

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**PRESTIGE PET PRODUCTS, INC.,
d/b/a HACHT SALES & MARKETING,**
a Michigan corporation,

Plaintiff,

vs.

HONORABLE _____

CIVIL ACTION NO. _____

**JAMES LEIST, an individual,
and PET CHEWZ CO.,**
a Wisconsin corporation,
jointly and severally,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff Prestige Pet Products, Inc. d/b/a Hacht Sales & Marketing (“Prestige”) files this Complaint against the defendants James Leist (“Leist”) and Pet Chewz Co. (“Pet Chewz”) as follows:

I. THE PARTIES

1. Prestige is a Michigan corporation with its principal place of business at 41123 Jo Drive, Novi, Michigan 48375-1933.

2. Defendant James Leist is an individual, who resides in Plymouth, Wisconsin 53073. Leist distributes, offers for sale and sells the accused porkhide twists as described herein in the United States, in the State of Michigan and this District.

3. Pet Chewz Co. is a Wisconsin corporation, with its principal place of business at 359 South Pleasant View Rd., Apt. #206, Plymouth, Wisconsin 53073. Pet Chewz distributes, offers for sale and sells the accused porkhide twists as described herein in the United States, in the State of Michigan and this District.

II. JURISDICTION AND VENUE

4. This is an action for copyright infringement in violation of the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.*; for trade dress infringement in violation of the Lanham Act of 1946, as amended, 15 U.S.C. § 1125(a); for violation of the Michigan Consumer Protection Act, MCLA § 445.903; and for civil conspiracy and tortious interference with a contractual and business relations under Michigan law.

5. This Court has subject matter jurisdiction over the claims herein pursuant to 15 U.S.C. §§ 1121 and 28 U.S.C. §§ 1331, 1338(a) and 1338(b) and also has supplemental jurisdiction under 28 U.S.C. § 1367(a) over Prestige’s state law claims. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b), 1391(c) and 1400(b).

6. This Court has personal jurisdiction over the defendants because the defendants are conducting business in the State of Michigan and this District as alleged above, and are committing acts of infringement in this District.

III. FACTUAL BACKGROUND

A. Prestige’s Exclusive Agreement

7. Prestige is a national marketer and distributor of high quality dog chews.

8. On December 1, 1998, Hacht Sales and Marketing, Ltd. (“HSM”) entered into an agreement with NINGDE Prefectural Foreign Trade Corporation (“NINGDE”). (Exhibit A.) The agreement states that HSM is the sole and exclusive importer and distributor in North America for all porkhide products handled by NINGDE. The agreement also states that if NINGDE receives an inquiry about any of its porkhide products from a third party, it shall immediately turn the inquiry over to HSM and inform the inquiring party that HSM is the sole and exclusive distributor for NINGDE on its porkhide products.

9. On May 31, 2005, Hacht Sales and Marketing, Ltd. (“HSM”) entered into an agreement with XIAPU Orient Pet and Leather Products (“XIAPU”) Co., Ltd. of China. (Exhibit B.) The agreement stated that Hacht would be the sole and exclusive importer and distributor in North America of the porkhide products manufactured by XIAPU. The agreement

also states that if XIAPU receives an inquiry about any of its porkhide products from a third party, it shall immediately turn the inquiry over to HSM and inform the inquiring party that HSM is the sole and exclusive distributor for XIAPU of its porkhide products.

10. XIAPU and NINGDE are related companies. Prestige's products are manufactured in XIAPU's factory and NINGDE ships and exports Prestige's products to Prestige.

B. Defendant Leist's Activities

11. Leist worked for Prestige from May 2005 to March 31, 2010. In the fall of 2006, Prestige paid for Leist to travel to China and Prestige introduced Leist to Prestige's Chinese agent Kenny Ip and key contacts at NINGDE and XIAPU.

12. Leist held the position of national salesman and sales manager, which allowed him to work closely with Hacht. Due to his position at Prestige, Leist had access to and obtained confidential product information, such as pricing and sourcing, relating to Prestige's products.

