

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KMG INTERNATIONAL, BV,
a foreign corporation,

Case No.:

Plaintiff,

vs.

FUN LIGHT AMUSEMENTS, SRO, a
Foreign corporation, CONFOLDING GROUP, SRO,
A foreign corporation, and ALAN FERGUSON, an
individual,

Defendants.

PLAINTIFF’S COMPLAINT

Plaintiff, KMG INTERNATIONAL, BV (“KMG” or “Plaintiff”), hereby file this Complaint, and sue Defendants, FUN LIGHT AMUSEMENTS, SRO (“Fun Light”), CONFOLDING GROUP, SRO (“Confolding”) and ALAN FERGUSON (“Ferguson”) (collectively “Defendants”), and further state as follows:

INTRODUCTION

1. This is an action for claims of federal unfair competition under the Lanham Act, common law unfair competition, violation of Florida’s Deceptive and Unfair Trade Practices Act, and patent infringement.

PARTIES

2. Plaintiff, KMG, is a foreign corporation organized under the laws of the Netherlands with its principal place of business in the Netherlands.

3. Since 1991, KMG has been active in the development, design, and production of various fairground attractions and amusement rides, which are sold by KMG throughout the United States and Europe.

4. The amusement rides that KMG has developed, manufactured and sold each involve innovative and unique design concepts and are inherently distinctive. KMG's strict adherence to high safety standards in the design and manufacturing of its products, including its compliance with international quality standards in industrial production, has been internationally recognized among manufacturers in the amusement ride industry.

5. Defendant, Fun Light is organized under the laws of the Czech Republic. Fun Light is a manufacturer, distributor and seller of amusement rides throughout the United States and Europe. Fun Light is the manufacturer, or in the alternative, the distributor of the "Extreme" ride which is the subject of the action.

6. Defendant, Confolding, is organized under the laws of the Czech Republic. Confolding is a manufacturer, distributor and seller of amusement rides throughout the United States and Europe. Confolding is the manufacturer, or in the alternative, the distributor of the "Extreme" ride which is the subject of the action.

7. Defendant, Ferguson is the agent, distributor and/or seller of Fun Light's amusement ride in the United States. Specifically, Defendant Ferguson holds himself out as the U.S. Representative of Fun Light on his website and states "I am U.S.A. Representative for Fun Light Amusements SRO" and states that he "has represented Fun Light Amusements for 8 years in the U.S.A.". See **Composite Exhibit "1"**.

8. Similarly, Defendant Fun Light holds Ferguson out as its “U.S.A. Representative” on its website and on identification badges at the Florida-based trade shows for the amusement ride industry. **See Composite Exhibit “2”**.

JURISDICTION AND VENUE

9. Defendants were conducting business throughout the United States and, specifically, within the State of Florida by making, importing, distributing, advertising, promoting, marketing, reproducing, offering for sale and/or selling unauthorized and knock off amusement rides, designs, and/or component parts which appear virtually identical to the amusement rides designed, manufactured, distributed and/or sold by the Plaintiff.

10. This Court has jurisdiction in this matter pursuant to 15 U.S.C. § 1121, as well as 28 U.S.C. §§ 1331, 1332 and 1338(a) and the doctrines of pendent and ancillary jurisdiction.

11. Venue in this matter is proper pursuant to 28 U.S.C. § 1391(b) and (c), and 1400(b). Specifically, the causes of action sued upon accrued in the District and Defendants were present in this jurisdiction either personally or through their agents and committed tortious acts and affirmative acts of infringement and has sold, offered for sale, and/or marketed tangible products while present in the State of Florida and the Middle District of Florida in Gibsonton, Florida and are conclusively presumed to be both engaged in substantial activities in this state and conducting business in this state based upon said sales and/or offers to sell.

KMG’S INVENTIONS AND PATENT

12. Since 2002, KMG has designed the “Freak Out” amusement ride, which is a swing attraction with 16-seats and a height of 20 meters that swings backwards and forward

(over the spectators) and which can be stored on one trailer. A brochure of KMG's Freak Out ride is attached hereto as **Exhibit "3"**.

