

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ORIGINAL

FILED IN CLERK'S OFFICE  
U.S.D.C.-Atlanta

MAY 23 2006

LUTHER D. THOMAS, Clerk  
By: *[Signature]*  
Deputy Clerk

IN ZONE, INC.,

Plaintiff,

v.

WALGREENS CO.,

Defendant.

CASE NO.

**06 CV 1240**

**-ODE**

JURY TRIAL DEMANDED

**COMPLAINT**

**Introduction**

This complaint seeks preliminary and permanent injunctive relief (and other relief) to prevent irreparable harm to Plaintiff, In Zone, Inc. ("In Zone"), being caused by the Defendant's unauthorized use of In Zone's distinctive trade dress and patented design in violation of the Lanham Act, the Patent Laws of the United States and Georgia law. In Zone has used and promoted its distinctive **BUBBA KEG®** thermal insulated beverage containers (the "**BUBBA KEG®** Trade Dress") since 2002 and it has become well known in the beverage container industry and to consumers because of its distinctiveness. The ornamental design of the **BUBBA KEG®** beverage container is also protected by a United States Design Patent. In 2004, 2005 and 2006, In Zone negotiated with Defendant, Walgreens Co. ("Walgreens" or "Defendant"), seeking to sell **BUBBA KEG®** thermal insulated beverage containers to Walgreens. Walgreens did not place any orders with In Zone. Instead, Defendant Walgreens began making, distributing, and selling a nearly identical insulated mug named the "Beer Mug". The Beer Mug uses a design that

infringes In Zone's design patent. Moreover, the Beer Mug configuration is confusingly similar to In Zone's distinctive **BUBBA KEG®** Trade Dress and is likely to deceive and confuse consumers, and irreparably harm and dilute In Zone's valuable goodwill in the **BUBBA KEG®** Trade Dress. Therefore, In Zone, through its attorneys, alleges as follows:

**Parties**

1. Plaintiff, In Zone, Inc., is a Georgia corporation with its principal place of business at 7775 The Bluffs, Suite H, Austell, Georgia 30168.

2. Upon information and belief, Defendant, Walgreens Company, is an Illinois corporation and has a principal place of business at 200 Wilmot Road, Deerfield, Illinois 60015. It may be served by serving its agent for service of process, Allan M. Resnick, 200 Wilmot Road, Deerfield, Illinois 60015-4616.

**Nature of Action; Jurisdiction**

3. This is an action for patent infringement under the Patent Laws of the United States, 35 U.S.C. §§ 271 *et seq.*, trade dress infringement and unfair competition under the Lanham Act, 15 U.S.C. §§ 1125 *et seq.*, deceptive trade practices under Georgia Code Ann. § 10-1-370 *et seq.*, and trademark infringement, unfair competition, and unjust enrichment under Georgia common laws. The amount in controversy exceeds \$75,000, exclusive of interests and costs.

4. This Court has jurisdiction over the claims made in this complaint under the federal Patent Laws of the United States, 35 U.S.C. § 281, the Lanham Act, 15 U.S.C. § 1121, and under the Judicial Code of the United States, 28 U.S.C. §§ 1331, 1332, & 1338 and supplemental or pendant jurisdiction over the state law claims because they derive from a common nucleus of operative facts with regard to the federal claims.

5. Personal jurisdiction and venue are proper in this district pursuant to 28 U.S.C. § 1391& 1400(b) because Walgreens maintains stores in, and has committed and continues to commit acts of patent and trade dress infringement and unfair competition in, the State of Georgia and in this judicial district.

### **FACTS**

#### **In Zone and Its Patented Design and Trade Dress**

6. In Zone makes and sells, among other things, distinctive thermal insulated beverage containers comprising a keg-like shape and having a distinctive metal band around the middle portion of the container. The product configuration of In Zone's **BUBBA KEG®** beverage containers constitutes its legally protectable **BUBBA KEG®** Trade Dress. A true and correct picture of a mug comprising the **BUBBA KEG®** Trade Dress is attached as **Exhibit A**.

