

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION



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JACOB J. DELL, INDIVIDUALLY & §
D/B/A MAGIC IN THE SKY §
c/o Botkin & Hall, LLP §
1003 N. Hickory Road
South Bend, IN 46615

V. §

CIVIL NO.

MIAND, INC. §
3999 E. Hupp Road §
Building R-3-1 §
La Porte, IN 46350 §

JURY DEMAND

PLAINTIFF’S ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Plaintiff Jacob J. Dell, Individually and d/b/a Magic in the Sky (“Dell” or “Plaintiff”) files this Original Complaint against MIAND, Inc. (“MIAND” or “Defendant”), and in support thereof alleges the following:

Parties

1. Plaintiff is an individual who resides in Boerne, Texas, and is doing business as Magic in the Sky which has its principal place of business in Boerne, Texas.

2. Defendant MIAND, Inc. is a corporation organized under the laws of Indiana with its principal place of business at 3999 E. Hupp Road, Building R-3-1, La Porte, Indiana 46350, and may be served by serving its registered agent, Andrew James, at the company’s registered address, 3999 E. Hupp Road, Building R-3-1, La Porte, Indiana 46350.

Jurisdiction and Venue

3. This is an action for trademark infringement and unfair competition pursuant to the Federal Lanham Act, Title 15 U.S.C. § 1051 *et seq.* This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

4. Venue is proper in this District under 28 U.S.C. §1391 because the Defendant is located within this district and a substantial number of events giving rise to the claim occurred within this district.

5. The Defendant is subject to the personal jurisdiction of this Court because Defendant is located in this district and many of the alleged facts and acts complained of herein occurred in this district.

Facts

6. Plaintiff is the owner and operator of Magic in the Sky, a pyrotechnics company, based in Boerne, Texas.

7. Plaintiff has continuously used the trademark MAGIC IN THE SKY (the “Mark”) in conjunction with providing and advertising fireworks displays since at least as early as March 24, 2001.

8. Plaintiff has continuously developed and maintained common law trademark rights in the Mark for providing and advertising fireworks displays since at least as early as March 24, 2001.

9. Plaintiff filed U.S. trademark application Serial No. 86/883,757 with the United States Patent and Trademark Office (“USPTO”) on January 22, 2016 for the mark MAGIC IN THE SKY for “fireworks; installation of lighting for theatrical and holiday displays; entertainment services, namely, fireworks displays; educational services, namely, fireworks

safety training; and lighting design and technology specification services pertaining to theatrical applications and commercial and residential applications in the nature of holiday displays.”

10. Plaintiff’s U.S. trademark application Serial No. 86/883,757 registered on the USPTO Principal Register as U.S. Trademark Registration No. 5,184,437 on April 18, 2017 for MAGIC IN THE SKY for “fireworks; installation of lighting for theatrical and holiday displays; entertainment services, namely, fireworks displays; educational services, namely, fireworks safety training; and lighting design and technology specification services pertaining to theatrical applications and commercial and residential applications in the nature of holiday displays.” A copy of Plaintiff’s Registration Certificate for the Mark is attached as **Exhibit 1**.

11. Plaintiff owns U.S. trademark Reg. No. 5,184,437 and all associated trademark rights in the Mark.

12. Plaintiff’s fireworks display services provided using the Mark have received national attention, awards, and recognition, resulting in a significant amount of goodwill associated with Plaintiff’s Mark.

13. Defendant is using the phrase SKY MAGIC PYROTECHNICS (the “Infringing Mark”) in connection with its providing fireworks and fireworks display services.

14. Defendant is using the Infringing Mark on the website <https://skymagicpyro.com/>, business cards, and other promotional material commonly used in the trade in connection with providing fireworks and fireworks display services.

15. Plaintiff first discovered Defendant was using the Infringing Mark when a representative of Busch Gardens in Tampa, Florida, asked if Plaintiff was involved with Defendant after having seen Defendant’s use of SKY MAGIC on the internet.

16. Plaintiff notified Defendant of Plaintiff's trademark rights in the MAGIC IN THE SKY mark and objecting to Defendant's use of the confusingly similar Infringing Mark in a letter dated June 19, 2018. Plaintiff further requested in the June 19, 2018 letter that Defendant cease use of its Infringing Mark. A copy of Plaintiff's June 19, 2018 letter to Defendant is attached as **Exhibit 2**. However, no response was received from Defendant.

17. On September 7, 2018, Plaintiff sent a second letter to Defendant and demanded that Defendant cease use of the Infringing Mark. Once again, no response was received from Defendant. A copy of the September 7, 2018 letter is attached as **Exhibit 3**.

18. Defendant continues to use the Infringing Mark for its fireworks display services.

Count I – Trademark Infringement Pursuant to Lanham Act

19. The allegations set forth above in Paragraphs 1 through 18 are incorporated by reference and fully set forth herein.

20. Plaintiff is the owner and senior user of the trademark MAGIC IN THE SKY for fireworks and fireworks display services.

