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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT SEATTLE

10 SHERRILL MILLER, a Washington  
11 individual, RICHARD HIGGINBOTHAM, a  
12 Washington individual, collectively d/b/a E.B.  
13 FOOTE WINERY,

12 Plaintiffs,

13 v.

14 DEAN L. FOOTE, II, a California individual,  
15 CHRISTINE FOOTE, a California individual,  
16 collectively d/b/a FOOTE PRINT WINERY,

16 Defendants.

Case No.:

COMPLAINT

DEMAND FOR JURY TRIAL

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18 Plaintiffs Sherrill Miller, Richard Higginbotham, collectively d/b/a E.B. Foote Winery  
19 (collectively, “E.B. Foote Winery” or “Plaintiffs”), for their Complaint, allege as follows, upon  
20 knowledge with respect to themselves and their own acts and upon information and belief with  
21 respect to all other matters:

22 **I. NATURE OF PROCEEDINGS**

23 1. E.B. Foote Winery is one of the oldest wineries in Washington State. Plaintiffs own a  
24 federal trademark registration for and common law rights in the trademarks E.B. FOOTE and  
25 E.B. FOOTE WINERY, and a related Design mark (the “E.B. FOOTE Marks”). Plaintiffs bring  
26 this action at law and in equity to remedy acts of, *inter alia*, federal trademark infringement,  
27 federal unfair competition and misappropriation, common law unfair competition and

1 misappropriation, and common law trademark infringement, all caused by Defendants' use of the  
2 name "Foote Print Winery" for their competing and identical services, in this judicial district and  
3 throughout the United States, and other activities knowingly, willfully and intentionally  
4 undertaken by Defendants for the purpose of usurping the value and goodwill embodied by the  
5 E.B. FOOTE Marks and disrupting E.B. Foote Winery's business.

## 6 **II. PARTIES**

7 2. E.B. Foote Winery is a Washington sole proprietorship with its principal place of  
8 business at 224 SW 153rd Street, PMB 181, Burien, Washington 98166. E.B. Foote Winery is  
9 owned and operated by Sherrill Miller and Richard Higginbotham, a married couple, both  
10 residing in Burien, Washington.

11 3. Upon information and belief, Defendant Foote Print Winery, is a California sole  
12 proprietorship with its principal place of business at 36650 Glen Oaks Road, Temecula,  
13 California 92592. Also upon information and belief, Foote Print Winery is owned and operated  
14 by Christine Foote and Dean L. Foote, II, both residing in Temecula, California. Foote Print  
15 Winery, Christine Foote and Dean Foote are referred to collectively herein as "Foote Print  
16 Winery" or "Defendants."

## 17 **III. JURISDICTION AND VENUE**

18 4. This is a civil action for federal trademark infringement, federal unfair competition  
19 and misappropriation, common law unfair competition and misappropriation, and arises under  
20 the federal Lanham Act, 15 U.S.C. § 1051 *et seq.*, and Washington State common law.

21 5. This Court has jurisdiction over the subject matter of this complaint pursuant to  
22 28 U.S.C. § 1338(a) and (b) because the complaint involves claims for federal trademark  
23 infringement and unfair competition under the federal Lanham Act, 15 U.S.C. § 1051 *et seq.*

24 6. This Court has supplemental jurisdiction over the Washington State claims for  
25 common law unfair competition and misappropriation, under 28 U.S.C. § 1367.

26 7. This Court has jurisdiction over the Defendants pursuant to RCW 4.28.185, as  
27 Defendants have transacted business in this state, and this action concerns the ownership, use and

1 possession of property situated in this state.

2 8. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) & (c) and § 1400(a) as  
3 a substantial part of the events giving rise to Plaintiffs' claims occurred in this district, a  
4 substantial part of the injury to the property and rights of Plaintiffs that is the subject of this  
5 action occurred in this district and Defendants do business within this district.

#### 6 **IV. FACTS**

##### 7 **E.B. Foote Winery and Its Business**

8 9. Plaintiff E.B. Foote Winery is one of Washington State's oldest wineries, having been  
9 founded in 1978 by Eugene Foote. E.B. Foote Winery has operated continuously since then  
10 under the same name. Sherrill Miller and Richard Higginbotham have owned and operated E.B.  
11 Foote Winery since 1991.

12 10. E.B. Foote Winery markets, distributes, and sells its wines nationwide, including in  
13 the State of California. Over the years, E.B. Foote Winery has invested substantial resources in  
14 advertising and marketing its wines, including without limitation by participating in and entering  
15 its wines in many national wine competitions.

