

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

07 SEP 25 AM 11:24
SEC
LAURENCE
CLERK

NOVELTY, INC.
Plaintiff

vs.

MOUNTAIN VIEW MARKETING, INC. and
MCLANE COMPANY, INC.
Defendants

)
)
)
) CASE NO. _____
)
)

07-cv-1229-SEB-JMS

**COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF
AND DEMAND FOR JURY TRIAL**

Plaintiff, Novelty, Inc. (“Novelty”), by counsel, for its Complaint for Damages and Injunctive Relief and Demand for Jury Trial against Defendants, Mountain View Marketing, Inc. (“Mountain View”) and McLane Company, Inc. (“McLane”) (collectively “Defendants”), states as follows:

Nature of Action

1. This is an action, arising in part under federal, state and common law for trade dress infringement, copyright infringement, unfair competition and other related causes of action arising out of Defendants’ unauthorized copying, manufacturing, distributing, advertising, sales, infringement and use of Novelty’s intellectual property.

Jurisdiction and Venue

2. This Court has original subject matter jurisdiction in this action pursuant to the trademark and copyright laws of the United States, respectively 15 U.S.C. §1051 et seq. and 17 U.S.C. §101 et seq.; this Court has subject matter jurisdiction over these claims as federal questions pursuant to 28 U.S.C. §§1331 and 1338; this Court also has supplemental jurisdiction over Novelty’s state and other claims pursuant to 28 U.S.C.

§1367(a) inasmuch as those claims are so related to the federal claims as to form part of the same case or controversy; further, the parties are completely diverse in citizenship and the amount in controversy is likely over \$75,000, and therefore, there is diversity jurisdiction under 28 U.S.C. §1332.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(a), (b) and (c).

4. This Court may exercise personal jurisdiction over Defendants because of Defendants' contacts with this forum, and because Defendants have committed acts and crimes in the State of Indiana by delivering and selling infringing products in Indiana.

The Parties

5. Plaintiff, Novelty, is and at all times mentioned in this complaint, an Indiana corporation with its principal place of business at 351 West Muskegon Drive, Greenfield, Indiana 46140.

6. Upon information and belief, Defendant, Mountain View Marketing, Inc. ("Mountain View") is a Utah corporation with its principal place of business located at 215 North 1800 West, Lindon, Utah, 84042, with another office at 401 South Wilcox Street, Suite 100, Castle Rock, Colorado 80104. Mountain View is an importer and distributor of sunglasses, novelties, gifts, toys, jewelry, gloves, seasonal and apparel that distributes products to convenience, grocery, truck stops, and gift stores in the United States, including Indiana. Also upon information and belief, Mountain View transacts business in Indiana, regularly engaging in persistent courses of conduct in Indiana, deriving revenue from interstate commerce, and Mountain View's activities in this

judicial district include the sale of products that infringe Plaintiff's intellectual property rights as asserted herein.

7. Upon information and belief, Mountain View Marketing, Inc. is a subsidiary of co-defendant McLane Company, Inc. ("McLane") which is a Texas corporation with its principal place of business located at 4747 McLane Parkway, Temple, Texas 76504. McLane is an international grocery and foodservice distributor that provides third party logistics, traffic management and control functions. Also upon information and belief, like Mountain View, McLane transacts business in Indiana, regularly engaging in persistent courses of conduct in Indiana, deriving revenue from interstate commerce, and McLane's activities in this judicial district include the sale of products that infringe Plaintiff's intellectual property rights as asserted herein. Mountain View and McLane are competitors of Novelty.

8. Novelty is informed and believes, and based thereon alleges, that each Defendant, at all times herein mentioned and relevant to liability, acted as agents, servants, employees and representatives of the other Defendant, and that in performing and engaging in the acts alleged in this complaint, Defendants acted within the authorized course and scope of their agency and employment. Novelty is further informed and believes, and based thereon alleges that all of Defendants' acts and the acts of Defendants' other employees, agents, and representatives were authorized, consented to, with permission and ratified by all remaining Defendants.



