

FILED

STATE OF INDIANA) HAMILTON COUNTY SUPERIOR COURT

2006 JUN 28 AM 9:17
SS: CLERK, HAMILTON COUNTY COURTS
James B. ...

ROOM NO. —

COUNTY OF HAMILTON) CAUSE NUMBER:

29 D 0 1 0 6 0 . 6 PL 614

HEINEKEN USA, INC.)

Plaintiff,)

v.)

GONZALES ENTERPRISES, INC.)

D/B/A FIFTH SUN;)

HUB DISTRIBUTING, INC. D/B/A ANCHOR BLUE;)

RAZZ, INC. and)

MAUI NIX, INC.,)

Defendants.)

24 / 284

h

COMPLAINT

For this Complaint against Gonzales Enterprises d/b/a Fifth Sun (“Fifth Sun”); Hub Distributing, Inc. d/b/a Anchor Blue (“Anchor Blue”); Razz, Inc. (“Razz”); and Maui Nix, Inc. (“Maui Nix”), collectively referred to as “Defendants”, Plaintiff, Heineken USA, Inc. (“Heineken”) hereby alleges as follows:

SUBSTANCE OF THE ACTION

1. This case involves infringement upon the distinctive and world-famous Heineken trademarks used by Heineken in connection with the sale and promotion of its products. Defendants’ infringement arises out of the unauthorized use of the Heineken trademarks on clothing items bearing the Heineken marks (infringing items”).
2. Defendants’ use of the Heineken marks on the infringing items violates Heineken’s rights under federal trademark law, common law and Indiana state law. Heineken asserts claims for federal trademark infringement, federal trademark dilution, false designation

of origin or sponsorship, false advertising, and trade dress infringement pursuant to the Lanham Act, as well as common law trademark infringement, unfair competition, conversion, forgery, counterfeiting, and deception. Heineken seeks a permanent injunction preventing Defendants from using the distinctive Heineken trademarks, along with an award of damages, treble damages, profits, attorney's fees and costs.

THE PARTIES

3. Heineken is a company organized and existing under the laws of the state of New York.
4. Defendant Gonzales Enterprises, Inc. is a business organized and existing under the laws of California. Gonzales Enterprises operates and does business under the name Fifth Sun. Gonzales Enterprises may be served through its registered agent, Daniel T. Gonzales, 1262 Humboldt Avenue, Chico, CA 95928.
5. Defendant Hub Distributing, Inc. is a business organized and existing under the laws of California. Hub Distributing operates and does business under the name Anchor Blue. Hub Distributing may be served through its registered agent, CT Corporation System, 818 West Seventh Street, Los Angeles, CA 90017.
6. Upon information and belief, Defendant Razz, Inc. is a company organized and existing under the laws of the state of Minnesota. Defendant's business address is 256 North Garden, Bloomington, MN 55421. Upon information and belief, Razz, Inc. does not have a registered agent, but can be served through its business manager, Mary Brown.
7. Defendant Maui Nix, Inc. is a company organized and existing under the laws of the state of Florida. Maui Nix may be served through its registered agent, Karamitas Mauinix, 635 N. Atlantic Avenue, Daytona Beach, FL 32118.

JURISDICTION AND VENUE

8. This Court has original jurisdiction over this action pursuant to Ind. Code § 33-28-1-2 and Ind. Code § 33-33-29-7.
9. Defendant Fifth Sun has submitted to this Court's jurisdiction by doing business in the state of Indiana.
10. Defendant Fifth Sun has further submitted to this Court's jurisdiction by shipping items into Indiana.
11. Defendants Anchor Blue and Maui Nix are subject to jurisdiction in this state by advertising and offering items for sale in Indiana via their internet websites.
12. Defendant Fifth Sun manufactured and sold the infringing items to Defendants Anchor Blue, Maui Nix, and Razz. As such, all parties have been joined in this action as necessary for just adjudication.
13. All Defendants have been joined in this action as a result of the common question of law and/or fact presented in this Complaint.
14. Venue properly lies in this Court because a substantial part of the events giving rise to the claims alleged herein arose in Hamilton County, Indiana.