16 11. Over its nearly thirty years of wine production, E.B. Foote Winery has received  
17 awards and recognition from many regional and national publications, competitions and festivals  
18 including *Wine Spectator*, *Wine Enthusiast*, *Northwest Wine Press*, the Northwest Wine Summit,  
19 the Monterey Wine Competition, the Riverside International Wine Competition, the Los Angeles  
20 County Fair, the San Diego National Wine Competition, the National Women's Wine  
21 Competition, the San Francisco Chronicle Wine Competition, the West Coast Wine Competition,  
22 the San Francisco International Wine Competition and others. As this list demonstrates, E.B.  
23 Foote Winery and its products have received abundant national recognition, including in  
24 California.

25 12. As a result of this widespread distribution and recognition, E.B. Foote Winery is  
26 known to consumers as a source of high-quality wines. This goodwill is embodied in the E.B.  
27 FOOTE Marks.

1 13. E.B. Foote Winery's spelling of the word "Foote" with a final "e" is not a common  
2 word.

3 14. Ms. Miller and Mr. Higginbotham own United States trademark Registration  
4 No. 3,057,473 for the mark E.B. FOOTE for use in connection with *wine* in International Class  
5 033. E.B. Foote Winery first used this mark in connection with the specified goods on October  
6 31, 1978, and said registration issued on February 7, 2006.

7 15. Ms. Miller and Mr. Higginbotham also own United States trademark Registration  
8 No. 3,029,066 for the Design mark depicted below, for use in connection with *wine* in  
9 International Class 33. E.B. Foote Winery first used this mark in connection with the specified  
10 goods at least as early as May 1995, and said registration issued on December 13, 2005.



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14 16. Copies of federal trademark Registrations Nos. 3,057,473 and 3,029,066 are attached  
15 hereto as Exhibit 1.

16 17. Plaintiffs own and operate an internet website at and through the domain name and  
17 address <ebfootewinery.com>, which website is accessible throughout the United States,  
18 including to internet users located in California.

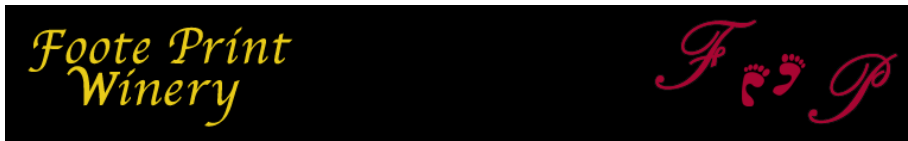
19 **Defendants and Their Businesses**

20 18. Upon information and belief, Defendant Foote Print Winery is a California sole  
21 proprietorship, owned and operated by Christine and Dean Foote, that produces, distributes and  
22 sells wine.

23 19. Foote Print Winery has adopted and is using the designation "Foote Print Winery" in  
24 interstate commerce in connection with its wines. The designation "Foote Print Winery"  
25 includes the same uncommon spelling of the word "Foote" with a final "e" that Plaintiff E.B.  
26 Foote Winery has been using as a trademark since 1978.

27 20. Foote Print Winery also has adopted and is using a design mark that incorporates a

1 script “F” and “P” (the “script design mark”), as depicted below and on Exhibit 2 hereto.



4 21. Foote Print Winery directly competes with E.B. Foote Winery, as both parties provide  
5 identical goods and services, namely wines and wine production.

6 22. Upon information and belief, Defendants first used the designation Foote Print  
7 Winery and the script design mark no earlier than late 2004 or early 2005.

8 23. Defendants sell wines under the Foote Print Winery designation in interstate  
9 commerce. Defendants operate an Internet website at and through the domain name and address  
10 <footeprintwinery.com>, which website is accessible throughout the United States, including to  
11 internet users located in Washington. Defendants’ website includes an “Online Store” from  
12 which it is possible to order Defendants’ wines for shipment to customers both in California and  
13 in other states, including Washington State. Attached hereto as Exhibit 2 are true and correct  
14 copies of excerpts from Defendants’ website. Attached hereto as Exhibit 3 is a true and correct  
15 copy of a screen shot from the “Online Store” portion of Defendants’ website, listing the states,  
16 including Washington State, to which Defendants will ship Foote Print Winery’s wines.

17 **Plaintiffs’ Prior Requests that Defendants Cease Their Unlawful Activities**

18 24. Given the close similarities between Plaintiffs’ E.B. Foote Marks and the Foote Print  
19 Winery designation and script design mark used by the Defendants on and in connection with  
20 their directly competing products, confusion is likely to occur among consumers.