7. On November 14, 2002, inventors Monty L. Allen, Kenneth C. Kreamle and Leon J. Scott filed an application for the ornamental design of the **BUBBA KEG®** beverage containers. The inventors executed an assignment to In Zone, Inc. that was recorded on November 14, 2002 at Reel 013508 and Frame 0861. In Zone, Inc. later merged into In Zone Brands, Inc. and the assignment by merger was recorded on January 9, 2004 at Reel 014245 and Frame 0608. On May 5, 2006, In Zone Brands, Inc. filed an amendment to its Articles of Incorporation with the Georgia Secretary of State changing its name to In Zone, Inc. United States Patent No. D490,654 ("In Zone's '654 Patent") entitled "Cup" issued on June 1, 2004, listing In Zone, Inc. as the sole Assignee. A true and correct copy of In Zone's '654 Patent and the merger recordation is attached as **Exhibit B**.

8. In Zone began selling its **BUBBA KEG®** beverage containers comprising the **BUBBA KEG®** Trade Dress at least as early as March 2003. Before June 2004, In Zone marked

its **BUBBA KEG®** beverage containers with the words “Patent Pending,” In Zone’s company logo, the word “IN ZONE” and its website address (www.in-zone.com). Since June 2004, In Zone has been marking its **BUBBA KEG®** beverage containers with the legend “U.S. Patent No. D490,654”. Walgreens was provided with product samples bearing such markings at least as early as May 19, 2004, when Mr. Gunnar Olson of In Zone made a presentation to Walgreens, which presentation is attached as **Exhibit C**.

9. In Zone has invested and continues to invest substantial sums in promoting its products and services offered under the distinctive **BUBBA KEG®** Trade Dress. In Zone’s **BUBBA KEG®** Trade Dress is well-known in the beverage industry and is recognized by the consuming public as a source identifier. The **BUBBA KEG®** Trade Dress is both inherently distinctive and has achieved secondary meaning. In Zone has developed valuable good will in its **BUBBA KEG®** Trade Dress.

**Walgreens, Its Infringement, and Its Other Injurious Activities**

10. Upon information and belief, Walgreens manufactures (or has manufactured) various products and sells both its own and other suppliers’ products through its Walgreens outlets. In 2005 and 2006, In Zone’s Director of National Accounts, Andrew Wonder, followed up with Walgreens purchasing manager, Lori Seaberg, in a continuing effort to sell **BUBBA KEG®** beverage containers to Walgreens. At the meetings, Mr. Wonder presented Ms. Seaberg with pricing information along with samples of In Zone’s **BUBBA KEG®** beverage containers. Moreover, Mr. Wonder notified Ms. Seaberg that In Zone had stopped at least one other retail chain from selling knock-off mugs that infringed upon In Zone’s rights. Ms. Seaberg never contacted Mr. Wonder regarding an order and Walgreens never purchased any **BUBBA KEG®** beverage containers.

11. Upon further information and belief, Walgreens has sold, and continues to sell, in this judicial district and elsewhere, thermal insulated beverage containers having a product configuration that is confusingly similar to In Zone's distinctive **BUBBA KEG®** Trade Dress and a design that infringes In Zone's '654 Patent. Moreover, the Walgreens mugs are, except for the mold number that is formed onto the bottom of the mugs, *identical* to the knockoff mugs that were previously distributed by another retail chain. Such acts of Walgreens constitute infringement of In Zone's patent, infringement of In Zone's trademark and trade dress rights in the **BUBBA KEG®** Trade Dress, and unfair competition. Such acts of infringement and unfair competition are likely to continue unless enjoined by this Court. True and correct copies of photographs of Walgreens' "Beer Mug" compared to In Zone's **BUBBA KEG®** beverage container are attached as **Exhibit D**.

12. On information and belief, Walgreens' infringement and other unlawful activities are intentional, in that Walgreens intentionally and willfully copied the distinctive **BUBBA KEG®** Trade Dress and/or committed other tortious acts in an effort to capitalize on the goodwill that has been developed by In Zone's efforts and investment of resources. Moreover, on further information and belief, Walgreens intentionally and willfully copied In Zone's patented design and made, had made, used and/or sold products incorporating that design in violation of In Zone's patent rights.

#### **Injury to In Zone and to the Consuming Public**

13. Walgreens' unauthorized use of a product configuration that is confusingly similar to In Zone's **BUBBA KEG®** Trade Dress falsely indicates to consumers that Walgreens' activities are approved, sponsored, or licensed by, or that Walgreens is affiliated or otherwise

associated with In Zone, which is not the case.

