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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WYLIEPALOOZA ICE CREAM)
EMPORIUM, LLC)
)
Plaintiff,)
)
v.)
)
B.A.M. SWEETS, LLC d/b/a WYLIE’S,)
AMANDA R. JOHNSON, and STEPHEN)
B. JOHNSON,)
)
Defendants.)

CASE NO. 1:19-cv-02110

**COMPLAINT FOR TRADEMARK INFRINGEMENT
AND UNFAIR COMPETITION**

Plaintiff, Wyliepalooza Ice Cream Emporium, LLC (“Wyliepalooza”), by counsel, for its Complaint against Defendants, B.A.M. Sweets, LLC d/b/a Wylie’s, Amanda R. Johnson, and Stephen B. Johnson (collectively, “Defendants”), alleges and states the following claim for relief:

INTRODUCTION

1. This action arises from Defendants’ willful infringement of Wyliepalooza’s trademark rights in an effort to wrongfully profit from the substantial goodwill and reputation of Wyliepalooza. Since 2013, Wyliepalooza has operated an ice cream shop that sells ice cream, sundaes, milkshakes, bubble tea, and cakes under the unregistered marks WYLIEPALOOZA, WYLIE, and designs. Since May 2014, Wyliepalooza has also operated an ice cream truck that sells ice cream at community events in the Indianapolis geographic area under the marks WYLIEPALOOZA, WYLIE, and designs.

2. Fully aware of the fame and reputation of the WYLIEPALOOZA trademark as a result of a prior business arrangement between the parties, Defendants intentionally adopted a

confusingly similar name, WYLIE’S and design, as the designation for Defendants’ operation of an ice cream shop that sells ice cream, sundaes, milkshakes, bubble tea, and cakes. Defendants have also begun to operate an ice cream truck that sells ice cream at community events in the Indianapolis geographic area under the mark WYLIE’S.

3. In addition to using the distinctive component of Wyliepalooza’s standard character mark, WYLIE’S, and despite the use of different background colors, Defendants’ design mark has a central graphic feature nearly identical to Wyliepalooza’s distinctive design in that it uses Wyliepalooza’s ice cream cone with a cherry in place of a standard font letter “I” in “WYLIE”:

<p style="text-align: center;"><u>Wyliepalooza Design Marks</u></p>	<p style="text-align: center;"><u>Defendants' Design Mark</u></p>

4. Wyliepalooza notified Defendants of its rights and proposed an amicable resolution. Defendants rejected those efforts. As a result, Wyliepalooza brings this action for trademark infringement and unfair competition under Federal and Indiana statutory and common law, to ensure that the public is not confused, deceived or misled into purchasing Defendants’ products and services thinking that they originate with Wyliepalooza, and to enjoin Defendants from further acts of infringement and unfair competition.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to Section 39 of the Lanham Act (15 U.S.C. § 1121), and 28 U.S.C. §§ 1331 and 1338, and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Wyliepalooza's claims are predicated upon the Trademark Act of 1946, as amended, 15 U.S.C. §§ 1051 et seq., and substantial and related claims under the statutory and common law of the State of Indiana.

6. Venue is properly founded in this judicial district pursuant to 28 U.S.C. § 1391(b), because Defendants reside in this judicial district and are subject to personal jurisdiction within this judicial district, and because events giving rise to these claims occurred within this judicial district.

THE PARTIES

7. Plaintiff, Wyliepalooza, is a limited liability company organized and existing under the laws of the State of Indiana, having its principal place of business at 1217 Country Club Road, Indianapolis, IN 46234. Wyliepalooza is a family-owned and operated business that sells ice cream, sundaes, milkshakes, bubble tea, and cakes at its site in Irvington, Indiana, and via an ice cream truck at community events in the Indianapolis metropolitan area. Wyliepalooza's sole member is Patricia M. Timmons, a citizen of Indiana.

8. Defendant B.A.M. Sweets, LLC is a limited liability company organized and existing under the laws of the State of Indiana, having its principal place of business at 144 Torrey Pine Drive, Brownsburg, IN 46112. Its members are Defendants Amanda R. Johnson and Stephen B. Johnson, both of whom are citizens of Indiana. Defendants sell ice cream, sundaes, milkshakes, bubble tea, and cakes at a site in Brownsburg, Indiana, and via an ice cream truck at community events in the Indianapolis metropolitan area.