21 25. When Plaintiffs became aware of Defendants’ use of the Foote Print Winery  
22 designation, Plaintiffs contacted Defendants to alert Defendants as to the likely confusion among  
23 the parties’ respective marks, and to request that Defendants transition to another mark.  
24 However, notwithstanding numerous efforts by Plaintiffs and their counsel to contact Defendants  
25 and their counsel, Defendants have refused to comply with Plaintiffs’ request.

26 26. Defendants’ infringing activities continue unabated. Plaintiffs have been left with no  
27 choice but to institute the instant action seeking judicial protection of their rights.

1 **CLAIM I**  
2 **FEDERAL TRADEMARK INFRINGEMENT (15 U.S.C. § 1114)**

3 27. Plaintiffs reallege and incorporate by reference the allegations contained in  
4 paragraphs 1 through 26 as if fully set forth herein.

5 28. The United States Patent and Trademark Office has granted Plaintiffs Miller and  
6 Higginbotham federal trademark registrations No. 3,057,473 for the mark E.B. FOOTE and  
7 No. 3,029,066 for Plaintiffs' Design mark, both for use in connection with *wine* in International  
8 Class 033.

9 29. Plaintiffs use the E.B. FOOTE Marks as a designation of source and quality for  
10 their goods.

11 30. Defendants' use in interstate commerce of the mark "Foote Print Winery" and of  
12 Defendants' script design mark is likely to cause confusion, to cause mistake or to deceive  
13 consumers and therefore infringes Plaintiffs' rights in the registered trademarks identified above  
14 in violation of 15 U.S.C. § 1114(1). Plaintiffs are informed and believe and thereupon allege that  
15 Defendants have continued to use the "Foote Print Winery" mark and script design mark with  
16 full knowledge of Plaintiffs' prior rights in the E.B. FOOTE Marks.

17 31. Foote Print Winery's acts of trademark infringement have caused Plaintiffs to  
18 sustain monetary damage, loss and injury, in an amount to be determined at the time of trial.

19 32. Foote Print Winery has engaged in and continues to engage in these activities  
20 knowingly, willfully and deliberately, so as to justify the assessment of enhanced damages  
21 against it, in an amount to be determined at the time of trial.

22 33. Foote Print Winery's acts of trademark infringement, unless enjoined by this  
23 Court, will continue to cause irreparable damage, loss and injury to Plaintiffs, for which  
24 Plaintiffs have no adequate remedy at law.

1 **CLAIM II**  
2 **FEDERAL UNFAIR COMPETITION (15 U.S.C. § 1125(a))**

3 34. Plaintiffs reallege and incorporate by reference the allegations contained in  
4 paragraphs 1 through 33 as if fully set forth herein.

5 35. The acts of Defendants alleged herein are likely to cause confusion, cause  
6 mistake, or to deceive as to the affiliation, connection, or association of Defendants with E.B.  
7 Foote Winery, or as to the sponsorship or approval of Defendants' goods or commercial  
8 activities by E.B. Foote Winery.

9 36. Defendants' acts have caused and will continue to cause Plaintiffs to sustain  
10 damage, loss and injury, in an amount that cannot be fully measured or compensated in  
11 economic terms. The actions of Defendants have damaged, and will continue to damage, the  
12 business, market, reputation, and goodwill of Plaintiffs, and may prevent current and potential  
13 customers from doing business with Plaintiffs.

14 37. Foote Print Winery has engaged in and continues to engage in these activities  
15 knowingly, willfully and deliberately, so as to justify the assessment of enhanced damages  
16 against it, in an amount to be determined at the time of trial.

17 38. Foote Print Winery's acts of unfair competition, unless enjoined by this Court,  
18 will continue to cause E.B. Foote Winery to sustain irreparable damage, loss and injury, for  
19 which Plaintiffs have no adequate remedy at law.

20 **CLAIM III**  
21 **COMMON LAW UNFAIR COMPETITION AND MISAPPROPRIATION**

22 39. Plaintiffs reallege and incorporate by reference the allegations contained in  
23 paragraphs 1 through 38 as if fully set forth herein.

24 40. Foote Print Winery's acts as alleged herein constitute unfair competition with  
25 E.B. Foote Winery by creating a likelihood of confusion as to the source or sponsorship of the  
26 products sold by the Defendants; misappropriating the Plaintiffs' unique reputation and goodwill  
27 that is embodied in the Plaintiffs' E.B. FOOTE Marks, and diverting from the Plaintiffs the

1 benefits associated with that unique reputation and goodwill.

2 41. Foote Print Winery's acts have caused E.B. Foote Winery to sustain monetary  
3 damage, loss and injury, in an amount to be determined at the time of trial.

4 42. Foote Print Winery has engaged and continues to engage in these activities  
5 knowingly, willfully and deliberately.