GENERAL ALLEGATIONS AS TO HEINEKEN

Heineken's Trademark Rights

15. Heineken owns and manages one of the world's leading portfolios of beer brands. Relative to this business, Heineken is the exclusive owner of multiple federally registered trademarks. These registrations are active and unrevoked, and constitute *prima facie* evidence of Heineken's ownership of the marks. These trademarks are collectively

referred to herein as the “Heineken trademarks” or the “Heineken marks.”

16. The Heineken trademarks are distinctive and famous.
17. Heineken is engaged in the sale and/or licensing of promotional items bearing the Heineken trademarks in Indiana and elsewhere.
18. Heineken maintains strict control over the quality and nature of its products and items bearing the Heineken trademarks.
19. Heineken has invested considerable time and money in advertising the Heineken trademarks throughout Indiana and elsewhere. As a result of extensive worldwide advertising, the Heineken marks are immediately recognizable.
20. Heineken has acquired substantial goodwill among consumers.
21. As a result of such goodwill and immediate recognition, and as a result of extensive advertising, the Heineken trademarks have become highly valuable.

Defendant’s Infringement of Heineken’s Trademark Rights

22. Subsequent to Heineken’s development, use and registration of the Heineken trademarks, Defendants began using the Heineken marks or confusingly similar variations of the marks.
23. Defendants have manufactured, produced, advertised and/or sold clothing items bearing the Heineken trademarks.
24. Defendants have not received permission from Heineken, or anyone acting on Heineken’s behalf, to manufacture, produce, advertise or sell any item bearing the Heineken trademarks.
25. By manufacturing, producing, advertising and/or selling items bearing the Heineken marks without permission, Defendants have attempted to profit from and capitalize on the

trademark rights and substantial goodwill developed by Heineken.

26. Defendants have willfully and intentionally manufactured, produced, advertised and/or sold products bearing the Heineken trademarks with knowledge that the Heineken marks are federally registered trademarks owned by Heineken.
27. Defendants manufactured, produced, advertised and/or sold items bearing the Heineken marks with knowledge that Defendants' use of the Heineken trademarks was unauthorized.
28. The manufacture, production, advertisement, and/or sale of items bearing the Heineken trademarks created a likelihood of consumer confusion.
29. Defendants used the Heineken marks with the intent to confuse and/or deceive consumers.

COUNT I
FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114

30. Heineken incorporates herein by reference the allegations contained in all previous paragraphs of this Complaint.
31. Defendants have used in commerce, and in connection with the sale of goods, a reproduction, counterfeit, copy or colorable imitation of the Heineken trademarks.
32. Defendants have reproduced, counterfeited, copied or imitated the Heineken marks and applied the marks to labels, signs, prints, packages, receptacles or advertisements intended to be used in commerce.
33. Defendants' use of the Heineken trademarks creates the likelihood of confusion, mistake and/or deception among consumers.
34. Defendants willfully infringed on the trademark rights of Heineken. Defendants intended to confuse, mistake or deceive consumers.

35. Defendants used the reproductions of the Heineken trademarks with knowledge that the marks were copies and/or counterfeits.
36. Consumers were initially interested and lured to the infringing items by the similarity to the Heineken marks.
37. As a result of Defendants' infringement, Heineken has suffered irreparable harm to valuable Heineken trademarks. Unless Defendants are permanently enjoined from further infringement, Heineken will continue to suffer irreparable harm.
38. A permanent injunction is necessary to prevent Defendants from further interference with Heineken's trademark rights.
39. As a result of Defendants' infringement under 15 U.S.C. § 1114, Heineken has been injured and is entitled to damages, including but not limited to, Defendants' profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT II
TRADEMARK DILUTION UNDER 15 U.S.C. § 1125(c)

40. Heineken incorporates by reference the allegations contained in all previous paragraphs of this Complaint.
41. The Heineken trademarks are the product of creativity and imagination.
42. The Heineken trademarks are distinctive and famous.
43. Defendants adopted the Heineken trademarks after the marks became famous.
44. Defendants' use of the Heineken trademarks caused dilution of the marks.
45. Defendants' use of the Heineken trademarks is commercial and in commerce.
46. Defendants' use of the Heineken trademarks has weakened the unique association of the marks with Heineken, as owner of the marks.