Factual Allegations

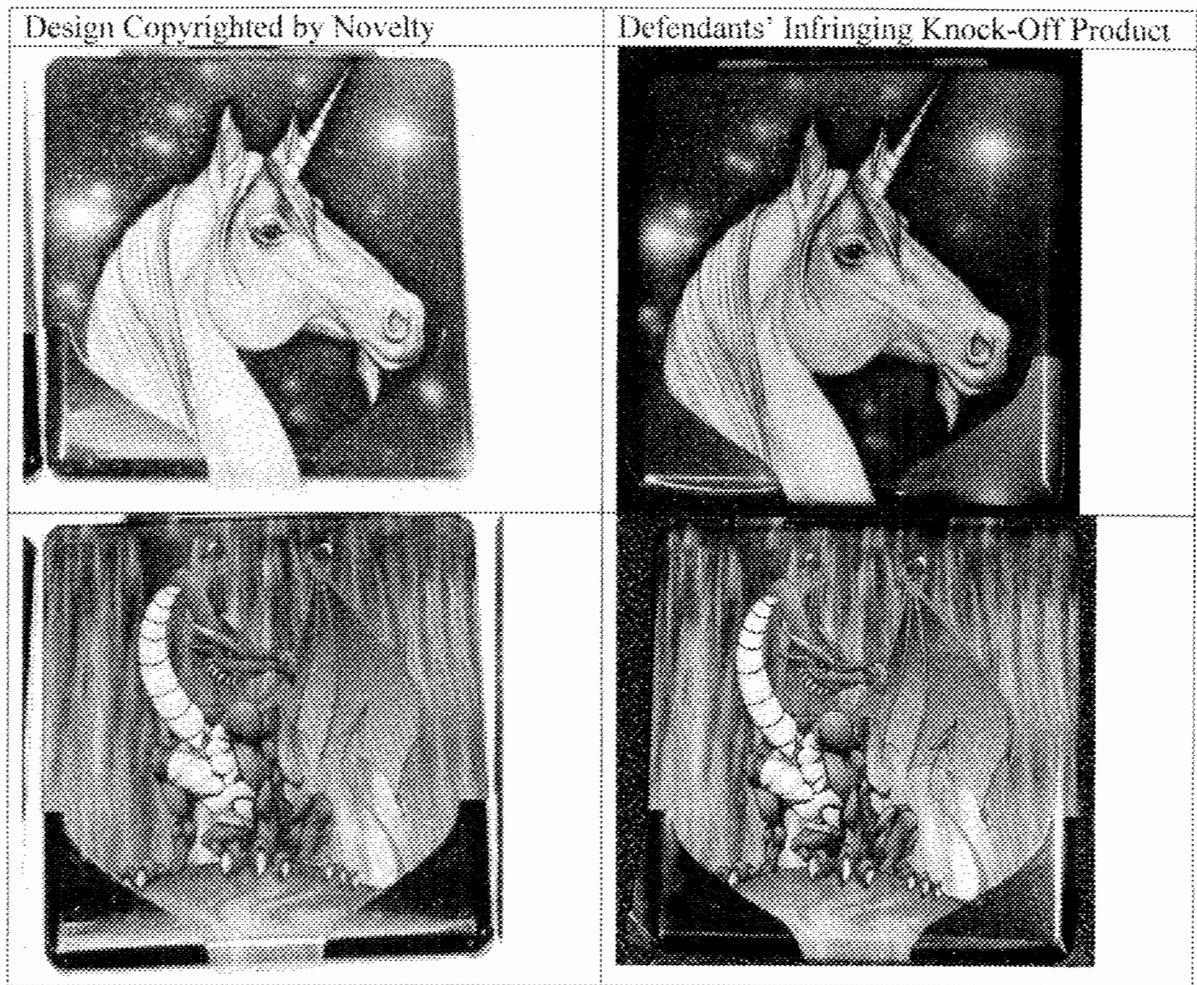
9. Novelty is one of the largest distributors of products to convenience stores in the United States. Novelty has been in the business since 1980, growing and expanding to

service over 13,000 customers across the nation. Novelty distributes many novelty type items found for sale in convenience stores including lighters, t-shirts, hats and other items. Novelty is a licensed distributor of many well-known companies including Disney, Paramount Pictures and others.

