



Provided by:Overhauser Law Offices L

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

XP INNOVATION, LLC d/b/a )  
DAN'S COMP, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
IAN SMITH, )  
 )  
Defendant. )

Case No. 3:13-cv-106

**COMPLAINT FOR TRADEMARK INFRINGEMENT, FALSE DESIGNATION OF ORIGIN, FALSE ADVERTISING, AND UNFAIR COMPETITION**

Plaintiff XP Innovation, LLC d/b/a Dan's Comp ("Dan's Comp") for its complaint (the "Complaint") against Ian Smith ("Smith") alleges:

**SUBJECT MATTER JURISDICTION AND VENUE**

1. This is an action for trademark infringement under 15 U.S.C. § 1114(1), false designation of origin and unfair competition under 15 U.S.C. § 1125(a)(1)(A), false advertising under 15 U.S.C. § 1125(a)(1)(B), and unfair competition and trademark infringement under Indiana common law. This Court has subject matter jurisdiction of this action and these claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

2. This Court has supplemental jurisdiction over the claims in this Complaint that arise under the common law of the State of Indiana pursuant to 28 U.S.C. § 1367(a) because the state law 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.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) as a substantial part of the events or omissions giving rise to the claims and the threatened and actual harm to Dan's Comp occurred in this District by reason of Smith's conduct as alleged below.

**PARTIES AND PERSONAL JURISDICTION**

4. Dan's Comp is an Indiana limited liability company with its principal place of business in Mt. Vernon, Indiana.

5. On information and belief, Smith is an individual residing at 721 Mathias Avenue, Massillon, Ohio 44646.

6. The Court has personal jurisdiction over Smith under Indiana's Long Arm Statute, Ind. R. Trial P. 4.4 because Smith conducted his business within this district related to the unlawful activities at issue in this Complaint and the harm suffered by Dan's Comp in this District flows directly from the business conducted by Smith.



**FACTUAL ALLEGATIONS**



**A. Dan's Comp's Use of the DAN'S COMP Trademarks.**

7. Dan's Comp owns and operates the one of the world's largest and most trusted BMX stores.

8. Dan's Comp is the owner of all right, title, and interest in and to the below marks (collectively, the "Dan's Comp Marks"):

TRADEMARK	DATE OF FIRST USE	REGISTRATION NO.	GOODS AND SERVICES
DAN'S	March 1, 1984	2,176,911	Bicycles and bicycle parts, namely, frames, handlebars, stems, wheels, inner tubes, tires, cranks, pedals, forks, pegs, chainwheels and number plates in International Class 12.  Mail order services

			featuring bicycles and bicycle parts in International Class 35.
DAN'S COMPETITION	June 15, 1996	2,176,580	Bicycles and bicycle parts, namely, frames, handlebars, stems, wheels, inner tubes, tires, cranks, pedals, forks, pegs, chainwheels and number plates in International Class 12.  Mail order services featuring bicycles and bicycle parts in International Class 35.
	September 29, 1997	2,607,447	Retail store services and online retail services featuring bicycles, bicycle parts and clothing and accessories used therewith, and mail order catalogue services and online retail ordering services featuring bicycles, bicycle parts and clothing and accessories used therewith in International Class 35.
DAN'S BMX	June 30, 1997	3,853,112	Bicycles in International Class 12.  Shirts in International Class 25.
	July 31, 2000	3,940,083	Bicycle parts, namely, tubes, rim strips; Bicycle pumps; Bicycles in International Class 12.  Backpacks in International Class 18.  Bicycle racing number plates not made of metal in International Class 20.  Belts; shirts; socks in International Class 25.

	July 31, 2000	3,957,948	Shirts in International Class 25.  Computerized on-line retail store services in the field of bicycles, bicycle parts and clothing and accessories used therewith in International Class 35.
	July 8, 2009 (Class 12)  April of 2000 (class 35)	4,074,705	Bicycles in International Class 12.  Mail order catalog services featuring bicycles, bicycle parts and clothing and accessories used therewith in International Class 35.
HIGH SPEED MAIL ORDER	April of 2000	4,101,708	Mail order services featuring bicycles, bicycle parts, and bicycle-related goods in International Class 35.

