

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

DARRYL D. AGLER,	)	
	)	
Plaintiff,	)	
	)	Case No. 1:14-cv-99
v.	)	
	)	
WESTHEIMER CORPORATION,	)	
	)	
Defendant.	)	

**COMPLAINT**

Plaintiff Darryl D. Agler ("Agler"), through his undersigned counsel, and for his Complaint against Defendant Westheimer Corporation ("Westheimer"), alleges as follows:

**Nature of the Action**

1. This is an action for trademark infringement, counterfeiting, unfair competition, and false designation of origin arising under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and the statutes and common law of the State of Indiana.

**Jurisdiction and Venue**

2. Jurisdiction over the parties and subject matter of this action is proper in this Court pursuant to 15 U.S.C. § 1121 (actions arising under the Lanham Act), 28 U.S.C. § 1331 (actions under the laws of the United States), 28 U.S.C. § 1332(a) (diversity of citizenship between the parties), and 28 U.S.C. § 1338(a) (actions arising under an Act of Congress relating to, among other things, trademarks). This Court has supplemental jurisdiction over the claims in this Complaint that arise under state statutory and common law pursuant to 28 U.S.C. § 1367(a).

3. This Court has personal jurisdiction over Westheimer because Westheimer does business in the State of Indiana.

4. Venue is properly founded in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) because Agler resides in this District, may be found in this District, and a substantial part of the events giving rise to the claims in this action occurred within this District.

**Parties**

5. Agler is an individual residing at 5506 Quail Canyon Circle, Fort Wayne, Indiana 46835 and does business as The Stratotone Guitar Co.

6. Upon information and belief, Westheimer is an entity organized and existing under the laws of the State of Illinois, with its principal place of business located at 3451 West Commercial Avenue, Northbrook, Illinois 60062.

**Allegations Applicable to All Counts**

7. The following factual allegations are set forth for purposes of all legal counts alleged in this Complaint, *infra*.

8. Agler custom-manufactures high-quality guitars and sells them across the United States of America. Each of Agler's guitars is painstakingly hand-crafted from the wood of a customer's choosing and features vintage hardware and pick-ups.

9. Agler currently accepts orders for his guitars on his website at <stratotoneguitar.com> (the "Site"). A printout of the Site is attached hereto as Exhibit A.

10. Agler also regularly showcases and sells his guitars at vintage guitar shows across the nation.

11. Agler's guitars generally retail from \$1250 and upward.

12. On March 7, 2006, Agler filed Application Ser. No. 78/831,179 (the "'179 Application") with the United States Patent and Trademark Office (the "PTO") for the mark STRATOTONE (the "STRATOTONE Mark") pursuant to 15 U.S.C. §1051(b). The

STRATOTONE Mark was identified in association with “musical instruments, namely, guitars” in International Class 15. A copy of the ‘179 Application is attached hereto as Exhibit B.

13. The ‘179 Application matured into U.S. Reg. No. 3,986,754 (“‘754 Registration”) on June 28, 2011. A copy of the ‘754 Registration is attached hereto as Exhibit C.

14. Since at least as early as January of 2007, Agler’s marketing and promotions in connection with his guitars have included the STRATOTONE Mark.

15. As pictured below, the STRATOTONE Mark also appears on what is commonly referred to as the “head” of Agler’s guitars.



16. At the National Association of Music Merchants (“NAMM”) show in 2010, Agler noticed Westheimer selling a mass-produced cheaper version of the same style of guitar under the STRATOTONE Mark at a much lower price point than Agler’s custom STRATOTONE

guitars, notwithstanding Agler's prior exclusive rights in the STRATOTONE Mark. Agler spoke to Westheimer personnel twice at the NAMM show, notifying them that Westheimer's products were infringing the STRATOTONE Mark. Agler was unable to sell any of his guitars at the 2010 NAMM show.