13. The "Freak Out" ride was invented and designed by Lousito Johannes Eusebio Kroon and Albert Louisito Phillipus Kroon of Neede, Netherlands, who assigned the rights to the device to Cobar Beheer BV which is the holding company of all KMG companies. It in turn assigned all relevant rights to said amusement device to Plaintiff KMG.

14. The Freak Out utilizes this invention and designs found in United States Patent 6,872,144 (the "'144 Patent"), entitled "Amusement Device," which was duly and lawfully issued on March 29, 2005. KMG is the sole owner of all rights, title and interest in the '144 Patent. A true copy of the '144 Patent is attached hereto as **Exhibit "4"**.

BACKGROUND FACTS

15. On February 5-8, 2019, the International Independent Showmen's Association ("IISF") held a trade show at 6915 Riverview Drive, Gibsonton, Hillsborough County, Florida.

16. IISF is one of the largest trade shows within the amusement ride industry. The trade show provides the opportunity for the sellers of amusement rides to market, promote, advertise and sell their products, and provides more ample buying opportunities.

17. On or about February 5, 6 and 7, 2019, Defendant Fun Light distributed sales, marketing, and/or promotional brochures, via its agent in the United States, Ferguson, which included a confusingly similar knockoff version of KMG's "Freak Out" ride, which Fun Light called the "Extreme" ride.

18. Defendants Fun Light and Confolding: (1) jointly promoted the "Extreme" ride, (2) jointly appeared at the same IISF trade show booth, and (3) shared joint brochures for the "Extreme" ride in which the names and logos of both Confolding and Fun Light were used.

19. Specifically, the promotional materials distributed at this IISF trade show showed that Fun Light and Confolding marketed, promoted, and attempted to sell KMG's "Freak Out" ride as the "Extreme" ride. The brochures of the "Extreme" ride are attached as **Exhibit "5"**.

20. Further, a photograph of the large banner of the "Extreme" ride at the joint Confolding and Fun Light trade show booth is attached as **Exhibit "6"**.

21. The website materials from Fun Light promoting the "Extreme" ride are attached as **Exhibit "7"**.

22. A side-by-side comparison of the KMG "Freak Out" ride with the "Extreme" ride is attached as **Exhibit "8"**.

23. Defendant Funlight was aware of its improper duplication of the KMG "Freak Out" ride. Specifically, a Netherlands Court entered judgement in October 2014 against Fun Light for illegally copying the same KMG "Freak Out" ride.

24. The "Extreme" ride that was manufactured and/or distributed by Defendants Fun Light and Confolding utilized mechanical systems which infringed upon the '144 Patent.'

25. Defendants Fun Light and Confolding, through their employees and agents in attendance at the IISF trade show in Gibsonton, Florida, including Ferguson, were specifically and actively marketing, promoting, advertising, offering for sale, and attempting to sell the Extreme ride to U.S. customers.

26. Defendants Fun Light, Confolding and Ferguson are is in no way associated with, sponsored by, or affiliated with KMG, and Defendants' unauthorized use of Plaintiff's designs, patents, trademarks, logos, trade dress, and/or other intellectual property is without the authorization or authority of the Plaintiff.

27. Plaintiff has retained the undersigned law firm of Hill, Rugh, Keller & Main, P.L. and The Sheehan Firm, P.C., to pursue this matter on its behalf, and it is obligated to pay them reasonable attorneys' fee and costs and litigation expenses associated with the prosecution of this matter.

COUNT I

Unfair Competition under the Lanham Act against Fun Light, Confolding and Ferguson

28. Plaintiff realleges and incorporates by reference paragraphs 1 through 27 above as if set forth fully in this count.

29. This is a count for unfair competition pursuant to 15 U.S.C. § 1125(a) against Fun Light.

30. Through Defendants' continued and elicit use of the Plaintiff's proprietary and protected ornamental features, designs, design features, advertising and promotion material, photographs and other actions at issue, Defendants have engaged in unfair competition and has continued to falsely designate the origin of Defendants' amusement rides.