9. Copies of the registration certificates for each of the above marks are attached to this Complaint as Exhibit 1.

10. The Dan's Comp Marks have enjoyed significant exposure to the consuming public, and have been featured in printed publications, on the Internet, and in other materials distributed throughout the United States and the world.

11. Dan's Comp uses the Dan's Comp Marks in connection with the above described goods and services (the "Goods and Services") in all fifty (50) states, the District of Columbia, and throughout the world.

12. The Dan's Comp Marks are widely known and recognized among consumers.

13. The Dan's Comp Marks are unique and distinctive and, as such, designate a single source of origin for the Goods and Services.

14. Dan's Comp spends tens of thousands of dollars each year to advertise and promote the Dan's Comp Marks and the associated Goods and Services in the United States and throughout the world.

15. As a result of Dan's Comp's extensive and substantially exclusive use of the Dan's Comp Marks with the Goods and Services, the Dan's Comp Marks have developed significant goodwill in the market and are extremely valuable to Dan's Comp.

16. Dan's Comp expends substantial effort and expense to protect the Dan's Comp Marks and their distinctiveness in the marketplace.

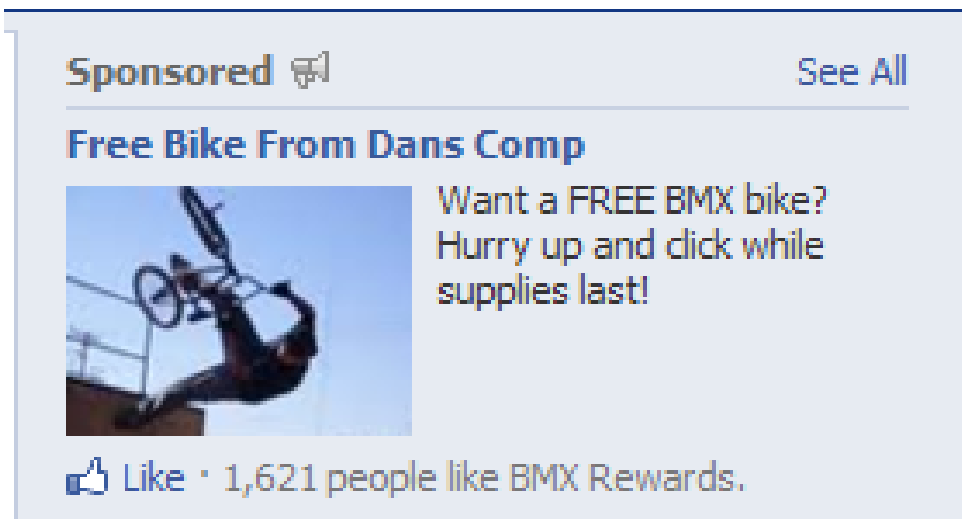
17. Having been widely promoted to the general public, and having exclusively identified the Goods and Services, the Dan's Comp Marks symbolize the tremendous goodwill associated with Dan's Comp and are a property right of incalculable value.

