

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION**

SUNDESA, LLC, a Utah limited liability
company,

Plaintiff,

v.

EURARK, L.L.C., d/b/a LIFEPLUS
INTERNATIONAL, an Illinois limited
liability company,

Defendant.

Case No. 1:18-cv-00012-BRW

Honorable Judge Billy Roy Wilson

JURY TRIAL DEMANDED

AMENDED COMPLAINT

Plaintiff Sundesa, LLC (“Sundesa”) complains against defendant Eurark, L.L.C. d/b/a Lifeplus International (“Eurark” or “Defendant), for the causes of action alleged as follows:

THE PARTIES

1. Sundesa is a limited liability company duly organized and existing under the laws of the State of Utah, with its principal place of business located at 250 South 850 East, Lehi, Utah 84043.

2. Sundesa alleges Eurark, L.L.C. is a limited liability company organized and existing under the laws of the State of Illinois.

3. Sundesa alleges Lifeplus International is a fictitious name used by Eurark in Arkansas, where Eurark operates a regular and established place of business located at 50 Industrial Drive, Batesville, Arkansas 72501.

JURISDICTION AND VENUE

4. This is a civil action arising under the patent laws of the United States, including, but not limited to, 35 U.S.C. §§ 1, *et seq.*, including 35 U.S.C. § 271.

5. This is also a civil action for trademark infringement arising under the Lanham Act of 1946, as amended, 15 U.S.C. § 1114, *et seq.*

6. This is also a civil action for trademark infringement and false designation of origin arising under the Lanham Act, 15 U.S.C. § 1125(a).

7. This is also a civil action for unfair competition arising under the common law of the State of Arkansas.

8. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1338(a), and 15 U.S.C. § 1121. This Court has related claim jurisdiction over the state law claims pursuant to 28 U.S.C. § 1338(b) and 28 U.S.C. § 1367.

9. This Court has personal jurisdiction over Eurark because Eurark has purposely availed itself of the privileges and benefits of the laws of the State of Arkansas.

10. On information and belief, Eurark does, and has done, substantial business in this judicial district, including: (i) being registered with the secretary of state to do business under the name Eurark, L.L.C., as well as the following fictitious names: Lifeplus International, Distinctive Marketing Company, Life Plus USA, and Prohealth/Life Plus International; (ii) advertising and selling infringing products, including at least counterfeit shaker cups; (iii) regularly doing business, or soliciting business, by virtue of nationwide sales and offers to sell through Eurark's interactive and commercial websites, including but not limited to: <https://us.lifeplus.com/us-en>, which direct Eurark's services and products to Arkansas residents; and (iv) engaging in other

persistent courses of conduct, and/or deriving substantial revenue from products and/or services provided to persons in this District and State.

11. This Court's exercise of personal jurisdiction over Eurark is consistent with the Constitutions of the United States and the State of Arkansas.

12. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400.

FACTUAL BACKGROUND

13. Sundesa, the global leader in portable mixing products, manufactures and sells, *inter alia*, Blender Bottle® brand shaker cups.

14. Sundesa's technological innovations are protected by, *inter alia*, a portfolio of utility and design patents, including United States Design Patent No. D510,235 (the "Asserted Patent").

15. Sundesa has appropriately marked all products embodying the claims of the Asserted Patent since their introduction to the market.

16. Sundesa is the exclusive licensee of the Asserted Patent and has been granted all rights thereunder, including the right and standing to enforce the Asserted Patent and recover damages for infringement thereof.

17. Defendant is in the business of selling nutritional products and supplements. Defendant also sells, and offers for sale, counterfeit shaker cups that embody the claimed design of the '235 Design Patent (the "Accused Products").

18. The design of each Accused Products is substantially the same as the design that is the subject matter of the '235 Design Patent.

19. Furthermore, the design of each of the Accused Products is so similar to the design that is the subject matter of the '235 Design Patent that customers are likely to be

deceived and persuaded to buy the Accused Products thinking they are actually buying products protected by the '235 Design Patent.

