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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 UNITED BRANDS COMPANY, INC.,

14 Plaintiff,

15 v.

16 ANHEUSER-BUSCH, INC.,

17 Defendant.

Case No. 10-CV-2281-BEN (WMC)

Hon. Roger T. Benitez
Courtroom 3

**REPLY IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS**

Hearing Date: March 7, 2011
Time: 10:30 a.m.
Judge: Hon. Roger T. Benitez
Courtroom No.: 3

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20 **I. INTRODUCTION**

21 In deciding Anheuser-Busch, Inc.'s ("A-B") Motion to Dismiss, the Court is presented with
22 two straightforward issues:

23 **Sufficiency of Factual Pleadings.** Under the holdings of *Bell Atl. Corp. v. Twombly*, 550 U.S.
24 544, 570 (2007) and *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937 (2009), a plaintiff must plead
25 sufficient facts showing that its claims are plausible on their face and that the facts pled allow the
26 court to draw the reasonable inference that the defendant is liable for the alleged misconduct. Here,
27 despite having two attempts at pleading sufficient facts, United Brands Company, Inc. ("UBC") has
28 failed to allege facts sufficient to support its claims for Trade Dress Infringement and False

1 Designation of Origin (Claim I); Trade Mark Infringement (Claim II); Federal Dilution (Claim III);
2 California Statutory Dilution (Claim V); California Statutory Trademark Infringement (Claim VI); and
3 Common Law Trademark Infringement (Claim VIII). Should the Court dismiss these claims for
4 failure to sufficiently plead? Yes.

5 **Certain Claims Fail As a Matter of Law.** UBC's remaining claims for Copyright
6 Infringement (Claim IV); Bus. & Prof. Code § 17200 (Claim VII); and Common Law Unfair
7 Competition (Claim IX) can be decided by the Court as a matter of law. Should the Court dismiss
8 these claims as a matter of law? Yes.

9 **II. THE RELEVANT DESIGNS**

10 UBC identifies a number of aspects that it claims make up the design for its DRAGON JOOSE
11 product. (See FAC, ¶¶12, 54) In the larger sense, these include the product's dragon character and
12 display of the name and alcohol content. A simple comparison of these elements to the A-B TILT
13 design reveals that there truly are no issues of infringement – trademark, trade dress, copyright or
14 otherwise – in this case.

15 **1. Dragons**

- 16 a. UBC's Dragon: A single Chinese dragon – a wingless dragon with a
17 long, skinny, serpentine shape – wrapped around an emblem
18 containing the JOOSE name.
19 b. A-B's TILT Dragon: Profiles of two European dragons – winged and
20 shorter than Chinese dragons – framing a crown and a shield
21 containing a single "T" in Old English font.

22 **2. Product Names**

- 23 a. JOOSE: JOOSE appears vertically in all capital letters in the emblem
24 surrounded by the Chinese dragon.
25 b. TILT: TILT appears horizontally in lower case letters underneath the
26 European dragons in a clearly different font.

27 **3. Alcohol Content**

- 28 a. JOOSE: The beverage's alcohol content appears at the top of the can in
the middle of a banner resembling a lightning bolt and appears again
toward the bottom of the can at the bottom of the JOOSE emblem.
b. TILT: The beverage's alcohol content appears at the top of the can in
the fire breathed by the dragons, above the crown and shield.

1 A side-by-side comparison reveals just how different the two designs really are:



13 **III. ARGUMENT**

14 **A. The Court Should Dismiss the FAC's First and Second Claims for Trade**
15 **Dress/Trademark Infringement/False Designation of Origin – 15 U.S.C. § 1125(a)**

16 UBC's primary arguments in opposition to A-B's motion to dismiss its claim for trade
17 dress/trademark infringement and false designation of origin is that the motion raises issues of fact
18 that are not properly resolved at the pleading stage. UBC sets up this straw man argument to avoid the
19 true thrust of A-B's motion – that the FAC fails to state a claim under the pleading standards
20 established by the Supreme Court in *Twombly* and *Iqbal*. In this case, the Court can resolve A-B's
21 motion as a matter of law in light of these legal standards.

