

1 Bobby A. Ghajar (SBN 198719)
 HOWREY LLP
 2 550 South Hope Street, Suite 1100
 Los Angeles, California 90071
 3 Telephone: (213) 892-1800
 Facsimile: (213) 892-2300
 4 E-mail: ghajarb@howrey.com

5 Peter E. Moll (*admitted pro hac vice*)
 Alan S. Cooper (*admitted pro hac vice*)
 6 HOWREY LLP
 1299 Pennsylvania Avenue, N.W.
 7 Washington, D.C. 20004
 Telephone: (202) 783-0800
 8 Facsimile: (202) 383-6610

9 Attorneys for Defendant Anheuser-Busch, Inc.

10
 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 UNITED BRANDS COMPANY, INC. 14 15 Plaintiff 16 v. 17 ANHEUSER-BUSCH, INC. 18 Defendant 19 20 21 22 23 24) Civil Action No. 3:10-cv-02281- BEN (WMc))) DEFENDANT’S NOTICE OF MOTION) AND MOTION TO DISMISS PLAINTIFF’S) CLAIMS FOR FEDERAL TRADEMARK) INFRINGEMENT, FEDERAL) TRADEMARK DILUTION, CALIFORNIA) STATUTORY TRADEMARK DILUTION,) FEDERAL TRADE DRESS) INFRINGEMENT, COPYRIGHT) INFRINGEMENT, CALIFORNIA) STATUTORY TRADEMARK) INFRINGEMENT, CALIFORNIA) STATUTORY UNFAIR COMPETITION,) COMMON LAW TRADEMARK) INFRINGEMENT, AND COMMON LAW) UNFAIR COMPETITION) [Fed. R. Civ. P. 12(b)(6)])) Hearing Date: March 7, 2011) Time: 10:30am) Judge: Hon. Roger T. Benitez) Courtroom No.: 3
--	---

1 Please take notice that on March 7, 2011, at 10:30 am, or as soon thereafter as the matter may
2 be heard, Defendant Anheuser-Busch, Inc. (“A-B”) will respectfully move this Court pursuant to Rule
3 12(b)(6) Fed. R. Civ. P. to dismiss the entirety of the First Amended Complaint filed by Plaintiff
4 United Brands Company, Inc. (“UBC”) on the ground that each of the claims asserted fail to state a
5 claim upon which relief can be granted. More specifically, the grounds for this motion are as follows:
6

7 (1) To the extent that UBC’s dilution claims under § 43(c) of the Federal Trademark Act,
8 15 U.S.C. § 1125(a), and Calif. Bus. & Prof. Code § 14247 rely on its purported trade
9 dress rights in the packaging of UBC’s “Dragon Joose” beverage, it fails to state a claim
10 upon relief can be granted because UBC has not alleged sufficient facts to establish that
11 such trade dress is “widely recognized among the general consuming public,” which is
12 the definition of a famous mark as set forth in § 43(c)(2)(A) of the Federal Trademark
13 Act, 15 U.S.C. § 1125(c)(2)(A), and applied under Calif. Bus. & Prof. Code § 14247.
14

15 (2) To the extent that UBC’s allegations of trademark dilution under § 43(c) of the Federal
16 Trademark Act, 15 U.S.C. § 1125(c), and Calif. Bus. & Prof. Code § 14247 rely on the
17 pleaded federal registrations identified in ¶ 16 of the First Amended Complaint, UBC
18 has failed to state a claim upon which relief can be granted because the trademarks
19 JOOSE and JOOSE & Design, which are the subject of those registrations, are so
20 fundamentally different from A-B’s TILT & Design mark that there cannot be any
21 likelihood of dilution which is a critical prerequisite for a finding of liability for dilution
22 under § 43(c) and § 14247.
23

24 (3) UBC’s assertion of trademark infringement, trade dress infringement, and false
25 designation of origin under § 43(a) of the Federal Trademark Act, 15 U.S.C. § 1125(a),
26 fails to state a claim upon which relief can be granted because UBC has failed to allege
27 facts establishing that consumers recognize the “Dragon Joose” packaging as a separate
28

1 indication of origin apart from the JOOSE brand name and/or that the elements
2 comprising the respective trade dress of the parties are confusingly similar.