14. Walgreens' unauthorized use of a product configuration that is confusingly similar to In Zone's **BUBBA KEG®** Trade Dress in the manner described above is likely to cause confusion, to cause mistake, and/or to deceive customers and potential customers of the parties, at least as to some affiliation, connection, or association of Walgreens with In Zone.

15. Walgreens' unauthorized use of a product configuration that is confusingly similar to In Zone's **BUBBA KEG®** Trade Dress unjustly enriches Walgreens at the expense of In Zone's valuable goodwill.

16. Walgreens' unauthorized use of a product configuration that is confusingly similar to In Zone's **BUBBA KEG®** Trade Dress removes from In Zone the ability to control the nature and quality of goods and services provided under its **BUBBA KEG®** Trade Dress, and places the valuable reputation and goodwill of In Zone's **BUBBA KEG®** Trade Dress in the hands of Walgreens, over whom In Zone has no control.

17. Walgreens' unauthorized use of a product configuration that is confusingly similar to In Zone's **BUBBA KEG®** Trade Dress also creates initial consumer interest in Walgreens goods and services, thereby diverting potential sales of In Zone's **BUBBA KEG®** products from In Zone distributors and representatives to the goods manufactured, sold and/or distributed by or on behalf of Walgreens.

18. Unless Walgreens' unlawful acts of patent and trade dress infringement and unfair competition are enjoined by this Court, they will continue, causing irreparable injury to In Zone and to the public, for which there is no adequate remedy at law.

**COUNT 1: PATENT INFRINGEMENT UNDER THE FEDERAL PATENT ACT**

19. In Zone repeats and re-alleges paragraphs 1–18 above as if fully set forth herein.

20. Walgreens' acts, as set forth above, constitute patent infringement in violation of the Patent Act, 35 U.S.C. § 271.

21. By reason of the foregoing, In Zone has been and will continue to be irreparably harmed and damaged. In Zone's remedies at law are inadequate to compensate for this harm and damage.

**COUNT 2: UNFAIR COMPETITION UNDER THE LANHAM ACT**

22. In Zone repeats and realleges paragraphs 1–21 above as if fully set forth herein.

23. Walgreens' unauthorized acts, as set forth above, constitute unfair competition in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A).

24. By reason of the foregoing, In Zone has been and will continue to be irreparably harmed and damaged. In Zone's remedies at law are inadequate to compensate for this harm and damage.

**COUNT 3: COMMON LAW TRADEMARK INFRINGEMENT**

25. In Zone repeats and realleges paragraphs 1–24 above as if fully set forth herein.

26. Walgreens' acts, as set forth above, constitute trademark infringement under the common laws of the State of Georgia.

27. By reason of the foregoing, In Zone has been and will continue to be irreparably harmed and damaged. In Zone's remedies at law are inadequate to compensate for this harm and damage.

**COUNT 4: COMMON LAW UNFAIR COMPETITION**

28. In Zone repeats and realleges paragraphs 1–27 above as if fully set forth herein.

29. Walgreens' acts, as set forth above, constitute unfair competition under the common laws of the State of Georgia.

30. By reason of the foregoing, In Zone has been and will continue to be irreparably harmed and damaged. In Zone's remedies at law are inadequate to compensate for this harm and damage.

**COUNT 5: GEORGIA DECEPTIVE TRADE PRACTICES**

31. In Zone repeats and realleges paragraphs 1–30 above as if fully set forth herein.

32. Walgreens' acts, as set forth above, constitute deceptive trade practices in violation of the Georgia Deceptive Trade Practices Act, Georgia Code Ann. § 10–1–370 *et seq.*

33. By reason of the foregoing, In Zone has been and will continue to be irreparably harmed and damaged. In Zone's remedies at law are inadequate to compensate for this harm and damage.

**COUNT 6: UNJUST ENRICHMENT**

34. In Zone repeats and realleges paragraphs 1–33 above as if fully set forth herein.

35. Walgreens' past and continued unauthorized use of a product configuration that is confusingly similar to In Zone's **BUBBA KEG®** Trade Dress enriches Walgreens at the expense of In Zone's valuable goodwill.