20. On information and belief, Defendant had pre-suit knowledge of the '235 Design Patent at least because of Sundesa's marking of its products embodying the claims of the Asserted Patent.

21. On August 23, 2017, Sundesa mailed Defendant a cease and desist demand letter along with a courtesy copy of the Asserted Patent.

22. Accordingly, Defendant has had knowledge of the Asserted Patent at least since August 23, 2017.

23. Sundesa is also the exclusive licensee of several federally registered trademarks including the BLENDER BOTTLE® trademark, United States Trademark Registration No. 3,471,977 (hereinafter the "Asserted Trademark").

24. Sundesa has developed recognition and goodwill for the products sold under the Asserted Trademark among both Sundesa's immediate customers and the consuming public, generally.

25. As a result of, among other things, Sundesa's substantial investment in the Asserted Trademark, and the products marketed thereunder, the consuming public recognizes the Asserted Trademark, and associates products and features bearing that mark with a single source, namely Sundesa.

26. Defendant makes, uses, sells, offers for sale, and imports the Accused Products and uses the Asserted Trademark to market the Accused Products.

27. Specifically, Defendant markets the accused product, at least on its website, as a "Lifeplus Blender Bottle."

28. Sundesa has not licensed Defendant any rights in or to the Asserted Trademark and Defendant does not have any right or authority to use, market, display, or sell products that depict that trademark.

29. Defendant's sale, marketing, and manufacturing of the Accused Products under the Asserted Trademark has an effect on interstate commerce.

30. Defendant's use of marks that are identical to the Asserted Trademark in marketing its Accused Products creates confusion as to the source of the Accused Products, leading customers to believe that they are in fact made, or authorized, by Sundesa.

31. On information and belief, Defendant had pre-suit knowledge of the Asserted Trademark at least because of Sundesa's cease and desist letters.

32. On August 23, 2017, along with its cease and desist letter, Sundesa mailed Defendant a courtesy copy of the registration certificate for the Asserted Trademark.

33. Accordingly, Defendant has had knowledge of the Asserted Trademark since at least August 23, 2017.

34. Sundesa has suffered cognizable injury as a result of Defendant's infringing activities.

35. Sundesa has suffered injury in fact and has lost money or property as a result of Defendant's unfair and unlawful business practices in the form of damage to its good will, lost sales, price erosion, and other actual damages.

FIRST CLAIM FOR RELIEF
(Infringement of the '235 Design Patent)

36. By this reference Sundesa realleges and incorporates the foregoing paragraphs as though fully set forth herein.

37. Defendant has infringed, and continues to infringe the '235 Design Patent by making, using, offering to sell, selling, or importing the Accused Products, in this District and elsewhere in the United States, the design of which is substantially the same as the ornamental design of the '235 Design Patent.

38. Defendant's actions constitute infringement of the '235 Design Patent in violation of 35 U.S.C. § 271.

39. Sundesa has sustained damages and will continue to sustain damages as a result of Defendant's aforementioned acts of infringement.

40. Sundesa is entitled to recover damages sustained as a result of Defendant's wrongful acts in an amount to be proven at trial.

41. Defendant's infringement of Sundesa's rights under the '235 Design Patent will continue to damage Sundesa's business, causing irreparable harm for which there is no adequate remedy at law, unless Defendant is enjoined by this Court.

42. Defendant has willfully infringed the '235 Design Patent, entitling Sundesa to increased damages under 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

43. Alternatively, Plaintiff is entitled to recover Defendant's total profits from its sale of the Accused Products under 35 U.S.C. § 289.

SECOND CLAIM FOR RELIEF
(Federal Trademark Infringement of the BLENDER BOTTLE® Trademark)

44. By this reference Sundesa realleges and incorporates the foregoing paragraphs as though fully set forth herein.

45. Defendant's use of the BLENDER BOTTLE® Trademark is likely to cause confusion, mistake or deception as to the source, origin, affiliation, connection, or association of

the Accused Products with Sundesa, or as to the approval of the Accused Products by Sundesa, and thus constitutes infringement under Section 32 of the Lanham Act, 15 U.S.C. § 1114.

