

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMERICAN BEVERAGE CORPORATION,

Civil Action No.

Plaintiff,

v.

FLORIDA FRUIT JUICES INC.,

ELECTRONICALLY FILED

Defendant.

COMPLAINT

AND NOW, comes American Beverage Corporation ("ABC"), by and through its counsel, Dickie, McCamey & Chilcote, P.C., and files the following COMPLAINT against Defendant, Florida Fruit Juices, Inc. ("FFJ"), and in support thereof aver as follows:

PRELIMINARY STATEMENT

This case involves ABC's LITTLE HUG® and LITTLE HUG FRUIT BARRELS® (the "Little Hug beverages") and FFJ's infringement of ABC's intellectual property rights therein. This case arose because Defendant, seeking to capitalize on the commercial success of ABC's Little Hug beverages, and despite a myriad of available alternatives, launched its LIL' SPORT® Fruit Flavored Drinks ("FFJ's Infringing Products") bottled in bottles that infringe ABC's trademarked barrel design which are packaged in 20-count variety packages that infringe the trade dress of Little Hug beverages. FFJ's infringing product not only infringes ABC's trademarked barrel design, but is packaged in 20-count variety packs so similar in appearance to ABC's trade dress that consumer confusion is likely to occur, if it has not already done so. While ABC welcomes fair competition, the Defendant's conduct in this case goes far beyond the standards of fair competition as recognized by the law.

THE PARTIES

1. Plaintiff, American Beverage Corporation is a corporation organized and existing under the laws of Delaware, with a principal place of business in Verona, Pennsylvania.

2. Upon information and belief, Florida Fruit Juices, Inc. is an Illinois corporation with its principal place of business in Chicago, Illinois, and produces products for sale throughout the United States, including in Pennsylvania and in this district.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121 (action arising under the Lanham Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1338(a) (any Act of Congress relating to patents or trademarks), 28 U.S.C. § 1338 (b) (action asserting claim of unfair competition joined with a substantial and related claim under the trademark laws), and 28 U.S.C. § 3167 (supplemental jurisdiction).

4. This Court has personal jurisdiction over the Defendant because the Defendant has substantial and continuous contacts with the Commonwealth of Pennsylvania, sells numerous products (including the FFJ infringing products) within the Commonwealth of Pennsylvania and has committed and continues to commit acts of trademark infringement in the Commonwealth of Pennsylvania. Upon information and belief, the Defendant derives substantial revenue from the sale of the FFJ infringing products within the Commonwealth of Pennsylvania and this district, expects its actions to have consequences within this district, and derives substantial revenue from interstate commerce.

5. Venue in this district is proper pursuant to 28 U.S.C. § 1391 because the Defendant is subject to jurisdiction in this district, transacts business within this district, and offers for sale in this district products that infringe ABC's intellectual property rights.

ABC'S LITTLE HUG BEVERAGES

6. ABC makes and sells a line of fruit flavored drinks bottled in barrel-shaped bottles and packaged in among other things, 20-count variety packs under its LITTLE HUG® and LITTLE HUG FRUIT BARRELS® brand names.

7. For all times relevant hereto, ABC has packaged its Little Hug beverages in the bottles and packaging that are the subject of this claim.

8. The design of the barrel-shaped bottles in which ABC bottles its Little Hug beverages is the subject of U.S. Trademark No. 1,367,177 (the "Barrel Design Trademark"). A true and correct copy of the Barrel Design Trademark certificate is attached hereto as Exhibit A.

9. The Barrel Design Trademark covers the distinctive trade dress of ABC's barrel-shaped bottle as shown in Exhibit A.

10. The packaging of ABC's Little Hug beverages embodies a singular and inherently distinctive trade dress characterized by a general overall appearance and commercial impression created through size, shape, color scheme, pictorial elements, labeling, and nutritional comments and information.

11. ABC's trade dress includes the Barrel Design Trademark, the appearance of the commercial embodiment of the Little Hug product, including the color of ABC's bottles when filled, the flavors and colors of the Little Hug product including fruit punch (red), strawberry kiwi (green), blue raspberry (blue), and grape (purple), and ABC's packaging of

the Little Hug product, including the rectangular shaped 20-count variety box with a yellow base color, purple partition with the product's name, the words Fruit Barrels written in an arc using red lettering with white accent bordering, and four (4) bottle images in the lower right hand corner.



Illustration 1: Little Hug Fruit Barrels and Packaging

12. The elements of ABC's trade dress are non-functional.
13. Continuously since 1974, ABC has made and sold in interstate commerce its Little Hug beverages in the Barrel Design Trademark.
14. In particular, the Barrel Design Trademark and associated trade dress has been marketed heavily throughout the nation beginning on or about 1974 and continuously since that time. The Barrel Design Trademark and associated trade dress has been used continuously by ABC and has acquired the status of a nationally famous mark.
15. Continuously since 1974, ABC has made and sold in interstate commerce its Little Hug beverages in its trade dress to identify the source of the Little Hug beverages and to distinguish them from those made and sold by others.