21. Plaintiff owns U.S. trademark registration no. 5,184,437 for MAGIC IN THE SKY for "fireworks; installation of lighting for theatrical and holiday displays; entertainment services, namely, fireworks displays; educational services, namely, fireworks safety training; and lighting design and technology specification services pertaining to theatrical applications and commercial and residential applications in the nature of holiday displays."

22. Defendant is using the trademark SKY MAGIC PYROTECHNICS to provide fireworks and fireworks display services.

23. Defendant's use of the mark SKY MAGIC PYROTECHNICS is causing, and will continue to cause, confusion, mistake, or deception on the public as to an affiliation, sponsorship, or approval between Plaintiff and Defendant's fireworks display services.

24. Defendant's acts constitute trademark infringement under the Lanham Act.

25. Defendant has continued to infringe Plaintiff's Mark for five months despite notice of Plaintiff's trademark rights and Plaintiff's objection to Defendant's use of its Infringing Mark.

26. Plaintiff has invested significant time and resources into developing the goodwill associated with the Mark. The goodwill of the Mark is of substantial value to Plaintiff, and Plaintiff has and will continue to suffer irreparable harm should trademark infringement by Defendant be allowed to continue.

27. Pursuant to 15 U.S.C. §1114 and §1116, Plaintiff is entitled to preliminary and permanent injunctive relief to restrain Defendant's infringement of the Mark, including but not limited to any and all use of the Infringing Mark.

28. Defendant's acts of trademark infringement have damaged Plaintiff in an amount not yet determined. Pursuant to 15 U.S.C. §1117, Plaintiff seeks Defendant's profits, actual damages, costs of this action, and such additional relief as may be deemed appropriate and awarded by this Court.

29. Defendant's acts of trademark infringement have been, and continue to be, deliberate and willful therefore warranting an award of enhanced damages. Accordingly, Plaintiff is entitled to and seeks a finding that this case is exceptional and warrants an award of attorney fees pursuant to 15 U.S.C. §1117(a).

Count II – Unfair Competition Pursuant to the Lanham Act

30. The allegations set forth above in Paragraphs 1 through 29 are incorporated by reference and fully set forth herein.

31. Plaintiff is the owner and senior use of the trademark phrase MAGIC IN THE SKY to provide fireworks displays and to advertise its fireworks display services.

32. Defendant is using the confusingly similar SKY MAGIC PYROTECHNICS to provide and advertise fireworks and fireworks display services.

33. Defendant's use of SKY MAGIC PYROTECHNICS is likely to cause confusion, mistake, or deception on the public as to the affiliation, connection, association, or approval between Plaintiff and Defendant's services.

34. Plaintiff has invested significant time and resources into developing the goodwill associated with the Mark. The goodwill of the Mark is of substantial value to Plaintiff, and Plaintiff has and will continue to suffer irreparable harm should unfair competition by Defendant be allowed to continue.

35. Pursuant to 15 U.S.C. §1116, Plaintiff is entitled to preliminary and permanent injunctive relief to restrain Defendant's unfair competition, including but not limited to any and all use of the Infringing Mark.

36. Defendant's acts of unfair competition have damaged Plaintiff in an amount not yet determined. Pursuant to USC §1117 Plaintiff is entitled to and seeks Defendant's profits, actual damages, costs of this action, and such additional relief as may be deemed appropriate and awarded by this Court.

37. Defendant's acts of unfair competition have been, and continue to be, deliberate and willful therefore warranting an award of enhanced damages. Accordingly, Plaintiff is entitled

to and seeks a finding that this case is exceptional and warrants an award of attorney fees pursuant to 15 U.S.C. §1117(a).

Jury Demand

Plaintiff hereby demands a trial by jury for all triable issues alleged in this Complaint.

Prayer

WHEREFORE, Plaintiff Jacob J. Dell, Individually and d/b/a Magic in the Sky respectfully prays that this Court enter judgement as follows:

(a) Defendant, and all other persons in active concert and/or participation with Defendant, be permanently enjoined from engaging in the acts of trademark infringement and unfair competition complained of herein, including but not limited to, ceasing use of SKY MAGIC PYROTECHNICS and/or any confusingly similar mark;

(b) Defendant pay Plaintiff all profits Defendant generated from Defendant's trademark infringement and unfair competition and all actual damages suffered by Plaintiff as a result of Defendant's trademark infringement and unfair competition;

(c) Finding this case is an exceptional case and awarding Plaintiff enhanced damages and attorney fees;

(d) Awarding Plaintiff prejudgment and post-judgment interest;

(e) Awarding Plaintiff costs of Court; and

(f) For such other and further relief to which Plaintiff shows himself to be justly entitled.

Dated: December _____, 2018

Respectfully Submitted,

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