22 In order to state a claim for trade dress/trademark infringement or false designation of origin
23 under § 43(a), UBC must allege that its asserted trade dress: (1) is nonfunctional; (2) is either
24 inherently distinctive or has acquired a secondary meaning; and (3) is likely to be confused with the
25 design of A-B's TILT product by members of the consuming public. *Two Pesos, Inc. v. Taco*
26 *Cabana, Inc.*, 505 U.S. 763, 773 (1992); *One Industrials, LLC v. Jim O'Neal Distrib., Inc.*, 578 F.3d
27 1154, 1166 (9th Cir. 2009). *See also* 15 U.S.C. § 1125(a). Whether the FAC properly alleges these
28 elements is determined according to the Supreme Court's decisions in *Bell Atl. Corp. v. Twombly*, 550

1 U.S. 544, 570 (2007), that a complaint must plead “enough facts to state a claim for relief that is
2 plausible on its face,” and *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949 (2009), that a claim is
3 plausible on its face “when the plaintiff pleads factual content that allows the court to draw the
4 reasonable inference that the defendant is liable for the misconduct alleged.” UBC’s claims for trade
5 dress/trademark infringement and false designation of origin do not meet these standards.

6 As stated in the moving papers, UBC’s claims are based on its DRAGON JOOSE Trade Dress
7 – the elements of which are set forth at paragraphs 12 and 54 of the FAC. Of these nine elements,
8 four of the elements are functional and, as such, are not entitled to trade dress protection.¹ These
9 include: (1) a 24-ounce can (FAC, ¶¶ 12.g., 54.f.), which functions to establish the product’s volume;
10 (2) the display of alcohol volume content (FAC, ¶¶ 12.f., 12.h., 54.g., 54.h.), which functions to meet
11 legal requirements; and (3) purple and black color scheme (FAC, ¶¶ 12.i., 54.i.), which functions to
12 designate flavor.²

13 With regard to the remaining five elements of the DRAGON JOOSE Trade Dress, A-B’s TILT
14 product does not use these features. Specifically, A-B’s TILT product does not use: (1) a prominent
15 stylized graphic of a dragon surrounded by the word mark JOOSE; (2) the JOOSE mark in large white
16 letters in a stylized, archaic font; (3) the JOOSE mark surrounded by a “shield” design as shown in the
17 JOOSE and Design mark; or (4) the DRAGON JOOSE mark also in a stylized font below the JOOSE
18 and Design mark and centered on the face of the can towards the bottom. (FAC, ¶¶ 12.a., 12.b., 12.c.,
19 12.d., 12.e.; 54.a., 54.b., 54.c., 54.d., 54.e.) With regard to the product names, the only similarity
20 between the “TILT” and “JOOSE” names is that they are both one-syllable words. The font,
21 capitalization and placement are completely different. The Court can determine no likelihood of
22 confusion regarding the names as a matter of law.

23 In considering UBC’s allegations in support of its claims for trade dress/trademark
24 infringement and false designation of origin under section 43(a) of the Lanham Act, it is clear that
25 UBC has failed to allege facts demonstrating that it has a plausible claim for relief or that would allow

26 ¹ Two of four deal with display of alcohol volume.

27 ² As noted in the moving papers, UBC has singled out A-B’s grape TILT product (because of its
28 purple color) and ignores the other three flavors (colors).