31. Through the use and incorporation of Plaintiff's trade dress, trademarks, advertising and marketing material, photographs and materials or colorable imitations thereof, Defendants have further created a false description or representation of the products and services provided by the Defendants, thereby affecting interstate commerce.

32. The total image and trade dress of KMG's amusement rides is inherently distinctive, primarily non-functional and the Defendants' trade dress is confusingly similar as demonstrated by the exhibits attached hereto.

33. A comparison of the total impression of the rides shows that the placement, design, and colorization of the masts, the masts' supports, the support arm, and other elements have been adopted in the "Extreme" ride to imitate the "Freak Out" ride.

34. Specifically, Defendants Fun Light and/or Confolding made choices in the size, finish, design, and placement such that the "Extreme" ride is confusingly similar to the total impression of the "Freak Out." For example, a few of the areas where the Freak Out and Extreme match are as follows:

- a. The masts are constructed as an a-frame and made of a square tubular construction, which on one side has been provided with turbo lighting and similar decoration;
- b. The gondola arms are made out of square long-shaped tubes, pointing downwards at an angle and are surrounded by turbo lighting and have been provided with similar decoration;
- c. The gondola arms are interconnected by round shaped tubing;
- d. The manner of building-up and storage is identical;
- e. The pendulum/swing arm has a round shape, is adorned with turbo lighting and is provided with similar decoration;
- f. The lower mast supports are built with an identical box profile constructed in an egg shape;
- g. The diagonal strut/support between the mast supports and the trailer are identical and painted in the same color as the egg shaped mast supports;
- h. The placement of the logo sides on either side of the attraction;
- i. The use of the primary colors red, blue, and yellow on the attraction;
- j. The attraction swings forward and backwards;
- k. The logos on top of the ride;
- l. The stairs to the left and right of the platform; and
- m. The folded decorative panel under the platform.

35. The Plaintiff has expended substantial money and time advertising and marketing its amusement rides, and the products have acquired secondary meaning due to consumers associating these amusement rides with KMG.

36. Through their marketing, advertising and representations, the Defendants have continued to misrepresent to prospective purchasers that the Defendants' imitation products are designed or created by Defendants, rather than Plaintiff.

37. Defendants are seeking to trade off the goodwill and reputation of Plaintiff and its products, and gain a competitive advantage for their imitation and/or knockoff products by associating their inferior products with Plaintiff's products, marks and materials and passing their products off as those of the Plaintiff. In the alternative, Defendants have actually copied Plaintiff's goods, materials and products and are passing those off as Defendants' own products.

38. There is a public benefit in ensuring that the public is not deceived into thinking that Defendant's products are associated with KMG's products when that is not the case.

39. The foregoing actions and unfair competition by the Defendants has been deliberate, willful, and wanton.

40. There is a strong likelihood of consumer confusion which has and/or will continue to result from Defendants' illicit use of Plaintiff's trade dress, marks, materials and confusingly similar product image which, when combined with the inferior quality of Defendant's products, will damage, dilute and tarnish Plaintiff's name, reputation, goodwill and identity.

41. As a proximate result of Defendants' conduct, the Plaintiff has been damaged. Such damages include damage to Plaintiff's goodwill and reputation, and other damages, including lost sales due to the deceptive practices engaged in by the Defendants, and Plaintiff is entitled to injunctive relief and to recover its costs and reasonable attorneys' fees.

COUNT II

Common Law Unfair Competition against Fun Light, Confolding and Ferguson

42. Plaintiff realleges and incorporates by reference paragraphs 1 through 27 above as if set forth fully in this count.

43. This is a count for unfair competition pursuant to Florida common law against Fun Light.

44. KMG spent considerable time and money to design, create, develop, manufacture, distribute and sell the amusement rides described in the preceding paragraphs, as well as the marketing and promotional material related thereto.

45. KMG has also spent considerable time and money developing a successful market for its rides, and has developed a reputation for high quality, standards, performance and service both internationally and throughout the United States, including the State of Florida.

46. Plaintiff has expended substantial money and time marketing and advertising its amusement rides, such that the amusement ride industry has come to associate intellectual property of KMG with their respective companies, and its valuable reputation and goodwill. Plaintiff's reputation and the success of its products, as well as the successes associated with Plaintiff's related materials and intellectual property, are well known in the marketplace and well known to Defendants.

