

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LONE STAR CONSOLIDATED FOODS, INC.,

Plaintiff,

v.

SELECT BRANDS, INC.

Defendant.

§
§
§
§
§
§
§
§
§

CIVIL ACTION NO.:

A JURY IS DEMANDED

COMPLAINT

Plaintiff Lone Star Consolidated Foods, Inc. ("Lone Star" or "Plaintiff") for its Complaint against Defendant Select Brands, Inc. ("Select Brands" or "Defendant"), alleges as follows:

Parties

1. Plaintiff Lone Star is a Texas corporation having its principal place of business at 1727 North Beckley, Dallas, Texas 75203.

2. Based upon information and belief, Defendant Select Brands is a corporation organized and existing under the laws of Kansas and having its principal place of business at 10817 Renner Blvd., Lenexa, KS 66219 and doing business within this judicial district.

Jurisdiction and Venue

3. This is an action for infringement of a federally registered trademark in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114; for federal trademark infringement and unfair competition in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); and for common law trademark infringement and unfair competition.

4. This Court has jurisdiction over this action pursuant to 15 U.S.C. § 1121 and pursuant to 28 U.S.C. §§ 1331 and 1338 because this is a civil action arising under an Act of

Congress relating to trademarks. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a) because the claims are so related to the federal claims that they form part of the same case or controversy and derive from a common nucleus of operative facts.

5. This Court also has jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332. The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. The matter in controversy is between citizens of different states.

6. This Court has personal jurisdiction over the Defendant because Defendant is doing business in Texas and has directed sales and marketing efforts toward this judicial district and, on information and belief, Defendant sold the products accused of infringement in this judicial district.

7. Venue is appropriate in this judicial district under 28 U.S.C. § 1391(b) and (c).

Factual Background

8. Lone Star is a food manufacturer and supplier located in the City of Dallas, Texas. In 1991, Lone Star adopted, and has continuously used since that time, the mark BABY CAKES in connection with staple foods, namely, doughnuts and bakery goods. Lone Star is the owner of U.S. Registration No. 1,722,252 of the mark “BABYCAKES” (stylized) for “staple foods, namely, doughnuts and bakery goods.” (A copy of the registration is attached hereto and marked as Exhibit A). Said registration is now outstanding and valid.

9. The validity of the registered mark and of the registration of the mark, registrant’s ownership of the mark, and Plaintiff’s exclusive right to use said registered mark in commerce for the above mentioned goods are incontestable under 15 U.S.C. § 1065, and 15 U.S.C. § 1115(b), as Plaintiff has filed the required affidavit with the U.S. Patent and Trademark Office.

10. Select Brands is in the business of designing, manufacturing and selling kitchen appliances. Select Brands sells its products under its own trademarks as well as manufactures private label products.

11. Select Brands uses and has been using the BABYCAKES mark in connection with electrical appliances, including cupcake makers, donut makers, etc. as well as paper baking cups, cake pop sticks, etc. Select Brands also uses “thebabycakeshop.com” for an interactive website allowing the user to order products directly over the Internet.

12. Upon information and belief, Select Brands also sells and has sold on its website “thebabycakeshop.com” baking mixes, e.g., doughnut mix, cake pop mix, cupcake mix, etc. Upon information and belief, Select Brands sells and has sold on its website “thebabycakeshop.com” cookbooks including recipes for bakery goods and donuts, and having in their titles the mark “BABYCAKES” (e.g., “175 best babycakes cake pops recipes”).

First Claim for Relief
Infringement of Federally Registered Trademark

13. Lone Star realleges paragraphs 1–12 of this Complaint.

14. The Defendant has, without the consent or authorization of Lone Star, used and has continued to use after receiving notice of Lone Star’s rights, a trademark that contains Lone Star’s BABYCAKES trademark verbatim and that is confusingly similar to Lone Star’s BABYCAKES trademark in connection with Defendant’s goods, and such use caused and if not enjoined is likely to continue to cause confusion, to cause mistake and to deceive.