17. Since that time, Westheimer has flooded the market with lower quality, cheaper guitars that bear the STRATOTONE Mark. These inferior products retail between \$199.00 and \$399.00, and have destroyed the market for Agler's high-end STRATOTONE guitars.

18. On December 4, 2012 Westheimer filed Application Ser. No. 85/794,320 (the "'320 Application") for the STRATOTONE Mark for use in association with "guitars" in International Class 15 pursuant to 15 U.S.C. §1051(a). In the '320 Application, Westheimer represented to the PTO that it had been using the STRATOTONE Mark in commerce since "00/00/2009" and that the STRATOTONE Mark was currently in use. A copy of the '320 Application is attached hereto as Exhibit D.

19. On March 26, 2013, the PTO refused to register the '320 Application unless Westheimer submitted a claim of ownership with respect to Agler's '754 Registration. A copy of this refusal is attached hereto Exhibit E.

20. Westheimer could not provide the PTO with a claim of ownership for the '754 Registration because it did not own the '754 Registration.

21. On April 25, 2013, Westheimer filed a petition to cancel the '754 Registration (the "Cancellation Petition") with the Trademark Trial and Appeal Board. The Cancellation Petition is currently pending under cancellation proceeding no. 92057116.

22. Westheimer is currently using the STRATOTONE Mark in commerce in association with guitars. A copy of a brochure featuring Westheimer's unauthorized use of the STRATOTONE Mark in association with guitars is attached as Exhibit F.

**COUNT I: FEDERAL UNFAIR COMPETITION AND FALSE DESIGNATION OF ORIGIN**

**(15 U.S.C. § 1125(a))**

23. Agler reincorporates and realleges paragraphs 1 through 22 as though fully set forth herein.

24. Westheimer's use in commerce of the STRATOTONE Mark has caused and will continue to cause consumers to believe, contrary to fact, that the guitars it provides are sponsored, licensed and/or otherwise approved by, or are in some way connected to or affiliated with Agler.

25. Westheimer's use in commerce of the STRATOTONE Mark already has and continues to cause mistake, deception, and consumer confusion.

26. Westheimer's use of the STRATOTONE Mark is likely to cause initial interest confusion among the general public.

27. Westheimer had actual and constructive knowledge of Agler's prior rights in the STRATOTONE Mark when it began using the STRATOTONE Mark in commerce.

28. Westheimer had actual and constructive knowledge of the previously-existing '179 Application for the STRATOTONE Mark when it began using the STRATOTONE Mark in commerce.

29. The foregoing actions of Westheimer constitute unfair competition and false designation of origin in violation of 15 U.S.C. § 1125(a), and, on information and belief, have been knowing, intentional, deliberate, willful, malicious, and in disregard of Agler's rights.

30. Westheimer has unfairly profited from the actions alleged.

31. By reason of foregoing knowing, intentional, deliberate, willful, and malicious actions, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate.

32. Westheimer's activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, the general public who has an interest in being free from confusion, mistake and deception.

33. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate it for injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief pursuant to 15 U.S.C. § 1116.

34. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts and pursuant to 15 U.S.C. § 1117, Agler is entitled to (i) Westheimer's profits; (ii) damages (and to have those damages trebled); and (iii) the costs of this action.

35. This is an exceptional case making Agler eligible for an award of attorneys' fees under 15 U.S.C. § 1117.

**COUNT II: FEDERAL TRADEMARK INFRINGEMENT**

**(15 U.S.C. § 1114)**

36. Agler reincorporates and realleges paragraphs 1 through 35 as though fully set forth herein.

37. Westheimer's use in commerce of the STRATOTONE Mark already has and continues to cause mistake, deception, consumer confusion.

38. Westheimer's use of the STRATOTONE Mark is likely to cause initial interest confusion among the general public.

39. The above-described acts of Westheimer constitute trademark infringement in violation of 15 U.S.C. § 1114(1), and, on information and belief, have been knowing, intentional, deliberate, willful, malicious, and intended to cause confusion or mistake, or to deceive, and in disregard of Agler's rights.

