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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

FILED
U.S. DISTRICT COURT
NEW ALBANY DIVISION
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SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

GREAT DIVIDE BREWING COMPANY,)
)
Plaintiff,)
)
vs.)
)
RED YETI BREWING COMPANY, INC.,)
)
Defendant.)

4 : 16 -cv- 0084 TWP -DML
Case No. _____

VERIFIED COMPLAINT
AND DEMAND FOR JURY TRIAL

Plaintiff, Great Divide Brewing Company (“Great Divide”), by counsel and for its complaint against Defendant Red Yeti Brewing Company, Inc., states as follows:

INTRODUCTION

1. This is an action at law and in equity for trademark infringement and dilution, trade dress infringement and dilution, unfair competition, and deceptive trade practices arising under the Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.* (the “Lanham Act”), and common law.

THE PARTIES

2. Great Divide is a Colorado corporation with a principal place of business of 2201 Arapahoe Street, Denver, CO 80205.

3. Upon information and belief, Defendant is an Indiana corporation with an address of 254 Spring Street, Jeffersonville, Indiana 47130.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, and 1338(a) and (b) in that it arises under the trademark laws of the United States and the law of unfair competition and is brought pursuant to Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§1114(1) and 1125(a) and (c), and the common law of trademark infringement, unfair competition and deceptive trade practices.

5. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 in that Great Divide and Defendant are citizens of different states and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

6. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a) because they are so related to the federal claims that they form part of the same case or controversy.

7. This Court has personal jurisdiction over Defendant because the Defendant resides in the Southern District of Indiana.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the property that is the subject of this action is situated in this District, and a substantial part of the events or omissions giving rise to the claim occurred in this District.

BACKGROUND

9. Great Divide is a Colorado-based brewer of beer and ales.

10. Great Divide owns U.S. Trademark Registration No. 2,957,257 for the trademark YETI (the “Yeti Mark”) which was registered by the U.S. Patent & Trademark Office in 2005 for beer and ale in International Class 032. A true and accurate copy of the registration is attached as Exhibit 1.

11. Great Divide owns the U.S. Trademark Registration No. 4,115,050 for the design trademark consisting of an outline of a yeti creature (the “Yeti Design Mark”) which was registered by the U.S. Patent & Trademark Office in 2012 for beer in International Class 032. A true and accurate copy of the registration is attached as Exhibit 2.

12. Great Divide has continually used the Yeti Mark since at least 2004 to identify its beers and ales, and to distinguish them from the products of other breweries.

13. Great Divide has continually used the Yeti Design Mark since at least 2008 to identify its beers, and to distinguish them from the products of other breweries.

14. Registration of the Yeti Mark and Yeti Design Mark constitutes prima facie evidence of the validity of the trademarks, Great Divide’s ownership thereof, and Great Divide’s exclusive right to use the trademarks nationwide.

15. On June 13, 2011, the U.S. Patent & Trademark Office issued a Notice of Acceptance under Section 8 of the Trademark Act, 15 U.S.C. § 1058(a)(1) and Section 15 of the Trademark Act, 15 U.S.C. § 1065 for the Yeti Mark. See Exhibit 3. Accordingly, Great Divide’s rights to the Yeti Mark were deemed “Incontestable” under Section 15 of the Trademark Act, 15 U.S.C. § 1065.

16. The Yeti Mark and Yeti Design Mark remain active, valid and enforceable.

17. Great Divide has developed common law trademark rights in the Yeti Mark through its continuous use of the Yeti Mark since at least 2004.

18. Great Divide has developed common law trademark rights in the Yeti Design Mark through its continuous use of the Yeti Design Mark since at least 2008.

19. Great Divide has invested significant funds in advertising to promote the Yeti Mark and Yeti Design Mark. As part of its brand investment, Great Divide advertises its goods

and services through traditional advertising, promotional goods, product packaging and labeling, social media, press releases, through its website and through other advertising activities.

20. As a result of its investment, the Yeti Mark and Yeti Design Mark have developed substantial public recognition and goodwill.

21. At substantial cost, Great Divide has created a unique and distinctive trade dress for its beer and ales featuring the Yeti Mark and Yeti Design Mark (the “Yeti Trade Dress”). For example, the Yeti Trade Dress is prominently featured on the labels of its beers and on its tap handles. See Exhibits 4 & 5.

22. As a result of Great Divide’s extensive use and promotion of its Yeti Trade Dress, it has built up and now owns valuable goodwill that is symbolized by the trade dress. The purchasing public has come to associate the Yeti Trade Dress with Great Divide.

23. The Yeti Trade Dress is inherently distinctive and there is no legitimate reason for any other brewer, beer seller or restaurant to copy or simulate the trade dress.