47. Through the Defendants' continued and elicit use of the Plaintiff's proprietary and protected ornamental features, designs, design features, advertising and promotion material, photographs and other actions at issue, the Defendants have continued to falsely designate the origin of Defendant's amusement rides.

48. Through the use and incorporation of Plaintiff's trade dress, marks, trademarks, advertising and marketing material, photographs and materials or colorable imitations thereof, the Defendants have further created a false description or representation of the products provided by the Defendants.

49. Through the Defendants' continued the illicit use of Plaintiff's intellectual property, confusingly similar product and design, and their overall marketing and promotional

strategy, Defendant has continued to falsely designate the origin of Defendants' amusement rides, seeking to pass off its inferior imitation products as that of Plaintiff.

50. Through their advertising and representations, the Defendants have continued to misrepresent to prospective purchasers that the Defendants' products are produced, sponsored, authorized, affiliated, or somehow endorsed by the Plaintiff. In the alternative, Defendants have actually copied Plaintiff's goods, materials and products and is passing those off as Defendants' own products.

51. As a proximate result of Defendants' conduct, Plaintiff has been damaged. Such damages include damage to Plaintiff's goodwill and reputation, and other damages, including lost sales due to the deceptive practices engaged in by the Defendants, the dilution of Plaintiff's marks, and the dilution of the market for the Plaintiff's products.

52. Defendants' acts of unfair competition have caused and are likely to cause substantial injury to the public and to Plaintiff for which there is no adequate remedy at law. Plaintiff is entitled to injunctive relief and to recover its costs and reasonable attorneys' fees.

COUNT III

Violation of Florida's Deceptive and Unfair Trade Practices Act against Fun Light, Confolding and Ferguson

53. Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraphs 1 through 27 stated previously.

54. This is an action against Defendants for damages, and declaratory and injunctive relief, pursuant to Florida Statutes §§ 501.201 *et seq.*, commonly referred to as Florida's Deceptive and Unfair Trade Practices Act.

55. The foregoing acts of Defendants constitute unfair methods of competition, unconscionable acts or practices, and unfair and deceptive acts and practices in the conduct of trade and commerce, in violation of Florida Statutes §§ 501.201 *et seq.*

56. At all times material to Plaintiff's Complaint, Defendants acted willfully, intentionally and maliciously, and with total disregard for Plaintiff's rights and property interests.

57. Defendants' conduct offends established public policy, and their practices with regard to their making, importing, distributing, promoting, marketing, reproducing, offering for sale and/or selling unauthorized and imitation amusement rides was immoral, unethical, oppressive, unscrupulous and/or substantially injurious to Plaintiff.

58. As a direct and proximate result of all of Defendants' actions described above, Plaintiff has sustained substantial damages to its legitimate business interests.

59. Moreover, Plaintiff and other companies similarly situated as Plaintiff risk suffering irreparable harm if Defendants are not enjoined from continuing to engage in such unlawful conduct. Plaintiff is without an adequate remedy at law, and the issuance of an injunction will not threaten the public health, safety or welfare. Also, the equities of this action strongly favor the Plaintiff.

60. Under Florida Statutes §§ 501.201 *et seq.*, therefore, Plaintiff is entitled to declaratory and injunctive relief against Defendants which declares Defendants' trade practices as unfair, deceptive and unconscionable, and which enjoins Defendants and all those in active concert or participation with Defendants from continuing to engage and profit from such unfair, deceptive and unconscionable acts and practices.

COUNT IV

Infringement of the '144 Patent by Fun Light, Confolding and Ferguson

61. Plaintiff realleges and incorporates by reference paragraphs 1 through 27 above as if set forth fully herein.

62. Fun Light, in violation of 35 U.S.C. § 271, is and has been directly infringing, contributing to the infringement of, and/or inducing others to infringe the ‘144 Patent by making, using, selling, and/or offering to sell in the United States, or importing into the United States, without authority, amusement rides utilizing the inventions and designs claimed in the ‘144 Patent.