47. Defendants used the marks in a way that creates an undesirable, unwholesome, or unsavory mental association with Heineken's trademarks.
48. As a result of Defendants' dilution under 15 U.S.C. § 1125(c), Heineken has suffered irreparable harm to valuable Heineken trademarks. Unless Defendants are permanently enjoined from further dilution, Heineken will continue to suffer irreparable harm.
49. A permanent injunction is necessary to prevent Defendants from further interference with Heineken's trademark rights.
50. Defendants' dilution of the Heineken marks has caused Heineken damages, including, but not limited to, Defendants' profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT III
FALSE DESIGNATION OF ORIGIN OR SPONSORSHIP,
FALSE ADVERTISING AND
TRADE DRESS INFRINGEMENT UNDER 15 U.S.C. § 1125(a)

51. Heineken incorporates by reference the allegations contained in all previous paragraphs of this Complaint.
52. Defendants used the Heineken trademarks in commerce and in connection with the sale of goods or services.
53. Defendants use of the Heineken marks is likely to cause confusion or mistake and/or is likely to deceive consumers as to the affiliation, connection or association of Defendants with Heineken; or as to the origin, sponsorship, or approval of Defendants' goods by Heineken.
54. Defendants' conduct constitutes false or misleading descriptions, false advertising, and false designations of the origin and/or sponsorship of Defendants' goods and constitutes trade dress infringement in violation of § 43(a) of the Lanham Act, as amended, 15

U.S.C. § 1125(a).

55. As a result of Defendants' conduct, Heineken has suffered irreparable harm to valuable Heineken trademarks. Unless Defendants are permanently enjoined from further false designations, false advertisement and trade dress infringement, Heineken will continue to suffer irreparable harm.
56. A permanent injunction is necessary to prevent Defendants from further interference with Heineken's trademark rights.
57. Defendants' violations of 15 U.S.C. §1125(a) have caused Heineken to incur damages, including, but not limited to, Defendants' profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT IV
COMMON LAW TRADEMARK INFRINGEMENT

58. Heineken incorporates by reference the allegations contained in all previous paragraphs of this Complaint.
59. Heineken was the first to use the Heineken trademarks or any marks similar thereto in association with the sale of any product or service. As a result of the continued sale by Heineken, the marks have become internationally known and Heineken has become identified in the public mind as the manufacturer and/or licensor of the products and services to which the Heineken trademarks are applied.
60. Heineken has acquired a reputation among consumers for quality and excellence, and the Heineken trademarks have come to symbolize that reputation.
61. Defendants, with knowledge of and with intentional disregard for the rights of Heineken, manufactured, produced, advertised and/or sold items using the Heineken marks or confusingly similar imitations thereof.

62. Defendants' use of the Heineken marks has created the likelihood of confusion among consumers.
63. Defendants' acts constitute trademark infringement and willful infringement under the common law.
64. As a result of Defendants' conduct, Heineken has suffered irreparable harm to valuable Heineken trademarks. Unless Defendants are permanently enjoined from further infringement, Heineken will continue to suffer irreparable harm.
65. A permanent injunction is necessary to prevent Defendants from further interference with Heineken's trademark rights.
66. As a result of Defendants' infringement, Heineken has suffered damages, including, but not limited to, Defendants' profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT V
UNFAIR COMPETITION

67. Heineken incorporates by reference the allegations contained in all previous paragraphs of this Complaint.
68. Defendants' unlawful and unauthorized use of the Heineken trademarks constitutes unfair competition with Heineken.
69. Defendants' conduct creates consumer confusion as to the source and/or origin of the infringing items.
70. Defendants' use of the Heineken trademarks is an attempt to interfere with Heineken's business relationship with its consumers and to trade on Heineken's goodwill.
71. As a result of Defendants' conduct, Heineken has suffered irreparable harm to valuable Heineken trademarks. Unless Defendants are permanently enjoined from further unfair

competition, Heineken will continue to suffer irreparable harm.

72. A permanent injunction is necessary to prevent Defendants from further interference with Heineken's trademark rights.

73. Defendants' unfair competition has caused Heineken to incur damages, including but not limited to, Defendants' profits from the sale of the infringing products, actual damages, costs of suit and attorney's fees.