1 the Court to draw the reasonable inference that A-B is liable for the misconduct alleged. *Twombly*,
2 550 U.S. at 570; *Iqbal*, 129 S.Ct. at 1949. Further, given the functional elements of the DRAGON
3 JOOSE Trade Dress and the disparities between the DRAGON JOOSE Trade Dress and A-B's TILT
4 product, there is no likelihood of confusion of the two designs as a matter of law. *See Toho Co. Ltd.*
5 *V. Sears, Roebuck & Co.*, 645 F.2d 788, 790 (9th Cir. 1981) (affirming 12(b)(6) dismissal of § 1125(a)
6 claim based on no likelihood of confusion.) For these reasons, the FAC's first two claims for relief
7 should be dismissed without leave to amend.³

8 **B. The FAC's Third Claim Fails to State a Claim for Trademark Dilution – 15**
9 **U.S.C. § 1125(c)**

10 The FAC is a muddled mess of defined terms that make it difficult to determine exactly what
11 UBC alleges are the designs or marks at issue, especially with regard to its third claim for relief for
12 dilution by blurring under section 43(c) of the Lanham Act. The problem stems from the FAC's
13 definition of DRAGON JOOSE Marks, which includes both the DRAGON JOOSE Trade Dress –
14 which includes the JOOSE trade marks (FAC, ¶¶ 12.a., -e., 54.a.-e.) – as well as the JOOSE Marks –
15 the registered JOOSE mark and the JOOSE mark and design (FAC ¶ 16). UBC's Opposition attempts
16 to alleviate this confusion by stating that its dilution claim is based on its DRAGON JOOSE Trade
17 Dress. However, the Opposition only further muddies the issue, stating in the heading to section
18 III.D.1. that UBC's dilution claim is based on its "DRAGON JOOSE Trade Dress Packaging" but
19 then stating in the next section heading that UBC has alleged facts sufficient to show that its
20 "DRAGON JOOSE Marks Are Famous."

21 UBC's inclusion of the JOOSE mark and the JOOSE mark and design in its definition of
22 DRAGON JOOSE Marks was intentional and was done in an attempt to confuse the Court and A-B
23 into believing that UBC can state claim for dilution because the DRAGON JOOSE *Marks* are
24 "famous" and because the A-B TILT design impairs the distinctiveness of its DRAGON JOOSE
25 *Trade Dress*. The Court should see through the ruse.

26
27 ³ As stated in the moving papers (section III.C.), the FAC's sixth and eighth claims for California
28 statutory and common law trademark infringement fail for the same reason as the FAC's first and
second claims for trade dress/trademark infringement and false designation of origin.

1 In order to state a claim for dilution by blurring, the FAC must properly allege, among other
2 things, that UBC's DRAGON JOOSE Trade Dress is famous. 15 U.S.C. § 1125(c). The FAC clearly
3 fails to properly allege facts supporting this element under the Supreme Court's minimal pleading
4 standards as set forth in *Twombly* and *Iqbal*.

5 For purposes of section 43(c), "a mark is famous if it is widely recognized by the general
6 consuming public of the United States as a designation of source of the goods or services of the
7 mark's owner." 15 U.S.C. § 1125(c)(2)(A). In determining whether a mark is famous, a court may
8 consider "all relevant factors," including (1) "The duration, extent, and geographic reach of
9 advertising and publicity of the mark, whether advertised or publicized by the owner or third parties";
10 (2) "The amount, volume, and geographic extent of sales of the goods or services offered under the
11 mark"; (3) "The extent of actual recognition of the mark"; and (4) whether the mark was registered.
12 15 U.S.C. § 1125(c)(2)(A). In analyzing these factors, the only conclusion for the Court to reach is
13 that UBC has failed to properly allege that the DRAGON JOOSE Trade Dress is famous.

14 In support of its dilution claim, UBC makes the improper conclusory allegations that its
15 DRAGON JOOSE product is the most popular and recognized of all its products and that its sales
16 comprise a "significant" percentage of all of its JOOSE products. (FAC, ¶ 70.) UBC then employs its
17 ruse by shifting gears and alleging that its DRAGON JOOSE *Marks* are "famous" (FAC, ¶ 71) and
18 are recognized nation-wide by the consuming public as originating from one source (FAC, ¶ 74); that
19 the DRAGON JOOSE *Marks* have appeared in several on-line and print magazines and newspapers
20 (FAC, ¶ 72), that products bearing the DRAGON JOOSE *Marks* are sold in 47 states and advertising
21 takes place in each those states (FAC, ¶ 73), and that UBC owns registrations for its JOOSE *marks*
22 and JOOSE *design and marks* (FAC, ¶ 75).