40. Westheimer has unfairly profited from the infringing actions alleged.

41. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate.

42. Westheimer's willful and intentional activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, Agler.

43. Westheimer's willful and intentional activities have irreparably harmed and, if not enjoined, will continue to irreparably harm, the general public who has an interest in being free from confusion, mistake and deception.

44. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

45. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts and pursuant to 15 U.S.C. § 1117, Agler is entitled to (i) Westheimer's profits; (ii) damages (and to have those damages trebled); and (iii) the costs of this action.

46. This is an exceptional case making Agler eligible for an award of attorneys' fees under 15 U.S.C. § 1117.

**COUNT III: FEDERAL TRADEMARK COUNTERFEITING**

**(15 U.S.C. § 1114)**

47. Agler reincorporates and realleges paragraphs 1 through 46 as though fully set forth herein.

48. Without authorization, Westheimer used and uses in commerce a spurious designation identical to the federally registered STRATOTONE Mark in connection with the sale, offering for sale, distribution, and advertising of guitars, which goods are covered by the '754 Registration.

49. Westheimer's unauthorized use of the federally registered STRATOTONE Mark in connection with guitars has and will continue to cause consumers to believe that Westheimer's guitars originate from or are otherwise controlled by Agler and/or that Westheimer has Agler's authorization to use the federally registered STRATOTONE Mark in connection with guitars.

50. Westheimer's unauthorized use of the federally registered STRATOTONE Mark in connection with guitars is likely to cause and has caused confusion, mistake, or deception, including as to the origin, connection or association of Agler with Westheimer's guitars.

51. Westheimer's use of the federally registered STRATOTONE Mark in connection with guitars as described in this Complaint constitutes counterfeiting within the meaning of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

52. Westheimer's acts are knowing, intentional, deliberate, willful, and malicious.

53. By reason of the foregoing, Westheimer is liable to Agler for (a) statutory damages in an amount of up to \$2,000,000 for each counterfeited mark, as provided by 15 U.S.C. § 1117(c) of the Lanham Act, or, at Agler's election, an amount representing three (3) times Westheimer's illicit profits; and (b) reasonable attorneys' fees and pre-judgment interest pursuant to 15 U.S.C. § 1117(b).



**COUNT IV: COMMON LAW UNFAIR COMPETITION  
AND TRADEMARK INFRINGEMENT**

54. Agler reincorporates and realleges paragraphs 1 through 53 as though fully set forth herein.

55. Westheimer's use in commerce of the STRATOTONE Mark in connection with guitars is likely to cause consumer confusion or mistake to deceive as to the source of Westheimer's goods.

56. Westheimer's conduct constitutes trademark infringement and unfair competition under the common law of the State of Indiana, entitling Agler to relief.

57. Westheimer has unfairly profited from the actions alleged herein.

58. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious actions described above, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate and has suffered irreparable harm.

59. By reason of Westheimer's knowing, intentional, deliberate, willful, and malicious acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

**COUNT V: UNJUST ENRICHMENT**

60. Agler reincorporates and realleges paragraphs 1 through 59 as though fully set forth herein.

61. At the expense of and detriment to and without the prior express or implied authorization of Agler, Westheimer has been unjustly enriched through Westheimer's knowing, intentional, deliberate, willful, and malicious use of the STRATOTONE Mark.

62. By reason of Westheimer's actions described above, Agler has suffered damages in an amount as yet to be ascertained but which continues to accrue and accumulate and has suffered irreparable harm.

63. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

### **COUNT VI: CONVERSION**

**(Ind. Code § 35-43-4-3)**

64. Agler reincorporates and realleges paragraphs 1 through 63 as though fully set forth herein.

65. By engaging in the knowing, intentional, deliberate, willful, and malicious actions described above, Westheimer has exerted unauthorized control over the STRATOTONE Mark with the intent to deprive Agler of its benefit.