COUNT VI
CONVERSION UNDER IND. CODE § 35-43-4-3

74. Heineken incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

75. Defendants knowingly or intentionally exerted unauthorized control over the property of Heineken.

76. Defendants sold items bearing Heineken intellectual property without Heineken's consent and in a manner or to an extent other than that to which Heineken had consented.

77. Defendants knowingly or intentionally exerted unauthorized control over the goodwill developed by Heineken.

78. As a result of Defendants' conversion, Heineken was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

COUNT VII
FORGERY UNDER IND. CODE § 35-43-5-2(b)

79. Heineken incorporates by reference the allegations contained in the previous paragraphs of this Complaint.

80. Defendants, with the intent to defraud, made, uttered, and/or possessed a written

instrument in such a manner that it purports to have been made by Heineken.

81. Heineken did not give Defendants the authority to make or possess the infringing items.

82. As a result of Defendants' forgery, Heineken was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

COUNT VIII
COUNTERFEITING UNDER IND. CODE § 35-43-5-2(a)

83. Heineken incorporates herein by reference the allegations contained in all previous paragraphs of this Complaint.

84. Defendants knowingly or intentionally made and/or uttered a written instrument in such a manner that it purports to have been made by Heineken.

85. Heineken did not give Defendants the authority to make or utter the infringing items.

86. As a result of Defendants' counterfeiting, Heineken was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

COUNT IX
DECEPTION UNDER IND. CODE § 35-43-5-3

87. Heineken incorporates herein by reference the allegations contained in all previous paragraphs of this Complaint.

88. Defendants knowingly or intentionally made a false or misleading written statement with the intent to obtain property.

89. Defendants, with the intent to defraud, misrepresented the identity or quality of property.

90. As a result of Defendants' deception, Heineken was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime

Victim's Act, Ind. Code § 34-24-3-1.

PRAYER FOR RELIEF

WHEREFORE, Heineken prays for relief against the Defendants as follows:

- a. That Defendants, their officers, partners, agents, servants, affiliates, employees, attorneys, and representatives, and all those in privity or acting in consent or participation with Defendants, and each and all of them, be permanently enjoined from:
 - (i) Imitating, copying, reproducing, or using, in any manner, the Heineken trademarks, or any other mark confusingly similar to the Heineken trademarks;
 - (ii) Committing any act that dilutes or is likely to dilute the distinctiveness of the Heineken trademarks;
 - (iii) Committing any act that is likely to create the impression that Defendants' business or products are in any way sponsored by, approved of or otherwise affiliated or connected with Heineken;
 - (iv) Importing, manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product or service using any simulation, reproduction, counterfeit, copy or imitation of any Heineken trademark or trade dress; and
 - (v) instructing, assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (i) through (iv) above.
- b. That Defendants be required to:

- (i) Deliver to Heineken for destruction all goods and materials bearing Heineken trademarks which Defendants have in their possession;
- (ii) Recall and deliver to Heineken for destruction all goods and materials bearing the Heineken trademarks that have been previously distributed or sold;
- (iii) Pay compensatory damages to Heineken in an amount to be determined at trial for the injuries Heineken has sustained as a consequence of the acts complained of;
- (iv) Pay Heineken treble damages, or alternatively, Defendants' profits trebled, whichever is greater;
- (v) Pay all of Heineken's litigation expenses, including reasonable attorneys' fees and costs of this action;
- (vi) Pay interest to Heineken, including pre-judgment interest on the foregoing sums; and
- (vii) File with this Court and serve on Heineken an affidavit setting forth in detail the manner and form of Defendants' compliance with the terms of this Court's orders.

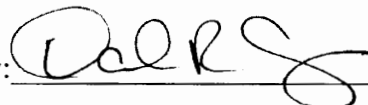
c. That Heineken be awarded such other and further relief as the Court may deem just and proper.

DEMAND FOR TRIAL JURY

Heineken hereby respectfully requests a trial by jury in this cause, and for all other relief just and proper in the premises.

Respectfully submitted,

Darlene R. Seymour
Attorney # 23133-49

By:  _____

Continental Enterprises
9135 N. Meridian St.
Suite A-1
Indianapolis, IN 46260