15. The aforesaid acts of the Defendant constitute trademark infringement in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

16. The aforesaid acts of the Defendant have been and continue to be intentional, willful and in bad faith.

17. Lone Star has been and is likely to be damaged by the Defendant's infringing and unlawful acts.

18. The acts of the Defendant complained of herein have caused and, unless enjoined by this Court, are likely to continue to cause Lone Star to suffer irreparable harm.

19. Lone Star has no adequate remedy at law and is entitled to seek injunctive relief as a result thereof pursuant to 15 U.S.C. § 1116.

Second Claim for Relief
Federal Unfair Competition and False Designation of Origin

20. Lone Star realleges paragraphs 1–19 of this Complaint.

21. The Defendant's use of the BABYCAKES trademark has caused and is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection with, or association of Defendant or Defendant's goods and commercial activities with Plaintiff or Plaintiff's goods and commercial activities, or as to the origin, sponsorship, or approval of Defendant's goods and commercial activities by Plaintiff.

22. The Defendant's use of the BABYCAKES trademark is competing unfairly with Plaintiff in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

23. The aforesaid acts of the Defendant constitute false designation of origin and false and misleading descriptions and representations in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

24. The aforesaid acts of the Defendant have been and continue to be intentional, willful and in bad faith.

25. Lone Star has been and is likely to be damaged by the Defendant's infringing and unlawful acts.

26. The acts of the Defendant complained of herein have caused and, unless enjoined by this Court, are likely to continue to cause Lone Star to suffer irreparable harm.

27. Lone Star has no adequate remedy at law and is entitled to seek injunctive relief as a result thereof pursuant to 15 U.S.C. § 1116.

Third Claim for Relief
Trademark Infringement and Unfair Competition under Common Law

28. Lone Star realleges paragraphs 1–27 of this Complaint.

29. Said acts of Defendant constitute unfair competition and an infringement of Plaintiff's common-law rights in said mark BABYCAKES.

30. The Defendant's acts alleged above have caused, and if not enjoined will continue to cause, irreparable and continuing harm to Plaintiff's BABYCAKES trademark, and Plaintiff's business, reputation and goodwill. Lone Star has no adequate remedy at law, as monetary damages are inadequate to compensate Lone Star for the injuries caused by the Defendant.

31. As a direct and proximate result of the Defendant's conduct alleged herein, Lone Star has suffered damages and the Defendant has been unjustly enriched and should be ordered to disgorge any and all profits earned as a result of and any damages to Lone Star resulting from such unlawful conduct.

Prayer for Relief

WHEREFORE, Lone Star prays for the following relief:

- a. Judgment in favor of Lone Star and against the Defendant as to all causes of action contained in Lone Star's complaint;
- b. An award of Lone Star's damages and costs and the Defendant's profits under 15 U.S.C. § 1117(a);
- c. A finding that this is an "exceptional" case under 15 U.S.C. § 1117(a), together with an award to Lone Star of treble actual damages or treble the Defendant's profits, whichever is greater, and its attorneys' fees, pursuant to 15 U.S.C. § 1117(b);
- d. Grant a preliminary and a permanent injunction requiring the Defendant to cease using and remove from or destroy all materials on which the BABYCAKES trademark appears, and remove and take steps to have removed any and all online postings in which the BABYCAKES trademark is used; and
- e. Grant Plaintiff Lone Star such other and further relief as the Court may deem necessary, just and proper.

Jury Demand

Plaintiff Lone Star respectfully demands trial by jury.

Dated this 2nd day of June, 2014.

Respectfully submitted,

BOOTH ALBANESI SCHROEDER LLC

/S/ PETER V. SCHROEDER

PETER V. SCHROEDER

Texas Bar No. 00794606

pschroeder@ipoftexas.com

ATTORNEY IN CHARGE

DAVID JOERS

Texas Bar No. 10669800

djoers@ipoftexas.com

1601 Elm Street, Suite. 1950

Dallas, TX 75201-4744

Telephone: 214-220-0444

Fax: 214-220-0445

ATTORNEYS FOR PLAINTIFF