23 Absent from the FAC are any allegations – viz., not improper conclusory allegations –
24 regarding (1) "The duration, extent, and geographic reach of advertising and publicity of the"
25 DRAGON JOOSE *Trade Dress*; (2) "The amount, volume, and geographic extent of sales of the
26 goods or services offered under the" DRAGON JOOSE *Trade Dress*; (3) "The extent of actual
27 recognition of the" DRAGON JOOSE *Trade Dress*; and (4) the fact that the DRAGON JOOSE *Trade*

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1 **Dress** was rejected from registration as a trade mark by the USPTO.⁴ These allegations are absolutely
2 necessary for UBC to state a claim for dilution under section 43(c) and UBC has not even attempted to
3 make such allegations.

4 Thus, the FAC fails allege facts that form a plausible claim for relief or that would allow the
5 Court to draw the reasonable inference that A-B is liable for the misconduct alleged for federal
6 dilution under section 43(c) of the Lanham Act. Therefore, this claim should be dismissed without
7 leave to amend.⁵

8 C. As a Matter of Law, UBC Cannot State a Claim for Copyright Infringement – 17
9 U.S.C. §§ 101 and 105

10 In opposition to A-B's motion on its copyright infringement claim, UBC claims, without citing
11 any supporting authority, that whether its work is entitled to "broad" or "thin" protection or whether
12 the virtually identical test or the substantially similar test applies are questions of fact that preclude the
13 Motion. (Opp'n at 14:22-26 ("[W]hether the idea of a dragon can be given expression in only a
14 narrow range is a question of fact."))

15 This is wrong. As the Ninth Circuit held in *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d
16 1435 (9th Cir. 1994), whether a copyrighted work is entitled to broad or thin protection and the scope
17 of the plaintiff's copyright are questions of law for the court:

18 [R]esolving this appeal is a matter of applying well-settled principles. In this, as in
19 other cases, the steps we find helpful to follow are these:

20 (1) The plaintiff must identify the source(s) of the alleged similarity between his work
and the defendant's work.

21 (2) Using analytic dissection, and, if necessary, expert testimony, the court must
22 determine whether any of the allegedly similar features are protected by copyright
23 [U]nprotectable ideas must be separated from potentially protectable expression; to
24 that expression, the court must then apply the relevant limiting doctrines in the context
of the particular medium involved, through the eyes of the ordinary consumer of that
product.

25 ⁴ See A-B's request for judicial notice at fn. 5 of its points and authorities and Exhibit B attached
26 thereto.

27 ⁵ The result is the same for the FAC's fifth claim for California statutory dilution, which, for the
28 reasons stated in the moving papers (section III.F.), suffers from the same deficiencies as the federal
dilution claim.

1 (3) Having dissected the alleged similarities and considered the range of possible
2 expression, *the court must define the scope of the plaintiff's copyright-that is, decide*
3 *whether the work is entitled to "broad" or "thin" protection.* Depending on the
4 degree of protection, the court must set the appropriate standard for a subjective
comparison of the works to determine whether, as a whole, they are sufficiently similar
to support a finding of illicit copying.

5 *Id.* at 1443 (emphasis added); *see also Sid & Marty Krofft Television Productions, Inc. v. McDonald's*
6 *Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) (stating that the extrinsic test "may often be decided as a
7 matter of law.") Therefore, the Court may rightfully decide this issue as a matter of law. In order to
8 do so, the Court must use "analytic dissection" to separate UBC's protectable expression from
9 unprotectable expression. This is where the holding in *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003)
10 is instructive. *Satava* confirms the black-letter rule that "expressions that are standard, stock, or
11 common to a particular subject matter or medium are not protectable under copyright law." *Id.* at 810.
12 Or, as the *Apple Computer* court stated the rule, "When the range of protectable and unauthorized
13 expression is narrow, the appropriate standard for illicit copying is virtual identity." 35 F.3d. at 1439.