6 43. Foote Print Winery's acts of common law unfair competition and misappropriation,  
7 unless enjoined by this Court, will continue to cause Plaintiffs to sustain irreparable damage, loss  
8 and injury, for which Plaintiffs have no adequate remedy at law.

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10 **CLAIM IV**  
**COMMON LAW TRADEMARK INFRINGEMENT**

11 44. Plaintiffs reallege and incorporate by reference herein the allegations contained in  
12 paragraphs 1 through 43 as if fully set forth herein.

13 45. Plaintiffs own the E.B. FOOTE Marks. Plaintiffs have used the marks E.B.  
14 FOOTE and E.B. FOOTE WINERY continuously in commerce since 1978, and the Design Mark  
15 since 1995.

16 46. Plaintiffs' first use of the E.B. FOOTE Marks was long prior to the Defendants'  
17 adoption of the Foote Print Winery designation and the Defendants' script design mark.

18 47. Defendants' activities have caused and are likely to continue to cause confusion  
19 between the Defendants and/or their products and Plaintiffs and/or their products, and such  
20 unlawful activities infringe the valuable common law trademark and other rights of Plaintiffs in  
21 the E.B. FOOTE Marks.

22 48. The acts and conduct of the Defendants, as alleged herein, constitute infringement  
23 of Plaintiffs' common law rights in the E.B. FOOTE Marks, and an effort to misappropriate the  
24 goodwill and value embodied in Plaintiffs' trademarks.

25 49. The Defendants' acts have caused Plaintiffs to sustain monetary damage, loss and  
26 injury, in an amount to be determined at the time of trial.  
27



1 50. The Defendants have engaged and continue to engage in these activities  
2 knowingly, willfully and deliberately.

3 51. The Defendants' acts, unless enjoined by this Court, will continue to cause  
4 Plaintiffs to sustain irreparable damage, loss and injury, for which Plaintiffs have no adequate  
5 remedy at law.

6 **V. PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs request entry of a judgment and Order in their favor and  
8 against Defendants on all claims as follows:

9 A. For a permanent injunction against the Defendants and each of their owners,  
10 proprietors, officers, agents, servants, employees and attorneys, and those persons acting in  
11 concert or participation with them who receive actual notice of the Order by personal service or  
12 otherwise:

13 1. Using on or in connection with the production, manufacture, advertising,  
14 promotion, displaying for sale, offering for sale, sales or distribution of any products or services,  
15 or for any commercial purposes whatsoever, including without limitation on or in connection  
16 with any internet website or domain name, the designation "Foote Print Winery" or any other  
17 designation incorporating the word "Foote", the script design mark, or any colorable imitations  
18 thereof or any other designation confusingly similar to Plaintiffs' E.B. FOOTE Marks;

19 2. Representing by any means whatsoever, directly or indirectly, or doing any other  
20 acts or things calculated or likely to cause confusion, mistake or to deceive consumers into  
21 believing that the Defendants' services or products are the services or products of Plaintiffs, or  
22 that there is any affiliation or connection between Plaintiffs or their services and goods and  
23 Defendants or their services and products and from otherwise unfairly competing with Plaintiffs.

24 B. That Defendants be required to recall from any and all channels of trade any and  
25 all advertising or promotional materials or other infringing matter.

26 C. Restraining the Defendants from inducing, encouraging, instigating, aiding,  
27 abetting or contributing to any of the aforesaid acts.

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D. That the Defendants file with the Court and serve on counsel for Plaintiffs within thirty (30) days after service on the Defendants of such Order, or within such extended period as this Court may direct, a report in writing and under oath, setting forth in detail the manner and form in which the Defendants have complied with the Order and injunction.

E. For an award against the Defendants, jointly, severally, and personally, of the Defendants' profits and Plaintiffs' damages resulting from the Defendants' unlawful acts set forth herein, in an amount to be proven at the time of trial, together with legal interest from the date of accrual thereof.

F. For an award of treble damages pursuant to 15 U.S.C. § 1117.

G. That Plaintiffs be awarded the costs of this civil action, together with Plaintiffs' attorneys' fees, pursuant to 15 U.S.C. § 1117, and the equity powers of the Court.

H. That Plaintiffs be awarded such other and further relief as the Court may deem equitable and proper.

1 **JURY DEMAND**

2 Plaintiffs request a jury trial on all issues so triable.

3 DATED this 8th day of February, 2008.

4 STOKES LAWRENCE, P.S.

5  
6 By: /s/ Shannon M. Jost

7 Shannon M. Jost (WSBA #32511)  
8 Attorneys for Plaintiffs  
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