18. The Dan's Comp Marks are valid and enforceable trademarks.

**B. Smith's Illegal Conduct.**

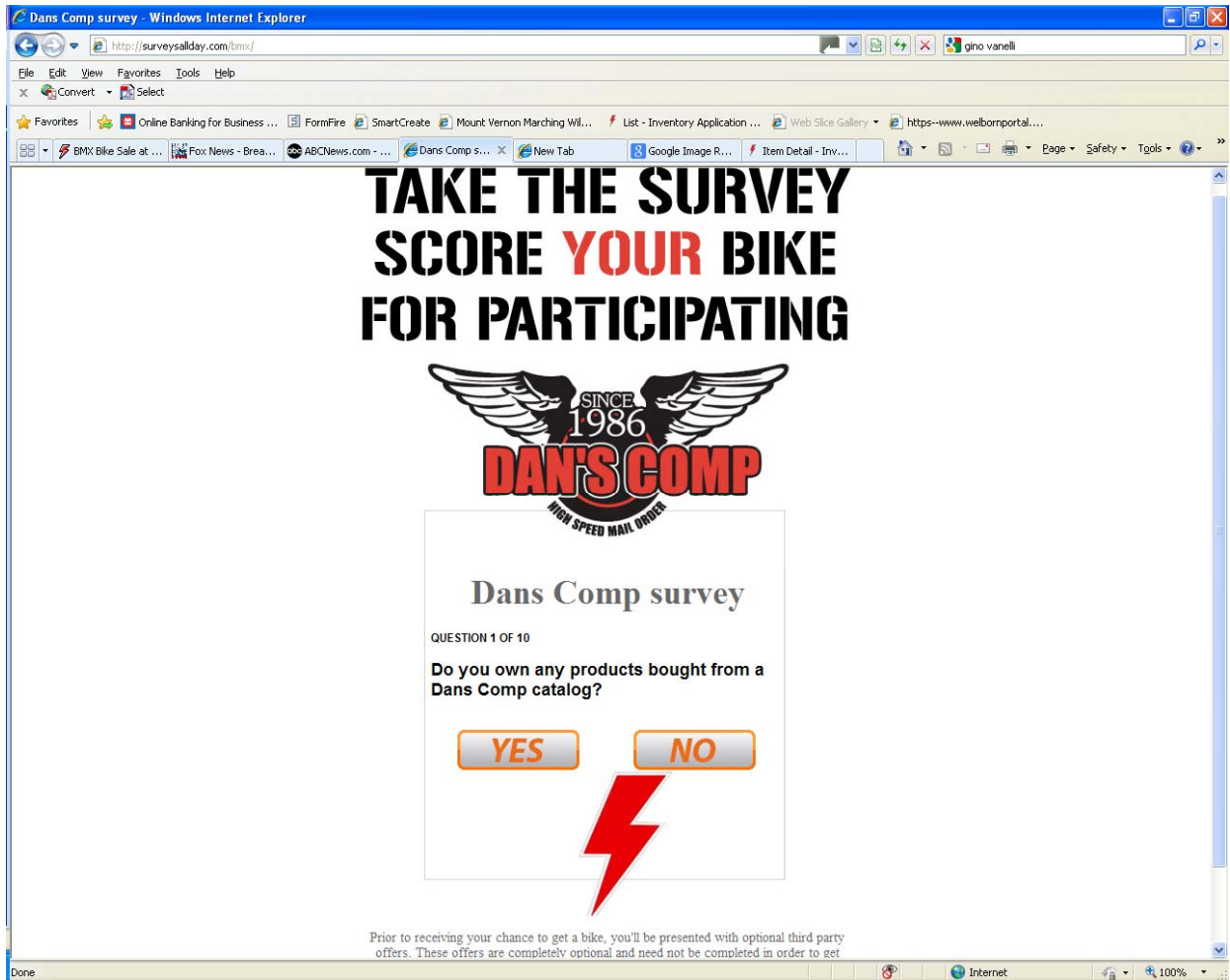
19. Smith is, and at all relevant times to this Complaint was, the registrant for the website <surveysallday.com/bmx> (the "Site").

20. Internet users were directed to this Site via a sponsored advertisement appearing on <www.facebook.com>. The sponsored advertisement is reproduced below:



21. Users who click on the sponsored advertisement were redirected to the Site, which was designed to appear as if it was sponsored by, affiliated with, or connected to Dan's Comp via unauthorized use of the Dan's Comp Marks.