10. Novelty created various distinctive designs for its exclusive use on Novelty's products including the designs that are the subject of U.S. Copyright Number VAu638-771 (the "Infringed Designs").

11. Defendants have infringed Novelty's copyrights and trade dress and competed unfairly with Novelty by making, importing, selling and distributing Novelty's Infringed Designs. Copies of some of the designs owned and copyrighted by Novelty, and infringing products of the Defendants, are as follows.

Design Copyrighted by Novelty	Defendants' Infringing Knock-Off Product
	



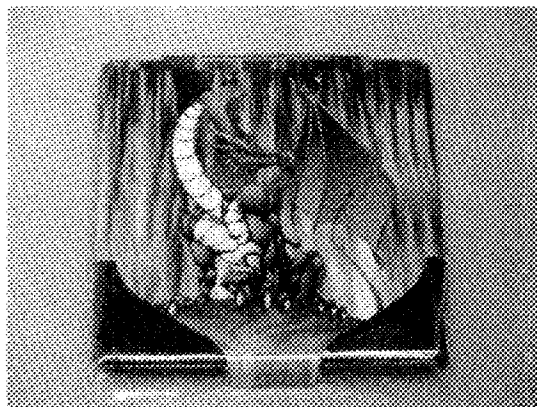
12. Novelty owns all copyrights and trade dress rights in the Infringed Designs and has registered its copyrights thereto.

13. In addition to the Infringed Designs, Novelty has amassed a substantial portfolio of intellectual property rights including numerous trademarks, identifying trade dress and other source identifiers. Intellectual property is particularly important in Novelty's business. The intellectual property rights such as that in the Infringed Designs are of incalculable value to Novelty's business and careful maintenance of its intellectual property rights is important to Novelty's success.

14. Novelty has developed substantial goodwill in its product designs, including the Infringed Designs, that is inherently distinctive, arbitrary and nonfunctional, and which operates as a source identifier for Novelty's products. As a result of the design elements in such trade dress, and Novelty's marketing and sales activities, products bearing the Infringed Designs have acquired further distinctiveness.

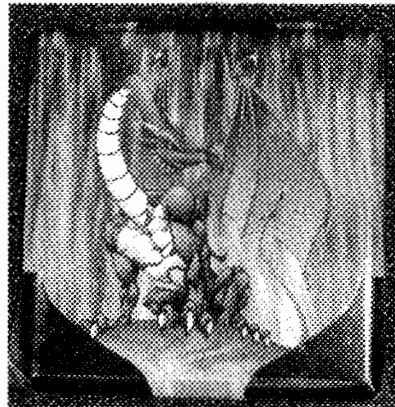
15. These arbitrary and nonfunctional design elements, among others, both individually and in combination, constitute Novelty's proprietary trade dress in the Infringed Design, are inherently distinctive, operate as source identifiers for Novelty's products, and make the products bearing the Infringed Design and its packaging unusual and memorable. Such distinctiveness creates a strong secondary meaning in the minds of the consuming public in that it associates such trade dress with Novelty.

16. On September 7, 2007, the Convenient Food Mart/Save Oil Company ("CFM") store #65, located at 1199 Scenic Drive, Herculaneum, Missouri, sold the following product:



17. Upon information and belief, co-defendants Mountain View and McLane supplied, distributed and/or sold the above infringing product to CFM.

18. On September 17, 2007 the Crystal Flash convenience store located at 1215 S. Girl School Road, Indianapolis, Indiana, sold the following infringing product:



19. Upon information and belief, co-defendants Mountain View and McLane supplied, distributed and/or sold the infringing product to Crystal Flash.

20. The designs on and products sold at the CFM and Crystal Flash stores are identical to Novelty's designs and products.

21. Upon information and belief, Defendants have intentionally infringed Novelty's aforementioned intellectual property rights through the sale of "knock-offs," or infringing substantially similar copies of Novelty's designs. Defendants copied, imported, manufactured, sold, distributed or otherwise used products with Novelty's designs, including, but probably not limited to, the products described above.