DEFENDANT’S INFRINGING ACTIVITIES

24. Upon information and belief, Defendant is the owner of a restaurant and brewery named “Red Yeti Brewing Co.” aka “Red Yeti Restaurant and Brewpub,” which sells a variety of craft beers including beers brewed by Red Yeti Brewing Co.

25. Upon information and belief, Red Yeti Brewing Co. was opened in 2013.

26. Red Yeti Brewing Co. is marketed towards enthusiasts of beer, and uses its beer selection as a marketing and branding tool.

27. Red Yeti Brewing Co. is marketed using the term “Yeti” and a yeti design. See Exhibits 6 and 7.

28. Defendant advertises through Twitter and Facebook promoting and marketing the craft beers it brews and/or has on tap. See Exhibits 8, 9, and 10.

29. Great Divide has no connection or affiliation with Defendant and has not consented to or authorized any aspect of the use of the Yeti Mark, Yeti Design Mark, or any confusingly similar marks.

30. Upon information and belief, Defendant has offered for sale, distributed, advertised, and promoted the sale of beer using the Yeti Mark and a mark confusingly similar to the Yeti Design Mark.

31. Because Defendant is using the Yeti Mark and a confusingly similar mark to the Yeti Design Mark, Defendant thereby uses in commerce a reproduction, counterfeit, copy, or colorable imitation of Great Divide's registered mark and trade dress without the consent of Great Divide.

32. Defendant's continuing use of the Yeti Mark and a confusingly similar version of the Yeti Design Mark in connection with the sale of beer at the Red Yeti Brewing Co. restaurant is likely to cause confusion and mistake and to deceive consumers. Defendant's infringement will create the false and misleading impression that Defendant's products are affiliated, connected, or associated with Great Divide, or have the sponsorship, endorsement or approval of Great Divide.

33. Great Divide has demanded that Defendant cease and desist from using the Yeti Mark and the Yeti Design Mark, but Defendant has failed and refused and continues to fail and refrain from using the Yeti Mark and the Yeti Design Mark.

34. By the acts complained of in this action, Defendant has infringed on the Yeti Mark and Yeti Design Mark, engaged in unfair and deceptive practices, and deliberately traded on Great Divide's goodwill and reputation, to the irreparable injury and damage of Great Divide.

35. Great Divide has no adequate remedy at law.

36. Due to Defendant's acts, Defendant has been unjustly enriched, and Great Divide is entitled to an accounting for all of Defendant's profits derived from infringing sales.

37. Defendant should be permanently enjoined from using the Yeti Mark, Yeti Design Mark, or any confusingly similar mark in connection with the sale of beer. In addition, Defendant is liable for damages caused by its infringements.

38. Due to Defendant's acts, Great Divide has suffered and is likely to suffer substantial actual damages for injury to its goodwill and reputation, dilution of the distinctive quality of its Yeti Mark and Yeti Design Mark, and injury to its relationships with its customers.

39. Defendant's actions have caused and will continue to cause irreparable injury to Great Divide.

FIRST CLAIM FOR RELIEF
(TRADEMARK INFRINGEMENT IN VIOLATION OF 15 U.S.C. § 1114(1))

40. Great Divide incorporates the preceding paragraphs as if fully set forth in this paragraph.

41. Defendant has used marks which are identical to and confusingly similar to Great Divide's federally registered mark in violation of 15 U.S.C. § 1114, and Defendant's activities have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public and, additionally, injury to Great Divide's goodwill and reputation as symbolized by the federally registered Yeti Mark and Yeti Design Mark, for which Great Divide has no adequate remedy at law.

42. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with Great Divide's federally registered mark, all to Great Divide's irreparable injury.

43. Defendant's use of the Yeti Mark and Yeti Design Mark in commerce infringes Great Divide's exclusive rights in its federally registered Yeti Mark and Yeti Design Mark in connection with beer and ale in violation of 15 U.S.C. § 1114(1).

44. Defendant has caused and is likely to continue causing substantial injury to the public and to Great Divide, and Great Divide is entitled to preliminary and permanent injunctive relief under 15 U.S.C. § 1116.

45. Due to Defendant's acts, Great Divide is entitled to recover Defendant's profits or such sum as the Court shall find to be just, damages sustained by Great Divide, and the costs of this action, as well as a sum in excess of Great Divide's actual damages not exceeding three times such amount, and attorneys' fees pursuant to 15 U.S.C. § 1117.

SECOND CLAIM FOR RELIEF
(UNFAIR COMPETITION – FALSE DESIGNATION OF ORIGIN IN VIOLATION OF 15 U.S.C. 1125(a))

46. Great Divide incorporates the preceding paragraphs as though fully set forth in this paragraph.

47. Defendant's use of the Yeti Mark and confusingly similar design to the Yeti Design Mark in commerce constitute a false designation of origin, false description, and false representation that Defendant and its beer products are sponsored by, authorized by, or affiliated with Great Divide. Defendant's acts are calculated and likely to cause confusion or mistake and deceive consumers as to the true origin, source, sponsorship or affiliation of Defendant's beers, in violation of 15 U.S.C. § 1125(a).