WYLIEPALOOZA AND THE WYLIEPALOOZA TRADEMARKS

9. Wyliepalooza has operated ice cream shops in the Indianapolis area since 2013, and has operated an ice cream truck in the Indianapolis area since May 2014. Over this period, Wyliepalooza has become renowned for its unique branding and high-quality services in providing ice cream and frozen treats at its ice cream shops and at festivals, private parties, and other community events throughout central Indiana.

10. Wyliepalooza's products and services are sold and/or offered for sale under its various common law trademarks, including WYLIE, WYLIEPALOOZA, WYLIEPALOOZA ICE CREAM EMPORIUM and WYLIEPALOOZA ICE CREAM TRUCK (collectively, the "Wyliepalooza Trademarks"). The Wyliepalooza brand was named after Ms. Timmons' granddaughter. "Wylie" is the distinctive feature in Wyliepalooza's various marks, including its design marks:



11. Wyliepalooza has advertised and promoted the products and services offered under the Wyliepalooza Trademarks. Wyliepalooza also relies on customer referrals, marketing, its website, Facebook, and Twitter pages. As a result of its efforts, services rendered under the Wyliepalooza Trademarks are closely associated with Wyliepalooza's reputation in the eyes of

the public and the industry. The Wyliepalooza Trademarks are, thus, invaluable assets to Wyliepalooza.

12. Wyliepalooza has realized success in its sales of products and services offered under the Wyliepalooza Trademarks.

13. Moreover, Wyliepalooza always endeavors to maintain the reputation for quality associated with the Wyliepalooza Trademarks. Wyliepalooza's painstaking adherence to only the highest quality standards has resulted in widespread and favorable public acceptance among consumers for all products and services offered under the Wyliepalooza Trademarks.

14. As a result of Wyliepalooza's advertising and promotion, adherence to the highest quality standards, and sales success, the Wyliepalooza Trademarks are widely-recognized in the Indianapolis metropolitan area, immediately identifying Wyliepalooza as the exclusive source of the services to which they are offered in connection with, and signifying goodwill of incalculable value.

DEFENDANTS' UNLAWFUL ACTS

15. In December 2016, Defendants Amanda Johnson and Brent Johnson entered into an agreement to purchase the assets of Wyliepalooza's ice cream shop located at 1022 W. Main Street, Brownsburg, Indiana. The assets sold to the Johnsons in the agreement did not include the Wyliepalooza Trademarks. Indeed, while the agreement gave the Johnsons a limited right to use "Wyliepalooza Ice Cream Emporium Brownsburg" at the Brownsburg location, the agreement set forth that the Johnsons "shall not use the name Wyliepalooza Ice Cream Emporium in any marketing, print, or electronic media without the consent of [Wyliepalooza]." The agreement further set forth that "[Wyliepalooza] shall have full right to revoke the limited right to use the name Wyliepalooza Ice Cream Emporium if the [the Johnsons'] operation of the business

Wyliepalooza Ice Cream Emporium Brownsburg receives twenty (20) bad reviews in one (1) quarter or [the Johnsons] operate[] the business against the spirit of the existing business model.”

16. Because the Johnsons’ purchase of the Brownsburg ice cream shop was an asset sale, which included the payment for assets over a three year term, the parties intended that, when the Johnsons paid off the note, the Johnsons would change the name of the Brownsburg ice cream shop to “BAM Sweets.” This intent is reflected in contemporaneous email communications between Ms. Timmons and Ms. Johnson on December 12, 2016, when Ms. Timmons granted access to Ms. Johnson as an administrator on the Facebook account and wrote that: “I will make you an additional admin but I have to stay as admin as well because the shop still represents Wyliepalooza in many ways and until the note is clear and you officially change the name of the shop to BAM Sweets I have to have access to address any issues if they come up that involve the name or reputation.”

17. Defendants are now operating an ice cream shop and ice cream truck under the WYLIE’S standard character and design trademarks (the “Infringing Marks”).