16. ABC has prominently displayed its trade dress to distributors, retailers and consumers through advertising, the internet, industry publications and points-of-sale.

17. ABC has invested substantial time, resources, and money in making and selling its Little Hug beverages in their Barrel Design Trademark and other trade dress.

18. As a result of ABC's commercial activities as set forth herein, ABC's trade dress has developed and now has a secondary and distinctive meaning to consumers and the fruit flavored drink industry. Specifically, ABC's trade dress has come to indicate that the Little Hugs beverages come from or originate only with ABC.

19. Sport drinks are within the natural zone of expansion of ABC's goods under its LITTLE HUG mark, Barrel Design Trademark, and other trade dress.

FFJ'S LIL' SPORT BEVERAGES

20. The Defendant makes and sells fruit flavored drinks under the "Lil' Sport" brand name.

21. Plaintiffs recently discovered that the Defendant makes and sells in interstate commerce fruit flavored beverages in twenty-count variety packages under their Lil' Sport brand name.

22. More importantly, the Defendant's Lil' Sport beverages are packaged in containers and packaging that infringe on Plaintiff's Barrel Design Trademark and so closely imitate and infringe ABC's trade dress that consumers are likely to be confused as to the source or origin of the Defendant's and Lil' Sport beverages.

23. The Defendant's Lil' Sport beverages are packaged in containers that are identical in overall commercial impression to the containers in which ABC's Little Hugs are packaged, including but not limited to size, shape, color scheme, pictorial elements, labeling,

and layout. Specifically, the Defendants have parroted the barrel shape of the Barrel Design Trademark, as well as the distinctive yellow packaging, flavors, twenty-count packaging, and labeling design on the packaging.



Illustration 2: Lil' Sport Packaging 1

24. In addition to the above packaging, the Defendant also packages Lil' Sport beverages in barrel-shaped containers which contain a "sport cap." These Lil' Sport beverages create consumer confusion by using a similar barrel-style design and identical flavors.

25. Additionally, Defendant uses the "Lil' Sport" name for these products, which is confusingly similar to ABC's Little Hugs mark.



Illustration 3: Lil' Sport "Sport Cap" Beverages

26. For several reasons, consumer confusion is not just likely, but inevitable.

27. Little Hugs compete directly with the Lil' Sport beverages.

28. The Lil' Sport beverages are offered in the same flavors as Little Hugs, including, for example, punch, grape, blue raspberry, and strawberry-kiwi.

29. The Lil' Sport and the Little Hugs beverages are relatively low-priced items, all costing approximately \$3.00 per package.

30. The Lil' Sport and the Little Hugs beverages are all single-serve fruit flavored beverage products that, given their low cost, are impulse purchases for consumers. As such, consumers exhibit very little brand loyalty in connection with fruit flavored beverage products, and are not likely to exercise a great deal of care before selecting their fruit flavored beverage products for purchase, nor in evaluating the quality of the fruit flavored beverage following consumption.

31. The Lil' Sport beverages are sold through many of the same trade channels as the Little Hugs, such as retail chains and supermarkets.

32. The Defendant's conduct as set forth herein is all the more egregious when measured against competing fruit flavored beverage products made and sold by other beverage manufacturers. A survey of the trade dress used by other beverage manufacturers shows the multiple packaging options available to companies such as the Defendant that bear no resemblance to ABC's unique barrel design for its Little Hug product.

Notice

33. ABC wrote to FFJ on November 20, 2014 advising FFJ that ABC believed FFJ was infringing on Plaintiff's rights and demanding that FFJ cease and desist such infringing conduct. A copy of ABC's letter is attached hereto as Exhibit B.

34. From that point, ABC and FFJ exchanged multiple written correspondence during December of 2014. At no point did FFJ indicate that it would comply with ABC's demand.

35. To this date, the Defendant has not complied with ABC's demands.

36. Accordingly, Plaintiff has no choice but to proceed with the instant action.

COUNT I: Trade Dress Infringement and Unfair Competition

37. The Plaintiff incorporates by reference the allegations in the preceding paragraphs as if set forth herein.

38. The Defendants have made and sold in interstate commerce their Lil' Sport beverages packaged in containers that embody ABC's trade dress.

39. As a result of the Defendant's conduct as set forth herein, consumers could be confused and induced to purchase the Defendant's Lil' Sport beverages, mistakenly believing them to be Little Hugs, thus depriving ABC of the profits of sale.

40. By engaging in the conduct set forth herein, the Defendant is passing off their Lil' Sport beverages as ABC's Little Hugs, trading off and exploiting ABC's reputation and goodwill, to ABC's detriment.