66. Westheimer has therefore committed conversion as defined under Ind. Code § 35-43-4-3.

67. Westheimer's conversion of the STRATOTONE Mark has proximately caused Agler to suffer damages in an amount as yet to be ascertained but which continues to accrue and accumulate and irreparable harm.

68. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

**COUNT VII: DECEPTION**

**(Ind. Code § 35-43-5-3(a)(6))**

69. Agler reincorporates and realleges paragraphs 1 through 68 as though fully set forth herein.

70. By engaging in the knowing, intentional, deliberate, willful, and malicious actions described above, Westheimer has disseminated to the public information that Westheimer knows is false, misleading, or deceptive, with the intent to promote Westheimer's business and/or commercial interests.

71. Westheimer has therefore committed deception under I.C. § 35-43-5-3(a)(6).

72. Westheimer's deception has proximately caused Agler to suffer damages in an amount as yet to be ascertained but which continues to accrue and accumulate and irreparable harm.

73. By reason of Westheimer's acts, Agler's remedy at law is not adequate to compensate him for the injuries inflicted by Westheimer. Accordingly, Agler is entitled to permanent injunctive relief.

**COUNT VIII: INDIANA CRIME VICTIM'S RELIEF ACT**

74. Agler reincorporates and realleges paragraphs 1 through 73 as though fully set forth herein.

75. Under the Indiana Crime Victims' Act (I.C. § 35-24-3-1), a person that suffers pecuniary loss as a result of the violation of I.C. § 35-43 *et seq.*, may bring a civil action against the person who caused the loss for treble damages, costs of the action, and reasonable attorneys' fees.

76. Westheimer has violated Ind. Code. § 35-43 through knowing, intentional, deliberate, willful, and malicious commission of (i) conversion under Ind. Code § 35-43-4-3 and (ii) deception under Ind. Code. § 35-43-5-3.

77. Agler is the victim of Westheimer's knowing, intentional, deliberate, willful, and malicious criminal actions, and, as a result, has suffered actual pecuniary damages in an amount as yet to be ascertained but which continue to accrue and accumulate.

78. Agler is accordingly entitled to an award of those actual damages as well as statutory treble damages, corrective advertising damages, costs, and reasonable attorneys' fees.

**DEMAND FOR JURY TRIAL**

Agler hereby respectfully requests that all issues raised by this Complaint be tried by jury.

**PRAYER FOR RELIEF**

WHEREFORE, Darryl D. Agler, by counsel, hereby requests that this Court enter an order:

(a) enjoining Westheimer from (i) using the STRATOTONE Mark or any other name, word, mark, or designation confusingly similar to the STRATOTONE Mark in connection with guitars and similar products; (ii) applying for registration of the STRATOTONE Mark or any other name, word, mark, or designation confusingly similar to the STRATOTONE Mark in connection with guitars and similar products; and (iii) continuing to prosecute the '320 Application.

(b) requiring Westheimer to withdraw that Cancellation Petition with prejudice and allow the '320 Application to expire;

(c) requiring Westheimer to provide an accounting of all gains, profits, savings and advantages realized by it from the unauthorized use of the STRATOTONE Mark.

(d) requiring Westheimer to surrender any and all merchandise, design, plans, and marketing materials featuring the STRATOTONE Mark;

(e) awarding Agler all damages (including treble damages), costs, disbursements, expenses, and attorneys' fees owed to him pursuant to the Lanham Act and Indiana common and statutory law by reason of Westheimer's willful infringement, counterfeiting, and conversion of the STRATOTONE Mark in connection with guitars;

(f) declaring that this is an exceptional case under 15 U.S.C. § 1117 due to Westheimer's knowing, intentional, deliberate, willful, and malicious acts of trademark infringement and counterfeiting and awarding Agler his reasonable attorneys' fees; and

(g) all other just and proper relief to which Agler is entitled.

Respectfully submitted,

Dated: March 27, 2014

/Louis T. Perry/  
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