14 UBC's interpretation of the holding in *Satava*, is unjustifiably narrow. UBC claims that the
15 *Satava* holding merely pronounces thin copyright protection on "realistic depictions of live animals."
16 Ergo, according to UBC, its depiction of a dragon is not subject to the *Satava* holding. (Opp'n at
17 15:9-15.)

18 The thin protection rule in *Satava* is not simply limited to realistic depictions of live animals.
19 It applies to all expressions where the available range of expression is narrow. The Nimmer treatise
20 confirms this conclusion in language directly applicable to this case: "Even if a work does not occur in
21 nature – *a dragon, for instance* – there is no liability if the only similarity between the two works is
22 that they each portray the same item, but in a different form." 4 Melville B. Nimmer and David
23 Nimmer, *Nimmer on Copyright* § 13.03[B][2] (Matthew Bender, Rev. Ed. 2010) (emphasis added).

24 In this case, the range of expression of dragons is narrow in that dragons are typically
25 portrayed as long, scaled, serpentine creatures with four legs, wings, and breathing fire. This narrow
26 range of expression means that copyright protection for dragon designs is thin and A-B's TILT can
27 only infringe if it is virtually identical to UBC's protectable elements. Even a casual analysis of

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1 A-B's TILT can show that it is not virtually identical to UBC's design. Thus, there can be no
2 infringement as a matter of law and the Court should dismiss UBC's copyright claim with prejudice.

3 **D. The Court Should Dismiss the FAC's Sixth Claim for California Infringement –**
4 **Bus. & Prof. Code § 14245**

5 A-B's argument in support of the dismissal of this claim was that the FAC had only alleged
6 that UBC was the owner of a "pending" California state trademark registration for its DRAGON
7 JOOSE Marks. (See FAC, ¶ 108.) After this motion was filed, the State of California issued the
8 registration for some of UBC's marks. (See Opp'n at § III.G.) Nevertheless, the FAC's allegations
9 regarding the "pending" registration remain deficient and this claim should be dismissed. Further,
10 this claim fails for the same reasons UBC's federal trademark infringement and false
11 designation claims fail. Therefore, this claim should be dismissed without leave to amend.

12 **E. UBC Has Failed to State a Claim for Unfair Competition – Bus. & Prof. Code §§**
13 **17200 et seq. – & Common Law Unfair Competition**

14 UBC claims as an independent basis for liability under the unlawful prong of Business and
15 Professions Code section 17200, *et seq.*, that A-B "has engaged in a systematic effort of moving and
16 removing JOOSE products where they are set for display." (Opp'n at 19:8-19.) UBC claims that
17 moving of product violates state and federal laws and regulations.

18 UBC's allegations, however, constitute mere conclusions couched as fact. UBC does not
19 allege any facts to allow the Court, or A-B, to determine if its claim is "plausible on its face."
20 *Twombly*, 550 U.S. at 570. Without supporting facts, there is no "reasonable inference that the
21 defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1499. This is precisely the kind of
22 factless, conclusory pleading that *Twombly* and *Iqbal* found to be insufficient. Moreover, the FAC
23 does not allege which statutory provisions A-B is claimed to have violated. The Court should
24 therefore dismiss this claim.

25 UBC's opposition states that its statutory and common law unfair competition claims are not
26 preempted by the Copyright Act because it bases these claims on "its exclusive right to use its product
27 packaging as an indicator of source of origin for its products." (Opp'n at 20:23-24.) UBC's FAC,
28 however, makes it clear that its common law unfair competition claim is based upon copyright

1 infringement. (FAC ¶ 130.) Thus, to the extent this claim relies upon copyright law, it should be
2 dismissed as preempted.

3 Therefore, the FAC's seventh and ninth claims for statutory and common law unfair
4 competition should be dismissed without leave to amend.

5 **IV. CONCLUSION**

6 For all of the reasons stated in the moving papers and herein, A-B's motion to dismiss should
7 granted without leave to amend.

8
9 DATED: February 28, 2011

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