46. Defendant's infringement of the BLENDER BOTTLE® Trademark negatively affects Sundesa's business in the United States and around the world.

47. Sundesa alleges, on information and belief, Defendant's infringement of the BLENDER BOTTLE® Trademark has taken place with full knowledge of Sundesa's marks, including Sundesa's incontestable BLENDER BOTTLE® mark, and, therefore, has been intentional, deliberate, and willful.

48. Defendant's violation of 15 U.S.C. § 1114 has caused Sundesa to suffer damages and irreparable harm.

49. By reason of the foregoing, Sundesa is entitled to monetary and injunctive relief pursuant to 15 U.S.C. §§ 1116–1118, as more fully set forth herein below.

THIRD CLAIM FOR RELIEF
(Federal Trademark Infringement, False Designation, and Unfair Competition with Respect to the Asserted Trademark)

50. By this reference Sundesa realleges and incorporates the foregoing paragraphs as though fully set forth herein.

51. As a result of the continuous use and promotion of Sundesa's Asserted Trademark, the Asserted Trademark has acquired strong goodwill and secondary meaning to consumers and potential customers in that consumers and potential customers have come to associate the Asserted Trademark with Sundesa.

52. Defendant's use of the Asserted Trademark is likely to cause confusion, mistake, or deception as to the source, origin, affiliation, connection or association of the Accused Products with Sundesa, or as to the approval of the Accused Products by Sundesa, and thus

constitutes trademark infringement, false designation of origin, and unfair competition with respect to the Asserted Trademark in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

53. Defendant's actions have taken place with full knowledge of the Asserted Trademark and therefore have been intentional, deliberate, and willful.

54. Defendant's violation of 15 U.S.C. § 1125(a) has caused Sundesa to suffer damages and irreparable harm.

55. By reason of the foregoing, Sundesa is entitled to monetary and injunctive relief pursuant to 15 U.S.C. §§ 1116–1118, as more fully set forth herein below.

FOURTH CLAIM FOR RELIEF
(Arkansas Common Law Trademark Infringement and Unfair Competition)

56. By this reference Sundesa realleges and incorporates the foregoing paragraphs as though fully set forth herein.

57. Defendant, by its actions set forth hereinabove, has engaged in intentional business acts or practices that are unlawful, unfair, and/or fraudulent, including the infringement of the Asserted Trademark.

58. Defendant's use of the Asserted Trademark is likely to cause confusion, mistake, or deception as to the source, origin, affiliation, connection, or association of the Accused Products with Sundesa, or as to the approval of the Accused Products by Sundesa.

59. Defendant's actions constitute intentional and willful unfair competition and palming off in violation of the common law of Arkansas. As explained above, Sundesa has invested a substantial amount of time, skill and money in its services and in developing its Asserted Trademark. Defendant's acts and conduct in using the Asserted Trademark were committed without the authorization or consent of Sundesa at little or no cost to Defendant.

60. By virtue of the acts complained of herein, Defendant has willfully and intentionally caused a likelihood of confusion among the purchasing public in this Judicial District and elsewhere, thereby unfairly competing with Sundesa in violation of the common law of the State of Arkansas.

61. By reason of the foregoing, Sundesa has suffered damages and irreparable harm.

62. By reason of the foregoing, Sundesa is entitled to, at least, damages from Defendant

PRAYER FOR RELIEF

WHEREFORE, Sundesa prays for judgment against Eurark as follows:

A. A judgment finding Eurark liable for infringement of the claims of the '235 Design Patent;

B. An order of this Court directing Eurark to make an accounting for the total number of Accused Products that it used, made, had made, sold, offered for sale, or imported into the United States.