18. Defendants started using the Infringing Marks on an ice cream truck in 2018, long after Wyliepalooza commenced use of the Wyliepalooza Trademarks. When Ms. Timmons heard rumors that Defendants were considering opening an ice cream truck, she texted Ms. Johnson to instruct her not to use the Infringing Marks. Specifically, on June 27, 2018, Ms. Timmons wrote to Ms. Johnson: “Hey there! Just leaving visit Indy for the gencon selection and someone said you’re starting a trailer – FYI you can’t use Wylie on the name – it was for the Brownsburg location use only.” Likewise, on July 15, 2018, Ms. Timmons explained to Ms. Johnson via text: “I have no say in whether or not you expand your business but I have to protect the use of our name – especially since we use it for our truck and the Irvington store.”

19. Despite Ms. Timmons' instructions, Defendants are using the Infringing Marks on products and services that are identical or closely related to the products and services offered under the Wyliepalooza Trademarks, including, but not limited to, the operation of an ice cream shop and an ice cream truck (the "Infringing Products and Services").

20. Further, like Wyliepalooza, Defendants advertise their products and services online at wyliebrownsburg.com. A screenshot from Defendants' web site is attached as Exhibit A.

21. Defendants offer their products and services to customers throughout the Indianapolis metropolitan area.

22. Wyliepalooza competes in the marketplace for the same consumers as Defendants.

23. On May 16, 2019, Wyliepalooza's counsel sent a letter to Defendants' counsel setting forth that Defendants' use of the Infringing Marks was in violation of Section 43(a)(1)(A) of the Lanham Act (15 U.S.C. § 1125) and Indiana's trademark law. In the letter, Wyliepalooza's counsel sought to reach an amicable resolution in which the Defendants would voluntarily change their name to something other than "Wyliepalooza," "Wylie's," or anything derived from "Wylie." Wyliepalooza indicated its understanding that changing the name was likely to take a period of time and set forth its offer to allow Defendants six months to phase out the use of the Infringing Marks. A true and accurate copy of the letter is attached as Exhibit B.

24. Defendants' counsel responded to the letter, indicating his view that the "use of the name Wylie's is ambiguous," and rebuffing Wyliepalooza's efforts to engage in further conversations. A true and accurate copy of the email correspondence between counsel is attached as Exhibit C.

25. Defendants' use of the Infringing Marks has caused, and is likely to continue to cause confusion, mistake, or to deceive as to the affiliation, connection, or association of Defendant's business with Wyliepalooza, and to damage to Wyliepalooza's business relations with consumers and prospective consumers.

26. Defendants are aware of the strength of the Wyliepalooza Trademarks, and the goodwill symbolized thereby, and that the Infringing Marks cannot be used as an indicator of source or sponsorship for the goods and services it is offering. Accordingly, Defendants have been engaging in the above-described unlawful activities knowingly and intentionally, or with reckless disregard for Wyliepalooza's rights in the Wyliepalooza Trademarks.

COUNT I

Unfair Competition and False Designation of Origin (15 U.S.C. § 1125(a))

27. Wyliepalooza realleges and incorporates paragraphs 1 through 26 of the complaint.

28. Defendants' use of the Infringing Marks in commerce and in connection with their products and services, is likely to cause confusion, mistake or deception: (i) as to the affiliation, connection or association with Wyliepalooza, and (ii) as to the origin, sponsorship or approval of their products and services and the commercial activities by Wyliepalooza.

29. Defendants' acts constitute a false designation of origin and unfair competition in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A).

30. Defendants have acted with knowledge of the Wyliepalooza Trademarks and with the deliberate intention to unfairly benefit from the incalculable goodwill symbolized thereby.

31. Defendants have profited from their unlawful actions and have been unjustly enriched to the detriment of Wyliepalooza. Defendants' unlawful actions have caused

Wyliepalooza monetary damage in an amount presently unknown, but in an amount to be determined at trial.

32. Upon information and belief, by its acts, Defendants have made and will make substantial profits and gain to which they are not entitled in law or equity.

33. Defendants' intentional and willful conduct has caused, and will continue to cause, Wyliepalooza irreparable harm unless enjoined, and Wyliepalooza has no adequate remedy at law.

COUNT II

Trademark Infringement (Indiana Common Law; Ind. Code § 24-2-1-13.5)

34. Wyliepalooza realleges and incorporates paragraphs 1 through 26 of the complaint.

35. Wyliepalooza owns all right, title, and interest in and to the Wyliepalooza Trademarks as aforesaid, including all common law rights in such marks, and such marks are distinctive and fanciful.

36. The aforesaid acts of Defendants constitute trademark infringement in violation of the common law of the State of Indiana and Ind. Code § 24-2-1-13.5.