41. By engaging in the conduct set forth herein, the Defendant has infringed and continues to infringe ABC's rights in its trade dress, in violation of § 32 of the Lanham Act, 15 U.S.C. § 1114 and § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). The Defendant's

conduct is likely to cause confusion – initially, post-sale, and otherwise – mistake, and deception among consumers as to the affiliation, connection, or association of the Defendant with ABC and as to the origin, sponsorship, and approval of the Defendant's Lil' Sport beverages and commercial activities by ABC. Such conduct also interferes with ABC's right to use its trade dress to identify ABC as the single source of the Little Hugs. The Defendant's conduct as set forth herein also constitutes false designation of origin, unfair competition, and false advertising in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

42. The Defendant's conduct as set forth herein is wrongful, malicious, fraudulent, deliberate, willful, and/or intentional.

43. The Defendant's conduct as set forth herein is wrongful, malicious, fraudulent, deliberate, willful, and/or intentional and has caused and will continue to harm the Plaintiff.

COUNT II: Dilution

44. The Plaintiff incorporates by reference the allegations in the preceding paragraphs as if set forth herein.

45. ABC's Barrel Design Trademark and trade dress has become famous within the meaning of 15 U.S.C. § 1125.

46. Because of the similarity of ABC's Barrel Design Trademark and trade dress and the Defendant's products, the consuming public of the United States is likely to, has and will make an association of those marks and that association has and will impair the distinctiveness of Plaintiff's marks.

47. The Defendant has caused and continues to cause irreparable injury to and dilution or a likelihood of dilution of the distinctive quality of ABC's Barrel Design Trademark and trade dress in violation of ABC's rights under 15 U.S.C. § 1125(c). The Defendant's use dilutes, blurs, tarnishes, and whittles away the distinctiveness of the Barrel Design Trademark and trade dress. The Defendant's acts are misappropriating the good will of the Barrel Design Trademark and trade dress.

48. The Defendant's conduct as set forth herein is wrongful, malicious, fraudulent, deliberate, willful, and/or intentional.

49. The Defendant's conduct as set forth herein is wrongful, malicious, fraudulent, deliberate, willful, and/or intentional and has caused and will continue to harm the Plaintiff.

COUNT III: State Law Unfair Competition

50. The Plaintiff incorporates by reference the allegations in the preceding paragraphs as if set forth herein.

51. The Defendant's conduct as set forth herein is likely to cause consumer confusion, to cause mistake, and to deceive as to the affiliation, connection, or association of the Defendants with ABC and as to the origin, sponsorship, and approval of the Defendant's Lil' Sport beverages and commercial activities by ABC. Such conduct also interferes with ABC's right to use its trade dress to identify ABC as the single source of the Little Hugs.

52. The Defendant's conduct as set forth herein constitutes unfair competition and palming off in violation of Pennsylvania statutory and common law.

53. The Defendant's conduct as set forth herein is wrongful, malicious, fraudulent, deliberate, willful, and/or intentional.

54. The Defendant's conduct as set forth herein is wrongful, malicious, fraudulent, deliberate, willful, and/or intentional and has caused and will continue to harm the Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff demands judgment against the Defendant as follows:

1. A judgment declaring that the Defendant has infringed ABC's trade dress, has competed unfairly with ABC, has injured ABC's business reputation by the unauthorized use of ABC's trade dress, and has willfully violated the applicable laws of the United States and of the states where the Defendants' goods have been sold, all to the detriment of Plaintiffs;

2. For a judgment against Defendant awarding the Plaintiff damages and lost profits, including:

- (a) All damages sustained by the Plaintiff as a result of the Defendants' unlawful infringement of ABC's trade dress, together with interest on such damages and that such damages be trebled, pursuant to 35 U.S.C. § 284 and 35 U.S.C. § 289;
- (b) All profits derived by the Defendant from the sale of goods by the direct or indirect use of ABC's trade dress or colorable imitations thereof, and that such profits be trebled;
- (c) All damages sustained by Plaintiff on account of trade dress infringement, unfair competition, and any other damages suffered by Plaintiff as a result of

the Defendant's conduct as set forth herein, and that such damages be trebled;

3. For an accounting of all Defendant's profits from the conduct complained of herein;
4. For an order directing the Defendants to pay punitive damages;
5. For an order directing the Defendants to pay restitution;
6. For an award of attorneys' fees pursuant to 35 U.S.C. § 285 and 15 U.S.C. § 1117 or as otherwise permitted by law;
7. For an award of pre-judgment and post-judgment interest at the maximum rate allowed by law;
8. For the costs and expenses of the suit herein; and
9. For such additional and further relief as this Court may deem just and proper.

Respectfully submitted,

Date: August 4, 2015

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JURY TRIAL DEMANDED