22. Defendants sell and continue to sell products bearing Novelty's designs. Defendants' products are knock-offs and infringing copies of Novelty's original design

and are confusingly similar to Novelty's products. The copying, manufacture, sale and distribution of the Novelty's designs constitute infringement.

23. Novelty has no adequate remedy at law and damage continues to Novelty.

COUNT I
Copyright Infringement under 17 U.S.C. §101 et seq.

24. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

25. Novelty is the owner of copyrights regarding the above designs, and in other designs for Novelty products.

26. The Infringed Design is wholly original to Novelty and is copyrightable subject matter under the laws of the United States.

27. On August 25, 2004, Novelty obtained duly issued United States Copyright registration for its design, U.S. Copyright No. VAu638-771.

28. Despite Novelty's valid copyrights, Defendants willfully copied and infringed the Infringed Designs, and other designs of Novelty in violation of the Copyright Act, 17 U.S.C. §101 et seq.

29. On information and belief, Defendants' willful and intentional copying was undertaken with full knowledge that it violated Novelty's ownership rights.

30. Novelty has suffered injury in an undetermined amount as the result of Defendants' acts of infringement that is irreparable in nature. However, as a direct and proximate result of Defendants' conduct, Novelty has at least suffered actual damages, lost profits, statutory damages, and statutory damages for willful infringement. In

addition, Novelty is entitled to an award of attorney fees as a part of costs under 17 U.S.C. §505, and all other reasonable relief available.

COUNT II
False Designation of Origin, Trade Dress Infringement and Unfair Competition
Under 15 U.S.C. §1125(a)

31. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

32. The acts complained of herein constitute false designation of origin, false representations or descriptions and/or unfair competition by Defendants in violation of Section 43(a) of the United States Trademark Act of 1946, as amended, 15 U.S.C. §1125 (a).

33. Novelty's products bear a distinctive trade dress that is nonfunctional. The totality of the elements of Novelty's products bearing its designs have acquired exclusive legal rights as a type of identifying symbol of origin, i.e. protectible trade dress.

34. Products having Novelty's designs were advertised and promoted for years using a continuous style of advertising, and this exclusive use causes the trade and purchasing public to identify products bearing the design with Novelty. The widespread public acceptance and recognition have also caused products bearing Novelty's designs to have acquired secondary meaning as a distinctive identifier of Novelty, and have become assets of substantial value as symbols of high quality products and goodwill.

35. Defendants' actions of copying, designing, manufacturing, packaging, selling or distributing infringing knock-offs bearing Novelty's designs in interstate commerce, without Novelty's consent, constitute false designation of origin, trade dress infringement

and unfair competition, and has caused and continues to cause a likelihood of confusion, mistake and deception as to source, sponsorship, affiliation, and/or connection in the minds of the public.

36. Defendants' conduct has created confusion, mistake and deception, and is likely to cause further confusion, mistake and deception among members of the general public. Defendants' false designation of origin, trade dress infringement and unfair competition in interstate commerce has infringed Novelty's trademarks rights in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

37. Novelty has been injured in an amount to be determined, and irreparable harm is imminent as a result of Defendants' conduct. Unless Defendants are enjoined and restrained by this Court, Defendants' continuing wrongful acts will further damage the ownership rights in its distinctive designs. Novelty is entitled to an injunction restraining Defendants and all persons acting in concert with them for engaging in any further acts in violation of the Lanham Act. Novelty is also entitled to recover Defendants' profits, actual damages, treble damages, costs of suit and attorney's fees, and all other reasonable relief available.

COUNT III
Common Law Trademark Infringement and Unfair Competition

38. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

39. Defendants' acts as set forth herein are intended to and are likely to cause confusion or mistake and to deceive the public into falsely believing that Defendants' products are sponsored by, or otherwise associated with Novelty.

40. Novelty's business reputation and goodwill have been injured, and the distinctive character and quality of the Novelty's trade dress has been and is being diluted or otherwise injured.

41. Moreover, Defendants are improperly using Novelty's designs to derive financial benefit, unfairly trading upon and misappropriating for Defendants' benefit Novelty's valuable goodwill, reputation, and business opportunities.