22. Users were prompted to answer survey questions regarding their buying habits in relation to the Goods and Services:

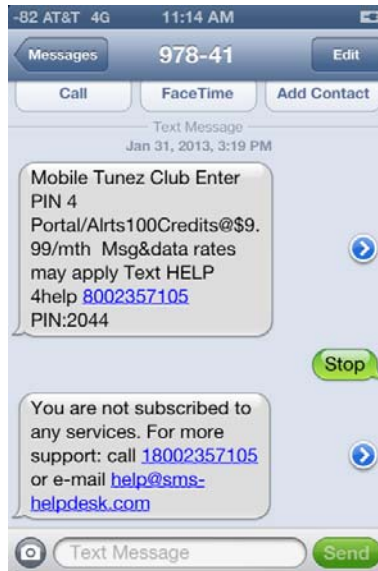


23. At the conclusion of the survey, users were prompted to enter their email addresses and their mobile phone number:

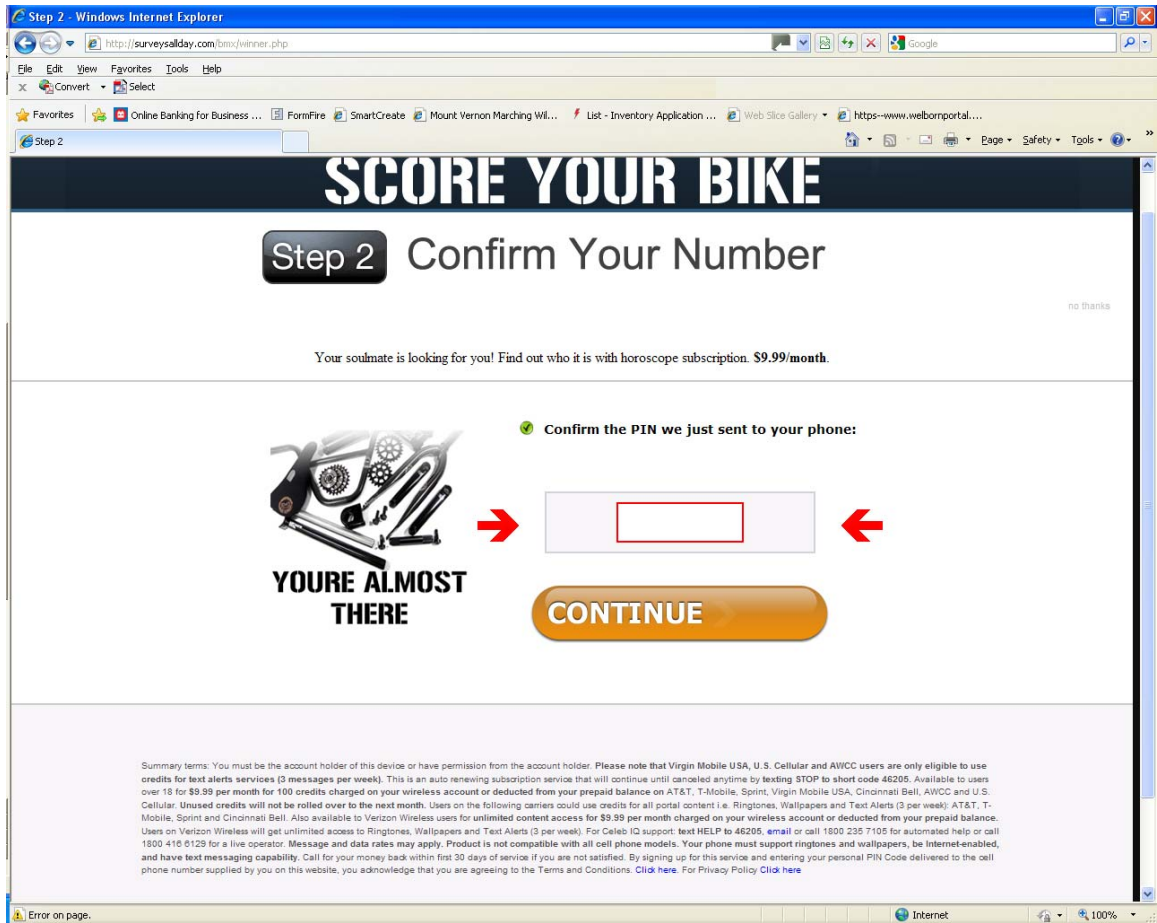
The image is a screenshot of a web browser displaying a survey form. The browser's address bar shows the URL [www.surveysallday.com/btmv/#](http://www.surveysallday.com/btmv/#). The page title is "Dans Comp survey". The main heading of the survey is "TAKE THE SURVEY SCORE YOUR BIKE FOR PARTICIPATING". Below the heading is the "DANS COMP" logo, which includes the text "SINCE 1986" and "FAST SPEED MAIL SERVICE". The survey text reads: "Congratulations you may have qualified for a bike of your choice. Please complete the form below and confirm your Registration". There are two input fields: "Enter Your Email Address:" and "Enter Your Mobile Number:". Below these fields is a "Submit" button with a lightning bolt graphic. At the bottom of the form, there is a disclaimer: "Prior to receiving your chance to get a bike, you'll be presented with optional third party offers. These offers are completely optional and need not be completed in order to get your own bike." and another disclaimer: "We are not affiliated with, sponsored by or endorsed by any of the listed products or retailers. Trademarks, service marks, logos, and/or domain names (including, without limitation, the individual names of products and retailers) are the property of their respective owners."