C. Orders of this Court temporarily, preliminarily, and permanently enjoining Eurark, its agents, servants, and any and all parties acting in concert with any of them, from directly or indirectly infringing in any manner any of the claims of the Asserted Patent, pursuant to at least 35 U.S.C. § 283;

D. An award of damages adequate to compensate Sundesa for Eurark's infringement of the '235 Design Patent, in an amount to be proven at trial, or in the alternative, an award of Eurark's total profits under 35 U.S.C. § 289;

E. An award of treble Sundesa's damages, pursuant to at least 35 U.S.C. § 284;

F. A declaration that this is an exceptional case and that Sundesa be awarded its attorney fees and expenses, pursuant to at least 35 U.S.C. § 285;

G. An award of Sundesa's costs in bringing this action, pursuant to all applicable state statutory and common law, including at least 35 U.S.C. § 284;

H. A judgment finding Eurark liable for infringement of the BLENDER BOTTLE[®] trademark, unfair competition, and unfair, deceptive, or misleading practices in violation of Arkansas common law.

I. A judgment finding Eurark liable for infringement of the BLENDER BOTTLE[®] trademark in violation of Arkansas common law.

J. A judgment finding Eurark liable for unfair competition under the Lanham Act.

K. A judgment finding Eurark libable for unfair competition and palming off in violation of Arkansas common law.

L. An order of this Court temporarily, preliminarily, and permanently enjoining Eurark, its principals, agents, and servants, and any and all persons or entities acting in concert with any of them from directly or indirectly infringing in any manner Sundesa's Asserted Trademark in connection with the Asserted Products or otherwise, pursuant to at least Section 34(a) of the Lanham Act, 15 U.S.C. § 1116(a);

M. An order of this Court temporarily, preliminarily, and permanently enjoining Eurark, its principals, agents, and servants, and any and all persons or entities acting in concert with any of them from producing, manufacturing, marketing, advertising, promoting, offering for sale, selling, or distributing products, including the Defendant's products marketed in connection with the Asserted Trademark, pursuant to at least Section 34(a) of the Lanham Act, 15 U.S.C. § 1116(a);

N. An order of this Court directing Eurark to destroy its entire stock of Accused Products, together with all labels, signs, prints, packages, wrappers, receptacles, and advertisements, as well as all plates, molds, matrices, or other means of making the same pursuant to at least Section 36 of the Lanham Act, 15 U.S.C. § 1118;

O. For damages in an amount to be proven at trial for trademark infringement under 15 U.S.C. § 1114;

P. For damages in an amount to be proven at trial for false designation of origin under 15 U.S.C. § 1125(a);

Q. For damages in an amount to be proven at trial for unfair competition and trademark infringement under Arkansas common law;

R. An award of Eurark's profits in an amount to be proven at trial, pursuant to at least 15 U.S.C. § 1117(a);

S. An award of three times Eurark's profits or Sundesa's damages, whichever is greater, pursuant to at least Section 35(b) of the Lanham Act, 15 U.S.C. § 1117(b);

T. An award of punitive damages, pursuant to all applicable state statutory and common law;

U. An award of Sundesa's costs in bringing this action, pursuant to all applicable state statutory and common law, including at least 15 U.S.C. § 1117(a);

V. An award of Sundesa's attorney fees, pursuant to agreement or all applicable state statutory and common law, including at least Sections 35(a) and (b) of the Lanham Act, 15 U.S.C. § 1117(a);

W. An imposition of constructive trust on, and an order requiring a full accounting of, the sales made by Eurark as a result of its wrongful or infringing acts alleged herein;

X. Prejudgment interest, pursuant to at least Section 35(b) of the Lanham Act, 15 U.S.C. § 1117(b);

Y. An award of Sundesa's attorneys' fees, pursuant to all applicable state statutory and common law;

Z. Prejudgment interest, pursuant to at least 35 U.S.C. § 284;

AA. Post-judgment interest, pursuant to at least 28 U.S.C. § 1961(a); and

BB. For such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY

Sundesa demands TRIAL BY JURY of all claims and issues so triable.

DATED: March 14, 2018

Respectfully submitted,

MASCHOFF BRENNAN

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