



Provided by:  
Overhauser Law Offices LLC  
www.iniplaw.org  
www.overhauser.com

#951660

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

FILED  
U.S. DISTRICT COURT  
INDIANAPOLIS DIVISION  
2013 JUN 18 PM 2:10

SOUTHERN DISTRICT  
OF INDIANA  
LAURA A. BRIGGS  
CLERK

	)	
AUSTRALIAN GOLD, LLC	)	Civil Action No. _____
Plaintiff,	)	
	)	
v.	)	<b>1:13-cv-0971 JMS -DML</b>
DEVOTED CREATIONS, INC.	)	JURY TRIAL DEMANDED
Defendant.	)	
	)	
	)	
	)	

**AUSTRALIAN GOLD'S COMPLAINT AND JURY DEMAND**

Plaintiff, Australian Gold, LLC, for its Complaint against the Defendant, Devoted Creations, Inc. ("Devoted Creations"), alleges as follows:

**Parties**

1. Australian Gold is an Indiana limited liability company having offices at 6270 Corporate Drive, Indianapolis, Indiana 46278.
2. Upon information and belief, Defendant Devoted Creations is a Florida corporation with its principle place of business in Oldsmar, Florida.

**Jurisdiction and Venue**

3. This Court has subject matter jurisdiction under Section 39 of the Trademark Act of 1946, 15 U.S.C. §§ 1121 (the "Lanham Act"), and 28 U.S.C. §§ 1331 and 1338.
4. This Court has personal jurisdiction over Devoted Creations because *inter alia* Devoted Creations conducts regular, continuous and systematic business in this Judicial District by selling, shipping and otherwise distributing its indoor tanning preparations to one or more distributors and salons located in this Judicial District. For example, Devoted Creations's

website (<http://www.Devoted Creations.com/>) lists TABS Distribution, Inc. in Indiana as a Devoted Creations distributor.

5. Venue in this Judicial District with respect to the claims set forth herein against Devoted Creations is proper pursuant to 28 U.S.C. § 1391(b).

6. Devoted Creations may be served via its registered agent Jeffrey M. Sherman at 3874 Tampa Road, Oldsmar, Florida 34677.

### **STATEMENT OF FACTS**

#### **A. Australian Gold and Its Mark**

7. Australian Gold has been in the business of selling indoor tanning preparations for over 20 years.

8. Australian Gold offers for sale a number of different product lines of indoor tanning preparations, including the AUSTRALIAN GOLD® line of indoor tanning preparations.

9. Since at least October 23, 2010, Australian Gold has used the mark LIVE LAUGH TAN® as a trade name and trademark in conjunction with the marketing and sale of its AUSTRALIAN GOLD® line of indoor tanning preparations and related promotional products.

10. Australian Gold uses the LIVE LAUGH TAN® trade name and trademark to promote its products to distributors, indoor tanning salons and clients of indoor tanning salons.

11. For example Australian Gold has sold and given away tote bags for use with tanning preparations with the trademark LIVE LAUGH TAN®.

12. Australian Gold has used its LIVE LAUGH TAN® mark continuously, notoriously and extensively with respect to and in association with its products and to promote its AUSTRALIAN GOLD® line of indoor tanning preparations since at least October 2010.

13. Consumers have come to know, rely upon, and recognize Australian Gold's LIVE LAUGH TAN® mark as identifying Australian Gold's line of indoor tanning preparations.

14. As a result of Australian Gold's substantial promotional, advertising, publicity, and public relations activities, its LIVE LAUGH TAN® mark has acquired substantial goodwill and is a valuable commercial asset.

15. Australian Gold's LIVE LAUGH TAN® mark is distinctive and inherently distinctive, serving to identify and indicate the source of Australian Gold's products to the consuming public, and to distinguish Australian Gold's indoor tanning preparations from those of others.

16. Australian Gold is the owner of United States Registration No. 4,154,194 for the mark LIVE LAUGH TAN® for tote bags. A copy of registration 4,154,194 is attached as Exhibit A.