3 (4) UBC's assertion of copyright infringement under 17 U.S.C. §§ 101 and 501 fails to
4 state a claim upon which relief can be granted because the designs covered by UBC's
5 pleaded copyright registrations and the allegedly infringing can designs used by A-B are
6 not "substantially similar" in protected expression, which is a critical prerequisite for a
7 finding of liability for infringement under § 501.

8 (5) UBC's assertion of California statutory trademark infringement under Calif. Bus. &
9 Prof. Code § 14245 fails to state a claim upon which relief can be granted because UBC
10 has not pleaded ownership of any California state registration, which is a fundamental
11 prerequisite for relief under § 14245.

12 (6) UBC's assertion of California statutory unfair competition under Calif. Bus. & Prof.
13 Code. § 17200 and common law unfair competition and trademark infringement fail to
14 state claims upon which relief can be granted for the same reasons that require dismissal
15 of UBC's trade dress infringement, and false designation of origin claims under § 43(a)
16 of the Federal Trademark Act, 15 U.S.C. § 1125(a), pursuant to Rule 12(b)(6).

17 (7) Additionally, UBC's assertion of California statutory unfair competition under Calif.
18 Bus. & Prof. Code. § 17200 and common law unfair competition must be dismissed
19 because those claims are preempted by the Copyright Act, 17 U.S.C. § 101 *et seq.*

20 This motion is based upon this notice of motion and motion, the concurrently filed
21 memorandum of points and authorities, the exhibits annexed hereto for which A-B has asked the Court
22 to take judicial notice, matters and pleadings that may be presented to the Court, and oral argument.

23 ///

24 ///

25 ///

1 Pursuant to Local Rule 7.1(d)(1), A-B requests oral argument unless the Court deems it unnecessary.

2
3 Dated: January 24, 2011

Respectfully submitted,

4
5 /s/ Bobby A. Ghajar
6 Bobby A. Ghajar (SBN 198719)
7 HOWREY LLP
8 550 South Hope Street, Suite 1100
9 Los Angeles, California 90071
10 Telephone: (213) 892-1800
11 Facsimile: (213) 892-2300
12 E-mail: ghajarb@howrey.com

13 and

14 Peter E. Moll (*admitted pro hac vice*)
15 Alan S. Cooper (*admitted pro hac vice*)
16 HOWREY LLP
17 1299 Pennsylvania Avenue, N.W.
18 Washington, D.C. 20004
19 Telephone: (202) 783-0800
20 Facsimile: (202) 383-6610

21 Attorneys for Defendant
22 Anheuser-Busch, Inc.
23
24
25
26
27
28

1 Certificate of Service

2 I hereby certify that on December 10, 2010, I electronically filed the following documents with
3 the Clerk of the Court for the United States District Court for the Southern District of California by
4 using the CM/ECF system:

5 (1) Defendant's Notice Of Motion And Motion To Dismiss Plaintiff's Claims For Federal
6 Trademark Infringement, Federal Trademark Dilution, California Statutory Trademark Dilution,
7 Federal Trade Dress Infringement, Copyright Infringement, California Statutory Trademark
8 Infringement, California Statutory Unfair Competition, Common Law Trademark Infringement, And
9 Common Law Unfair Competition

10 (2) Memorandum In Support Of Defendant's Motion To Dismiss Plaintiff's Claims For
11 Federal Trademark Infringement, Federal Trademark Dilution, California Statutory Trademark
12 Dilution, Federal Trade Dress Infringement, Copyright Infringement, California Statutory Trademark
13 Infringement, California Statutory Unfair Competition, Common Law Trademark Infringement, And
14 Common Law Unfair Competition

15 The participants listed below in the case who are "active" registered CM/ECF users will be
16 served by the CM/ECF system:

17 Nancy O. Dix, Esq.
18 Brian Behmer
19 Christina D. Yates
20 Christopher James Beal
21 DLA Piper LLP (US)
22 401 B. Street, Suite 1700
23 San Diego, California 92101-4297

24 I declare that I am employed by a member of the Bar of this Court, at whose direction this
25 service was made.

26 Dated: January 24, 2011

27 /s/ Bobby A. Ghajar
28 Bobby A. Ghajar