48. Defendant's use of Yeti Mark and confusingly similar design to the Yeti Design Mark are likely to cause confusion, deception, and mistake by creating the false and misleading impression that Defendant's goods are manufactured or distributed by Great Divide, or are affiliated, connected, or associated with Great Divide, have the sponsorship, endorsement, or approval of Great Divide.

49. Defendant has made false representations, false descriptions, and false designations of origin of its goods in violation of 15 U.S.C. § 1125(a), and Defendant's activities have caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the trade and public and, additionally, injury to Great Divide's goodwill and reputation as symbolized by the Yeti Mark and Yeti Design Mark, for which Great Divide have no adequate remedy at law.

50. Defendant's actions demonstrate an intentional and willful intent to trade on the goodwill associated with the Yeti Mark and Yeti Design Mark, all to the irreparable injury of Great Divide.

51. Defendant has caused and is likely to continue causing substantial injury to the public and to Great Divide, and Great Divide is entitled to preliminary and permanent injunctive relief under 15 U.S.C. § 1116.

52. Due to Defendant's acts, Great Divide is entitled to recover Defendant's profits or such sum as the Court shall find to be just, damages sustained by Great Divide, and the costs of this action, as well as a sum in excess of Great Divide's actual damages not exceeding three times such amount, and attorneys' fees pursuant to 15 U.S.C. § 1117.

THIRD CLAIM FOR RELIEF
(FEDERAL DILUTION)

53. Great Divide incorporates the preceding paragraphs as though fully set forth in this paragraph.

54. Great Divide has extensively and continuously promoted and used the Yeti Mark and Yeti Design Mark to identify and promote both its products and the company itself.

55. This product and corporate trademark has become a famous and well-known symbol of Great Divide and its goods and services.

56. Defendant is making commercial use in commerce of marks that dilute and are likely to dilute the distinctiveness of Yeti Mark and Yeti Design Mark by eroding the public's exclusive identification of this mark with Great Divide, and otherwise lessening the capacity of the Yeti Mark and Yeti Design Mark to identify and distinguish the products and services of Great Divide.

57. Defendant's actions have caused and will continue to cause irreparable injury to Great Divide's goodwill and dilution of the distinctiveness and value of the Yeti Mark and Yeti Design Mark in violation of 15 U.S.C. §1125(c).

FOURTH CLAIM FOR RELIEF
(COMMON LAW UNFAIR COMPETITION)

58. Great Divide incorporates the preceding paragraphs as though fully set forth in this paragraph.

59. The Yeti Mark and Yeti Design Mark have acquired a secondary meaning or significance that identifies Great Divide.

60. Defendant has unfairly used the Yeti Mark and a simulation of the Yeti Design Mark against Great Divide.

61. Defendant has sold, promoted, and offered for sale its products using the Yeti Mark and Yeti Design Mark in violation of and with knowledge of Great Divide's rights to the Yeti Mark and Yeti Design Mark, for the purpose of trading upon Great Divide's goodwill and reputation and the passing off of Defendant's products as that of Great Divide.

62. Defendant's acts constitute infringement of Great Divide's common law rights and improper and unfair competition.

63. Defendant's acts have damaged Great Divide in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF
(COMMON LAW TRADEMARK INFRINGEMENT)

64. Great Divide incorporates the preceding paragraphs as though fully set forth in this paragraph.

65. Defendant's use of the Yeti Mark and confusingly similar design to the Yeti Design Mark in connection with the sale of beers constitute infringement of Great Divide's common law rights in the Yeti Mark and Yeti Design Mark, and has created and will continue to create a likelihood of confusion to the irreparable injury of Great Divide unless restrained by this Court. Great Divide has no adequate remedy at law for this injury.

66. On information and belief, Defendant acted with full knowledge of Great Divide's use of and statutory and common law rights to, the Yeti Mark and Yeti Design Mark and without regard to the likelihood of confusion of the public created by Defendant's activities.

67. Defendant's actions demonstrate an intentional, willful, and malicious intent to trade on the goodwill associated with the Yeti Mark and Yeti Design Mark to the irreparable injury of Great Divide.

68. Great Divide, as a result of Defendant's acts, has been damaged in an amount not as yet determined or ascertainable. At a minimum, however, Great Divide is entitled to injunctive relief, to an accounting of Defendant's profits, to damages, and to costs.