**B. Devoted Creations' Unlawful Conduct**

17. Devoted Creations is also in the business of selling indoor tanning preparations.

18. Devoted Creations directly competes with Australian Gold in selling indoor tanning preparations.

19. Devoted Creations markets its indoor tanning preparations to distributors, indoor tanning salons and to clients of indoor tanning salons.

20. On information and belief, tanning salons which sell Devoted Creations' indoor tanning preparations are located throughout the United States.

21. Devoted Creations is advertising, promoting, selling, and offering an indoor tanning preparation using the name LIVE LOVE TAN (hereinafter the "Infringing Product").

22. Devoted Creations began promoting and/or selling the Infringing Product in approximately November 2011.

23. Devoted Creations' Infringing Product is advertised on the Devoted Creations website. A copy of the advertisement from the website is attached as Exhibit B.

24. On information and belief, Devoted Creations is aware of the valuable goodwill and reputation represented and symbolized by Australian Gold's LIVE LAUGH TAN® mark.

25. On information and belief, Devoted Creations is aware that Australian Gold's consumers and potential consumers rely upon Australian Gold's LIVE LAUGH TAN mark as distinguishing Australian Gold's indoor tanning preparations from those of others.

26. Devoted Creations' use of the LIVE LOVE TAN mark is without the permission, consent, or authority of Australian Gold.

27. On information and belief, Devoted Creations intentionally and willfully copied Australian Gold's LIVE LAUGH TAN® trademark.

**C. Effect of Devoted Creations' Conduct on Australian Gold and the Consuming Public**

28. Devoted Creations' LIVE LOVE TAN mark is substantially identical to Australian Gold's LIVE LAUGH TAN® mark.

29. Devoted Creations' Infringing Product directly competes with Australian Gold's indoor tanning preparations.

30. Devoted Creations' Infringing Product is offered for sale and/or promoted in the same channels of trade as Australian Gold's indoor tanning preparations.

31. Devoted Creations' indoor tanning preparations are directed for sale to indoor tanning consumers.

32. Australian Gold's indoor tanning preparations are directed for sale to indoor tanning consumers.

33. On information and belief, Devoted Creations' Infringing Product is being sold and/or promoted, and is likely to continue being sold and/or promoted, throughout the same geographic markets as Australian Gold's indoor tanning preparations.

34. Devoted Creations derives and will continue to derive substantial revenue from its Infringing Product.

35. Devoted Creations' continued use of the LIVE LOVE TAN mark on its websites, in its advertising and promotional materials, on its signage, and on its products is likely to diminish the goodwill associated with Australian Gold's LIVE LAUGH TAN® mark.

36. Devoted Creations' unauthorized use of the LIVE LOVE TAN is likely to cause confusion or mistake or to deceive consumers into believing that Devoted Creations' unauthorized products advertised, promoted, and offered under the Infringing Mark are sponsored, licensed or authorized by, or affiliated, connected or otherwise associated with Australian Gold or that Australian Gold's products are sponsored, licensed or authorized by, or affiliated, connected or otherwise associated with Devoted Creations.

37. As a result of Devoted Creations' Infringing Product, Devoted Creations is being unjustly enriched at Australian Gold's expense, and Australian Gold is being damaged.

38. Devoted Creations' advertising and sales of the Infringing Products has significantly injured Australian Gold's interests. Specifically, Devoted Creations (a) has traded upon and threatens to further trade upon the significant and valuable goodwill in Australian Gold's LIVE LAUGH TAN® mark; (b) is likely to cause public confusion as to the source, sponsorship or affiliation of Devoted Creations's products; (c) has damaged and threatens to

further damage Australian Gold's significant and valuable goodwill in its LIVE LAUGH TAN® mark; (d) has injured and threatens to further injure Australian Gold's right to use LIVE LAUGH TAN® mark as the exclusive indicia of origin of Australian Gold's line of skin tanning products in Indiana and throughout the United States; and (e) has lessened the capacity of Australian Gold's LIVE LAUGH TAN® mark to indicate that its products are sponsored by Australian Gold.