37. Defendants have acted with knowledge of the Wyliepalooza Trademarks and with the deliberate intention to unfairly benefit from the incalculable goodwill symbolized thereby.

38. Defendants have profited from their unlawful actions and have been unjustly enriched to the detriment of Wyliepalooza. Defendants' unlawful actions have caused Wyliepalooza monetary damage in an amount presently unknown, but in an amount to be determined at trial.

39. Upon information and belief, by its acts, Defendants have made and will make substantial profits and gain to which they are not entitled in law or equity.

COUNT III
Common Law Unfair Competition

40. Wyliepalooza realleges and incorporates paragraphs 1 through 26 of the complaint.

41. Defendants' use of the Infringing Marks in commerce in connection with its goods and services is intended to cause, has caused, and is likely to continue to cause confusion, mistake and deception among the general consuming public and the trade as to whether the goods and services bearing the Infringing Marks originate from, or are affiliated with, sponsored by, or endorsed by Wyliepalooza.

42. Wyliepalooza competes with Defendants for a common pool of customers.

43. Defendant has acted with knowledge of the Wyliepalooza Trademarks and with the deliberate intent to deceive the general consuming public and the industry, and to benefit unfairly from the incalculable goodwill symbolized by the Wyliepalooza Trademarks.

44. The aforesaid acts of Defendants constitute unfair competition in violation of the common law of the State of Indiana.

45. Defendants have profited from their unlawful actions and have been unjustly enriched to the detriment of Wyliepalooza. Defendants' unlawful actions have caused Wyliepalooza monetary damage in an amount presently unknown, but in an amount to be determined at trial.

46. Upon information and belief, by their acts, Defendant have made and will make substantial profits and gain to which they are not entitled in law or equity.

47. Defendants' intentional and willful conduct has caused, and will continue to cause, Wyliepalooza irreparable harm unless enjoined, and Wyliepalooza has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Wyliepalooza demands judgment against Defendants as follows:

1. Finding that (i) Defendants have violated Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)); and (ii) Defendants have engaged in trademark infringement and unfair competition under the common law of Indiana;

2. Granting an injunction preliminarily and permanently restraining and enjoining Defendants, their officers, agents, employees and attorneys, and all those persons or entities in active concert or participation with them, or any of them, from:

(a) advertising, marketing, promoting, supplying, distributing, offering for sale or selling any products or services which bear the Infringing Marks, the Wyliepalooza Trademarks, or any other mark substantially or confusingly similar thereto, and engaging in any other activity constituting an infringement of any of Wyliepalooza's rights in the Wyliepalooza Trademarks, or any other trademark owned by Wyliepalooza; and

(b) engaging in any other activity constituting unfair competition with Wyliepalooza, or acts and practices that confuse the public and/or the industry; and

3. Directing such other relief as the Court may deem appropriate to prevent the industry and public from deriving any erroneous impression that any product or service at issue in this case that has been advertised, marketed, promoted, supplied, distributed, offered for sale or sold by Defendants, has been authorized by Wyliepalooza, or is related to or associated in any way with Wyliepalooza or its products and services.

4. Directing that Defendants account to and pay over to Wyliepalooza all profits realized by its wrongful acts and directing that such profits be trebled in accordance with Section 35 of the Lanham Act, 15 U.S.C. § 1117 and Indiana law.

5. Awarding Wyliepalooza its actual damages in accordance with Section 35 of the Lanham Act, 15 U.S.C. § 1117 and Indiana law.

6. Awarding Wyliepalooza its costs and attorney's fees and investigatory fees and expenses to the full extent provided for by Section 35 of the Lanham Act, 15 U.S.C. § 1117 and Indiana law.

7. Requiring Defendants to deliver to Wyliepalooza for destruction or other disposition all advertising, promotional and marketing materials bearing the Infringing Marks, as well as all means of making same.

8. Requiring Defendants to terminate all use of wyliepaloozabrosnburg.com after a reasonable transition to a new domain, and not renew the infringing domain when its registration expires.

9. Awarding Wyliepalooza pre- and post- judgment interest on any monetary award made part of the judgment against Defendants.

10. Awarding Wyliepalooza such additional and further relief as the Court deems just and proper.

JURY DEMAND

Wyliepalooza requests a trial by jury on all claims so triable.

Respectfully submitted,

/s/ Craig E. Pinkus

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