVE & BATTISTA, P.A.
Miami Tower, 44th Floor
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 349-2300
Facsimile: (305) 349-2310
Attorneys for Tim Hortons USA Inc.

11515-002#2