42. Novelty has suffered substantial and irreparable harm for which there is no adequate remedy at law. Defendants' unlawful conduct constitutes unfair competition, trade dress infringement, dilution, and misappropriation under the common law and the statutes of the State of Indiana, entitling Novelty to all reasonable relief available.

COUNT IV
Indiana Crime Victims Act

43. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

44. Defendants' acts complained of herein constitute violations of the Indiana Crime Victims Act, I.C. Sec. 34-24-3-1 by engaging in "Deception" as expressed in I.C. 35-43-5-3(a)(6) and (9). Specifically, Defendants, with intent to defraud, misrepresented to the public the source of the Novelty's designs, and Defendants disseminated to the public products that Defendants knew are false, misleading, or deceptive, with intent to promote the purchase or sale of Novelty's designs; to-wit Defendants knew that the Novelty's designs were owned by Novelty, and that any such use was expressly prohibited, false, misleading or deceptive.

45. Defendants have caused irreparable injury to Novelty and Novelty's trade, business, reputation and goodwill. Defendants' actions also caused Novelty to incur fees and expenses. Accordingly, Novelty is entitled to three times its actual damages, costs of this action, reasonable attorney's fees, all other recovery authorized by I.C. 34-24-3-1, and all other reasonable relief available.

PRAYER FOR RELIEF

WHEREFORE, Novelty demands judgment as follows:

1. That judgment be entered in favor of Novelty on all causes of action set forth herein finding Defendants violated, infringed and diluted exclusive rights in Novelty's designs, that Defendants copied, manufactured, sold, advertised, promoted and otherwise improperly used Novelty's designs, copied Novelty's designs, and committed acts of false designation of origin, trade dress infringement, unfair competition and copyright infringement in violation of federal, state and common law;

2. That Defendants their officers, directors, principals, agents, servants, affiliates, employees, attorneys, representatives, successors and assigns, and all those in privity or acting in concert or participation with Defendants, and each and all of them, be preliminarily and permanently enjoined and restricted from directly or indirectly:

a. Copying, selling, offering for sale, promoting, advertising, distributing or providing or offering to provide any goods in conjunction with any trade dress or copyright that is identical to or similar to Novelty's designs;

b. Using, in any manner whatsoever, any other intellectual property identical to or confusingly similar to Novelty's designs.

3. That a declaration of Novelty's rights be issued as follows:

- a. That the trade dress rights claimed herein exist;
- b. That the copyright rights claimed herein exist;
- c. That Defendants' acts complained of herein violate those rights;
- d. That Defendants should be enjoined from further violations of those rights; and
- e. Such other declarations as this Court may deem necessary and/or proper;

4. That Defendants be required to deliver to Novelty proof of destruction or all merchandise, packaging, labels, boxes, cartons, advertising, brochures, plates, molds, documents advertising and promotional materials and other things possessed, used or distributed by Defendants, or on their behalf, which refer to or are at all similar to Novelty's designs;

5. That Defendants be required to account to Novelty for any and all profits gained by Defendants through the conduct complained of herein and to pay all such profits over to Novelty;

6. That Defendants be required to compensate Novelty for any and all damage suffered by Novelty as a result of the actions complained of herein;

7. That Novelty recover monetary relief to the extent provided by 15 U.S.C. § 1117 et seq., 17 U.S.C. § 501 et seq., as well as state and common law, including but not limited to treble damages;


8. That Novelty recover actual damages, lost profits, statutory damages, statutory damages for willful infringement, attorney's fees and costs as available by relevant statutes and laws;

9. That Novelty recover its costs, expenses and attorney's fees incurred in the prosecution of its claims against Defendants including but not limited to such costs, expenses and fees awardable pursuant to 15 U.S.C. § 1117 et seq., 17 U.S.C. § 505 as a prevailing party and I.C. 34-24-3-1; and

10. That Novelty obtain such other and further relief as this Court may deem appropriate.

NOVELTY DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted,

By:  _____
Paul Overhauser
Overhauser Law Offices
737 West Green Meadows Drive, Suite 300
Greenfield, IN 46140
(317)891-1500
(866) 283-8549 fax
Attorney for Plaintiff