24. An immediate text message was sent to the user's mobile number. Examples of such messages appear below:



25. Users were then prompted to enter a four digit pin that was text messaged to their mobile numbers:



26. Upon information and belief, entry of the four digit pin would sign the user up for the service described in the text message.

27. Upon information and belief, a user would not receive a free bicycle. Nor would a user earn a chance of winning a free bicycle.

28. Upon information and belief, there were no free bicycles given to any users because Smith had no bicycles to give.

29. Upon information and belief, thousands of individuals entered their personal information on the Site, mistakenly believing that they were dealing with Dan's Comp.

30. Upon information and belief, Smith profited (i) from users inadvertently signing up for services believing that they would win a free bicycle (or the chance for a free bicycle) and (ii) by selling the user information gathered from unsuspecting users of the Site.

31. Smith was aware that Dan's Comp owned the Dan's Comp Marks when he set up, operated, and ran the Site.

32. Smith was aware that Dan's Comp was an Indiana corporation and that Dan's Comp would suffer harm as a result of Smith's actions.

33. Smith used the Dan's Comp Marks, and marks confusingly similar to the Dan's Comp Marks, because Smith wanted to profit from the consumer goodwill associated with the Dan's Comp Marks.

34. Dan's Comp was never affiliated with the Site.

35. Dan's Comp never authorized Ian Smith to display or use the Dan's Comp Marks, or marks confusingly similar to the Dan's Comp Marks, on the Site.

36. Due to the nature of his Internet business, Smith can reasonably anticipate that he might be named as a defendant in different forums and jurisdictions.

**C. Harm to Dan's Comp and the General Public.**

37. Smith's unauthorized use of the Dan's Comp Marks, and marks confusingly similar to the Dan's Comp Marks, caused confusion, mistake, and deception as to the source of the Site, and falsely suggested a sponsorship by, connection with, license from, or association with Dan's Comp.

38. Dan's Comp has been irreparably harmed by Smith, and, if not enjoined, will continue to be irreparably harmed by Smith.

39. Smith's actions have also irreparably harmed, and if not enjoined, will continue to irreparably harm, the general public, who has an inherent interest in being free from confusion, mistake, and deception.

**COUNT 1**  
**Trademark Infringement of the Dan's Comp Marks**  
**Under 15 U.S.C. § 1114(1)**

40. Dan's Comp realleges and incorporates by reference each of the allegations contained in the preceding paragraphs as though fully set forth herein.

41. Smith's use in commerce of the Dan's Comp Marks is likely to cause confusion, mistake, and to deceive.

42. Smith's use in commerce of the Dan's Comp Marks is likely to cause initial interest confusion among the general public.

43. The above-described acts of Smith constitute trademark infringement in violation of 15 U.S.C. § 1114(1), entitling Dan's Comp to relief.