36. Walgreens' continued use of In Zone's **BUBBA KEG®** Trade Dress has, and continues to, confer an unjust benefit upon Walgreens.

37. It would be inequitable for Walgreens to retain that benefit without payment to In Zone.



**PRAYER FOR RELIEF**

**WHEREFORE**, In Zone, Inc. requests the entry of judgment against Walgreens Company as follows:

1. That the Court preliminarily and permanently enjoin Walgreens, its officer(s), agents, servants, employees, attorneys, successors and assigns, and all those persons in active concert or participation with any of them:

a. From directly or indirectly making or causing to be made, using or selling or causing to be sold, any apparatus, device or article which embodies and/or employs the invention defined by the claim of United States Letters Patent No. D490,654;

b. from using in any way, and on or through any medium, In Zone's **BUBBA KEG®** Trade Dress or any other product configuration that is confusingly similar thereto, in connection with the promotion, advertising, or offering of beverage container products;

c. from otherwise competing unfairly with In Zone in any manner, including, without limitation, unlawfully adopting or using a product configuration confusingly similar to In Zone's **BUBBA KEG®** Trade Dress;

d. from holding itself out in any form of advertising or promotion as an authorized distributor or representative of In Zone, or from representing or otherwise suggesting that Walgreens' activities are approved, sponsored, or licensed by, or that Walgreens is affiliated or otherwise associated with or approved by In Zone; and

e. from conspiring with, aiding, assisting or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs a-d above;

2. That the Court order Walgreens, its officer(s), agents, servants, employees, attorneys, successors and assigns, and all those persons in active concert or participation with any of them, to deliver up for destruction, or show proof of destruction of, any and all containers, labels, signs, prints, packages, wrappers, receptacles, and advertisements, and any other materials in their possession or control that are confusingly similar to the **BUBBA KEG<sup>®</sup>** Trade Dress or any other mark or trade dress confusingly or substantially similar thereto, or any other mark owned by In Zone or any of its affiliates, subsidiaries, or parents, and any materials or articles used for making or reproducing the same as provided by 15 U.S.C. § 1118;

3. That the Court order Walgreens to file with the Court and to serve upon In Zone, within thirty (30) days after the entry and service on Walgreens of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Walgreens has complied with the injunction;

4. That In Zone recover all damages it has sustained as a result of Walgreen's willful, wanton and deliberate infringement, false advertising, unfair competition and unjust enrichment and all additional statutory remedies;

5. That said damages awarded to In Zone be trebled pursuant to 15 U.S.C. § 1117(a) and/or 35 U.S.C. § 284;

6. That an accounting be directed to determine Walgreens' profits resulting from its infringement, false advertising, unfair competition and unjust enrichment, and that such profits be paid over to In Zone, increased as the Court finds to be just under the circumstances of this case;

7. That the Court declare that this be an exceptional case and award In Zone its reasonable attorneys' fees for prosecuting this action pursuant to 15 U.S.C. § 1117(a) and/or 35 U.S.C. § 285;

8. That In Zone recover its costs of this action and prejudgment and post-judgment interest; and

9. That In Zone recover such other relief as the Court may deem appropriate.

**JURY TRIAL DEMAND**


Pursuant to Fed. R. Civ. P. 38, In Zone hereby demands a trial by jury on all issues triable by right to a jury.

Respectfully submitted,

Dated: \_\_\_\_\_

May 23, 2006

By: \_\_\_\_\_



Fredric Chaiken (Georgia State Bar No. 118625)  
CHAIKEN KLOPFEIN, L.L.C.  
7000 Peachtree Dunwoody Rd.  
Bldg. 9, Suite 300  
Atlanta, Ga. 30328  
(770) 668-5454 Telephone  
(770) 668-1677 Facsimile

**OF COUNSEL:**

John C. Cain  
Texas State Bar No. 00783778  
WONG, CABELLO, LUTSCH,  
RUTHERFORD & BRUCCULERI, LLP  
20333 SH 249, Suite 600  
Houston, TX 77070  
(832) 446-2400 Telephone  
(832) 446-2424 Facsimile

**ATTORNEY FOR PLAINTIFF,  
IN ZONE, INC.**