SIXTH CLAIM FOR RELIEF
(DECEPTIVE TRADE PRACTICES IN VIOLATION OF C.R.S. § 6-1-113)

69. Great Divide incorporates the preceding paragraphs as though fully set forth in this paragraph.

70. By using the Yeti Mark and a confusingly similar mark to the Yeti Design Mark to suggest an affiliation with Great Divide that does not exist, Defendant engaged in an unfair and deceptive trade practice.

71. Defendant's wrongful behavior occurred in the course of its business, vocation, or occupation.

72. Defendant's unfair competition and trademark violations significantly impact the public as actual or potential consumers of Defendant's beer sales.

73. Through these wrongful acts, Defendant has caused damage to Great Divide, its brand, and its goodwill by causing Great Divide to lose control over the Yeti Mark and Yeti Design Mark.

PRAYER FOR RELIEF

WHEREFORE, Great Divide is entitled to and demands:

1. Defendant and all of its agents, officers, employees, representatives, successors, assigns, attorneys, and all other persons acting for, with, by, through, or under authority from

Defendant, or in concert or participation with Defendant, and each of them, be enjoined preliminarily and permanently, from:

- a. using the Yeti Mark and Yeti Design Mark, or any other copy, reproduction, or colorable imitation or simulation thereof;
 - b. using any trademark, trade dress, service mark, name, logo, design or source designation of any kind on or in connection with Defendant's goods or services that is a copy, reproduction, colorable imitation, or simulation of, or confusingly similar to the trademarks, trade dress, service marks, names, or logos of Great Divide;
 - c. using any trademark, trade dress, service mark, name, logo, design or source designation of any kind on or in connection with Defendant's goods or services that is likely to cause confusion, mistake, deception, or public misunderstanding that such goods or services are produced or provided by Great Divide, are sponsored or authorized by Great Divide, or are in any way connected or related to Great Divide;
 - d. using any trademark, trade dress, service mark, name, logo, design or source designation of any kind on or in connection with Defendant's goods or services that dilutes or is likely to dilute the distinctiveness of the trademarks, trade dress, service marks, names, or logos of Great Divide; and
 - e. passing off, palming off, or assisting in passing off or palming off, Defendant's goods or services as those of Great Divide, or otherwise continuing any and all acts of unfair competition as alleged in this Verified Complaint.
2. Defendant be ordered to remove all advertisements bearing the Yeti Mark and

design mark confusingly similar to the Yeti Design Mark;

3. Defendant be ordered to deliver up for impoundment and for destruction all signs, menus, advertisements, packages, promotional material, stationery or other materials in the possession, custody, or under the control of Defendant that are found to adopt, to infringe, or to dilute any of Great Divide's trademarks or trade dress or that otherwise unfairly compete with Great Divide and its products and services;

4. Defendant be compelled to account to Great Divide for any and all profits derived by Defendant from the sale or distribution of infringing goods as described in this Verified Complaint, including prejudgment interest thereon;

5. Great Divide be awarded all damages caused by the acts forming the basis of this Verified Complaint, together with prejudgment interest thereon;

6. Based on Defendant's knowing and intentional use of the Yeti Mark and design confusingly similar to the Yeti Design Mark, the damages award be trebled and the award of Defendant's profits be enhanced as provided for by 15 U.S.C. § 1117;

7. Defendant be required to pay to Great Divide the costs of this action and Great Divide's reasonable attorneys' fees pursuant to 15 U.S.C. § 1117 and C.R.S. § 6-1-113; and

9. Defendant be required to file with the Court and to serve upon Defendant's counsel within ten days after entry of any injunction or order issued in this action, a written report, under oath, setting forth in detail the manner in which Defendant has complied with such injunction or order.

10. Great Divide be awarded other and further relief as the Court may deem just.

JURY TRIAL DEMAND

Pursuant to Rule 38 of the Federal Rule of Civil Procedure and LR 38-1, Great Divide

hereby demands trial by jury on all claims and issues triable by jury in this action.

June 1, 2016

Respectfully submitted,


/s/ Michael W. McClain

Michael W. McClain

Robert W. DeWees, III

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***Local Counsel for Plaintiff, Great Divide Brewing
Company***

VERIFICATION

Brian Dunn, President of Great Divide Brewing Company, being of age and duly sworn, declares under penalty of perjury as follows: (1) that he is the President of Great Divide Brewing Company; (2) that he has read the foregoing Verified Complaint and Jury Demand; and (3) that factual allegations in the Verified Complaint are true to the best of his knowledge, information, and belief.

GREAT DIVIDE BREWING COMPANY



By: Brian Dunn
Its: President

STATE OF COLORADO)
) ss
COUNTY OF DENVER)

Subscribed, sworn to, and acknowledged before me by Brian Dunn, as President of Great Divide Brewing Company this 2nd day of June, 2016.

Witness my hand and official seal.



Notary Public

My commission expires: 1/27/20