44. Smith has unfairly profited from the infringing actions alleged.

45. By reason of Smith's acts, Dan's Comp has suffered damage to the goodwill associated with the Dan's Comp Marks.

46. Smith's actions have irreparably harmed, and if not enjoined, will irreparably harm, Dan's Comp.

47. Smith's actions have irreparably harmed, and if not enjoined, will irreparably harm, the general public who has an interest in being free from confusion, mistake, and deception.

48. By reason of Smith's actions, Dan's Comp's remedy at law is not adequate to compensate it for the injuries inflicted by Smith. Accordingly, Dan's Comp is entitled to preliminary and permanent injunctive relief pursuant to 15 U.S.C. § 1116.

49. By reason of Smith's willful acts, Dan's Comp is entitled to damages, and those damages be trebled under 15 U.S.C. § 1117.

50. This is an exceptional case, making Dan's Comp eligible for an award of attorney fees under 15 U.S.C. § 1117.

**COUNT II**  
**Unfair Competition and False Designation of Origin**  
**of the Dan's Comp Marks under 15 U.S.C. § 1125(a)(1)(A)**

51. Dan's Comp realleges and incorporates by reference each of the allegations contained in the preceding paragraphs as though fully set forth herein.

52. Smith's use in commerce of the Dan's Comp Marks is likely to cause confusion, mistake, and to deceive the relevant public that the Site is authorized, sponsored or approved by or is affiliated with Dan's Comp.

53. Smith's use in commerce of the Dan's Comp Marks was likely to cause initial interest confusion among the general public.

54. The above-described acts of unfair competition constitute trademark infringement of the Dan's Comp Marks and false designation of origin in violation 15 U.S.C. § 1125(a), entitling Dan's Comp to relief.

55. Smith has unfairly profited from the infringing actions alleged.

56. By reason of Smith's acts, Dan's Comp has suffered damage to the goodwill associated with the Dan's Comp Marks.

57. Smith's actions have irreparably harmed, and if not enjoined, will irreparably harm, Dan's Comp.

58. Smith's actions have irreparably harmed, and if not enjoined, will irreparably harm, the general public, who has an interest in being free from confusion, mistake, and deception.

59. By reason of Smith's actions, Dan's Comp's remedy at law is not adequate to compensate it for the injuries inflicted by Smith. Accordingly, Dan's Comp is entitled to preliminary and permanent injunctive relief pursuant to 15 U.S.C. § 1116.

60. By reason of Smith's willful acts, Dan's Comp is entitled to damages, and those damages be trebled under 15 U.S.C. § 1117.

61. This is an exceptional case, making Dan's Comp eligible for an award of attorney fees under 15 U.S.C. § 1117.

**COUNT III**  
**False Advertising Under 15 U.S.C. § 1125(a)(1)(B)**

62. Dan's Comp realleges and incorporates by reference each of the allegations contained in the preceding paragraphs as though fully set forth herein.

63. To the detriment of Dan's Comp and the goodwill it has established in the Dan's Comp Marks, Smith used in advertising and commerce false and misleading descriptions of fact, or false and misleading representation of fact concerning the offer of a free bicycle.

64. Smith's wrongful acts have deceived a substantial number of consumers.

65. The above-described acts constitute false advertising in violation 15 U.S.C. § 1125(a)(1)(B), entitling Dan's Comp to relief.

66. Smith has unfairly profited from the infringing actions alleged.

67. By reason of Smith's acts, Dan's Comp has suffered damage to the goodwill associated with the Dan's Comp Marks.

68. Smith's actions have irreparably harmed, and if not enjoined, will irreparably harm, Dan's Comp.

69. Smith's actions have irreparably harmed, and if not enjoined, will irreparably harm, the general public who has an interest in being free from confusion, mistake, and deception.

70. By reason of Smith's actions, Dan's Comp's remedy at law is not adequate to compensate it for the injuries inflicted by Smith. Accordingly, Dan's Comp is entitled to preliminary and permanent injunctive relief pursuant to 15 U.S.C. § 1116.