39. Unless these infringing acts by Devoted Creations are restrained by this Court, they will cause irreparable injury to Australian Gold and to the public, for which there is no adequate remedy at law.

40. On information and belief, Devoted Creations' acts of infringement complained of herein have been deliberate, willful, intentional, and in bad faith, with full knowledge and conscious disregard of Australian Gold's rights. In view of the egregious nature of Devoted Creations' actions, this is an exceptional case within the meaning of Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a).

**COUNT I: FEDERAL AND COMMON LAW TRADEMARK INFRINGEMENT**

41. Australian Gold incorporates by reference the averments contained in paragraphs 1 through 40.

42. Devoted Creations' LIVE LOVE TAN mark in its advertising and in conjunction with its indoor tanning preparations is confusingly similar to Australian Gold's use of its the LIVE LAUGH TAN® mark in conjunction with its sale of indoor tanning preparations and related products.

43. Devoted Creations' use of LIVE LOVE TAN is likely to cause confusion or mistake or to deceive consumers into believing that Devoted Creations' unauthorized products

and services advertised, promoted, and offered under the Infringing Mark are sponsored, licensed or authorized by, or affiliated, connected or otherwise associated with Australian Gold.

44. The acts of Devoted Creations complained of herein are likely to cause confusion, mistake, or deception as to origin, sponsorship or approval and therefore constitute Federal and common law trademark infringement in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114 *et seq.* and the common law

### **COUNT II: UNFAIR COMPETITION**

45. Australian Gold incorporates by reference the averments contained in paragraphs 1 through 44.

46. Devoted Creations' unauthorized use of the Infringing Mark is likely to cause confusion or mistake or to deceive consumers into believing that Devoted Creations' unauthorized products advertised, promoted, and offered under the Infringing Mark are sponsored, licensed or authorized by, or affiliated, connected or otherwise associated with Australian Gold.

47. The acts of Devoted Creations complained of herein are likely to cause confusion, mistake, or deception as to origin, sponsorship or approval and therefore constitute trademark infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125.

**Prayer for Relief**

In light of the foregoing, Australian Gold prays that this Court:

A. Enter judgment that the unauthorized use of the LIVE LOVE TAN Mark in Devoted Creations' commercial advertising, marketing and/or promotion and sales in the United States constitutes and creates a likelihood of confusion, mistake or deception among relevant consumers and therefore infringes Australian Gold's LIVE LAUGH TAN® mark.

B. Permanently enjoin Devoted Creations, its officers, agents, employees and attorneys, and those in active concert or participation therewith, from advertising and offering for sale or selling any products which have caused actual confusion or are likely to cause confusion with Australian Gold's LIVE LAUGH TAN® mark.

C. Award Australian Gold damages, costs, attorney's fees and/or expenses associated with this action and also including Devoted Creations' wrongful profits from or associated with its infringements of Australian Gold's rights under 15 U.S.C. § 1117.

D. Increase the amounts awarded to Australian Gold as damages and/or profits from Devoted Creations to the maximum amounts allowed or permitted under 15 U.S.C. § 1117.

E. Grant all such other relief that the Court deems just.

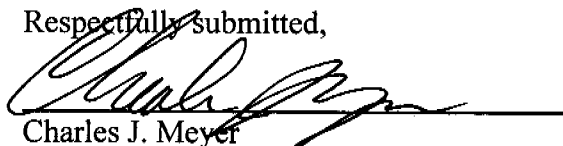


**Jury Demand**

Australian Gold respectfully demands a jury trial on all issues so triable.

Respectfully submitted,

DATED:



Charles J. Meyer

WOODARD, EMHARDT, MORIARTY,

McNETT & HENRY LLP

111 Monument Circle, Suite 3700

Indianapolis, IN 46204-5137

Phone: (317) 634-3456

Fax: (317) 637-7561

Email: [cjmeyer@uspatent.com](mailto:cjmeyer@uspatent.com)

*Attorneys for Plaintiff Australian Gold*