63. Confolding, in violation of 35 U.S.C. § 271, is and has been directly infringing, contributing to the infringement of, and/or inducing others to infringe the ‘144 Patent by making, using, selling, and/or offering to sell in the United States, or importing into the United States, without authority, amusement rides utilizing the inventions and designs claimed in the ‘144 Patent.

64. Ferguson has induced others to infringe the 144 Patent in violation of 35 USC § 271 (b). Specifically, Ferguson has actively induced, and continues to induce, the infringement of one or more claims of the 144 Patent by aiding and abetting, in the United States, the infringement of the 144 Patent by Fun Light and Confolding.

65. Fun Light had prior notice and knowledge of the ‘144 Patent, and was previously found liable by a Netherland court in October 2014 for its duplication of the design features, functional aspects, and overall appearance and operation of the “Freak Out” ride. Further, upon information and belief, Confolding had prior notice and knowledge of the ‘144 Patent based upon its affiliation and close working relationship with Fun Light.

66. Ferguson was aware of the aforementioned litigation and was action as Fun Light’s U.S. Representative at the time.

67. Notwithstanding their lack of a license or authorization from KMG, at the IISF trade show, Fun Light, Confolding and Ferguson attempted and offered to sell the “Extreme” ride to potential U.S. and foreign customers.

68. Defendants lack any justifiable belief that there is no infringement or that the infringed claims are invalid. Defendants have therefore acted with recklessness in its infringing activity, making Defendants’ infringement of the ‘144 Patent willful. As a result, KMG is entitled to an award of exemplary damages, attorney’s fees, and costs in bringing this action.

69. Fun Light and Confolding intend to continue their unlawful infringing activity related to the ‘144 Patent, and Ferguson intends to continue to promote, sell, import and induce the infringing activity within the United States.

70. Defendants’ acts of infringement have caused damage to KMG, and KMG is entitled to recover from Defendants the damages sustained by KMG as a result of Defendants’ wrongful acts, and injunctive relief and to recover its costs and reasonable attorneys’ fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. That Defendants, their officers, directors, agents, servants, employees, and all other persons or entities in active concert or participation with it, or any of them, be preliminarily and permanently enjoined and restrained from the presentation, display, marketing, promotion, advertising, importing, selling, and/or offering to sell in the United States of confusingly similar rides and/or rides which infringe upon the ‘144 Patent;

2. For judicial declaration that Defendants have engaged in unfair competition pursuant to the Lanham Act, 15 U.S.C. § 1125(a) and/or common law;

3. Enter judgment that Defendants have violated Florida's Deceptive and Unfair Trade Practices Act, including injunctive relief;

4. Enter a judgment that Defendants have infringed, directly and/or indirectly, and by way of inducing and/or contributing to the infringements of the '144 Patent;

5. That Defendants account to Plaintiff for all profits realized as a consequence of Defendants' unlawful acts, and that such profits be trebled, as provided by law pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117 or otherwise;

6. That Plaintiff be awarded damages in the full amount it has sustained as a consequence of Defendants' acts, trebled were provided by law, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117 or otherwise;

7. That Plaintiff has and recovers from Defendants reasonable attorney's fees, costs and disbursements in this action pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117 and as otherwise authorized by law;

8. That Defendants pay compensatory and punitive damages to Plaintiff;

9. That any monetary award include pre and post judgment interest at the highest rate by law;

10. That Plaintiff be awarded damages adequate to compensate Plaintiff for the patent infringement, inducement of infringement, and contributory infringement, together with pre and post judgment interest and accounting;

11. Increased damages pursuant to 35 U.S.C. § 284;

12. A finding that this case is exceptional and award to Plaintiff of its attorney's fees, expenses and costs pursuant to 35 U.S.C. § 285;

13. That Defendants pay Plaintiff costs of suit herein, and

14. Such other and further relief as this Court may deem just and proper.

Demand for Jury Trial

Plaintiff demands a trial by jury on all issues so triable.

Dated: February 7, 2019.

Respectfully submitted,

HILL, RUGH, KELLER & MAIN, P.L.

/s/ Richard A. Keller

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