71. By reason of Smith's willful acts, Dan's Comp is entitled to damages, and those damages be trebled under 15 U.S.C. § 1117.

72. This is an exceptional case, making Dan's Comp eligible for an award of attorney fees under 15 U.S.C. § 1117.

**COUNT IV**  
**Unfair Competition and Trademark Infringement of the**  
**Dan's Comp Marks under Indiana Common Law**

73. Dan's Comp realleges and incorporates by reference each of the allegations contained in the preceding paragraphs as though fully set forth herein.

74. Smith has used in commerce the Dan's Comp Marks in connection with his business.

75. Smith's use of the Dan's Comp Marks in connection with Smith's business is likely to cause confusion or mistake or to deceive as to the source of origin of the Site.

76. Smith's acts described above constitute trademark infringement and unfair competition under the common law of the State of Indiana, entitling Dan's Comp to relief.

77. Smith has unfairly profited from the actions alleged herein.

78. By reason of Smith's actions alleged herein, Dan's Comp has suffered damage to the goodwill associated with the Dan's Comp Marks and has suffered irreparable harm.

79. By reason of Smith's actions alleged herein, Dan's Comp's remedy at law is not adequate to compensate it for the injuries inflicted by Smith. Accordingly, Dan's Comp is entitled to preliminary and permanent injunctive relief.

80. Dan's Comp is informed and believes and on that basis alleges that Smith's conduct has been intentional and willful and in conscious disregard of Dan's Comp's rights.

#### **REQUEST FOR RELIEF**

Therefore, Dan's Comp respectfully requests judgment as follows:

1. That the Court enter a judgment that Smith:
  - a. violated and infringed the rights of Dan's Comp in the Dan's Comp Marks under 15 U.S.C. § 1114(1);
  - b. violated and infringed the rights of Dan's Comp in the Dan's Comp Marks under 15 U.S.C. § 1125(a); and
  - c. violated and infringed the rights of Dan's Comp in the Dan's Comp Marks under the common law.
2. That Smith and all persons acting in concert or privity with Smith, be preliminary and permanently enjoined from the following activities:



- a. Using the Dan's Comp Marks or any other name, mark, designation or depiction in a manner that is likely to cause confusion regarding whether the Site is affiliated or associated with or sponsored by Dan's Comp;
- b. Practicing trademark infringement, unfair competition, false designation of origin, passing off, false advertising, against Dan's Comp or misappropriation of Dan's Comp's trademark rights; and
- c. Assisting, aiding or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs 2(a) through 2(b) above;

3. That Smith be ordered to engage in corrective advertising to the extent necessary to correct any consumer confusion or misperceptions resulting from his unlawful acts complained of above;

4. That Smith be ordered to account to Dan's Comp for, and disgorge, all profits it has derived by reason of the unlawful acts complained of above;

5. That Smith be ordered to pay damages, and that those damages be trebled, under 15 U.S.C. § 1117;

6. That Smith be ordered to pay Dan's Comp's reasonable attorney fees, prejudgment interest, and costs of this action under 15 U.S.C. § 1117 and the common law;

7. That Smith be ordered to file with the Court and serve upon Dan's Comp a written report under oath setting forth in detail the manner and form in which Smith has complied with the injunction and judgment within thirty (30) days after the service of the injunction and judgment upon Smith; and

8. That the Court award all other appropriate relief.

Respectfully submitted,

FAEGRE BAKER DANIELS LLP

By: /s/ Louis T. Perry\_\_\_\_\_

Louis T. Perry (Atty. #25736-49)  
Amie Peele Carter (Atty. #19523-29A)  
300 N. Meridian Street, Suite 2700  
Indianapolis, IN 46204  
Telephone: (317) 237-0300  
Facsimile: (317) 237-1000  
louis.perry@faegrebd.com  
amie.peelecarter@faegrebd.com

*Counsel for Plaintiff XP Innovation, LLC d/b/a  
Dan's Comp*