13. Leist and Hacht had a close working relationship. Hacht had confidential communications with Leist on a regular basis. The information disclosed to Leist was not common knowledge.

14. Hacht routinely discussed with Leist Prestige's confidential information, including marketing strategies and customer lists. Hacht also divulged the costs associated with manufacturing, packaging and shipping Prestige's products with Leist.

15. During his time at Prestige and thereafter, Leist was aware of the HSM-NINGDE agreement and the HSM-XIAPU agreement, and the obligations thereto.

16. While at Prestige, Leist arranged, without Prestige's knowledge or consent, for NINGDE to supply products to other companies including Bay Sales, Carolina Prime, and others. Leist sold dog chew products to Dollar Tree under the Pet Chewz brand, which upon information and belief, is owned by Leist.

17. On several occasions, Leist deliberately contacted, without Prestige's knowledge and consent, XIAPU, NINGDE and Prestige's agent, Kenny Ip, to lure business away from Prestige.

18. Leist deliberately interfered with the business relationship between Prestige and XIAPU, NINGDE and Kenny Ip. Leist had several communications with NINGDE concerning a situation involving Costco's customers and the merchandise.

19. Leist deliberately made statements to XIAPU and NINGDE concerning sales of the products.

20. Leist deliberately arranged, without Prestige's knowledge or consent, for XIAPU and NINGDE to manufacture dog chew products, with the same packaging used by Prestige, for Leist to sell at Costco stores.

C. Defendant Pet Chewz's Activities

21. Upon information and belief, defendant Pet Chewz is a marketer and distributor of porkhide dog chew products.

22. Defendant Pet Chewz actively markets and sells porkhide twists to retailer Costco.

23. Defendant Pet Chewz deliberately arranged, without Prestige’s knowledge or consent, for NINGDE to supply dog chew products manufactured by XIAPU, with the same packaging as used by Prestige, as shown below.

BILL OF LADING

BILL OF LADING NO.
EGLV148100041133

ARRIVAL DATE
2011-04-03

VOYAGE NO.
0556E

VESSEL NAME
9300415

SHIPPER
NINGDE FULAIDE IMP AND EXP CO. LTD. NINGDE DONGQIAO ECONOMIC DEVELOPING ZONE, JIANMIN BLDG NO 2 5-A NINGDE, FUJIAN, CHINA TEL:0593-2933677 FAX:0593-2933977

CONSIGNEE
PET CHEWZ CO. LTD 359 SOUTH PLEASANT VIEW RD, SUITE #206 PLYMOUTH, WISCONSIN 53073, USA TEL: 920-980-9210


NOTIFY PARTY
WILLIAMS CLARKE CO., INC. USAPET CHEWZ CO. LTD

PORT OF LOADING
Kaohsiung

PORT OF DISCHARGE
Los Angeles, California

DECLARATION OF GOODS
DOG CHEWSDOG CHEWSDOG CHEWS 4 T PORKHIDE TWIST STICKS THE USDA APHIS IMPORT PERMIT NO C 11152 HPR CERTIFY THAT SHPT CONTAIN NO SOLIDWOOD PACKING MATERIALS

OTHER INFORMATION AVAILABLE
Gross Weight, Number of Units, Volume, Country of Origin, Carrier Code, Ship Registered In, Container Number, Marks & Numbers



Pet Chewz Co. Ltd imports products from Ningde Fulaide Imp And Exp Co. in Kaohsiung via Los Angeles, California. Container #FSCU4256330 TTNU5484729

COMPANY NAME
Pet Chewz Co. Ltd

ADDRESS
359 SOUTH PLEASANT VIEW RD, SUITE #206 PLYMOUTH, WISCONSIN 53073, USA TEL: 920-980-9210

TOTAL SHIPMENTS IN OUR DATABASE
3 record(s)

LATEST SHIPMENT
Apr 24, 2011

KNOWN SUPPLIERS
1 known suppliers

1. NINGDE FULAIDE IMP AND EXP CO. (China Taiwan)
2. [Join Now](#) to view 1 more connected companies...



24. Upon information and belief, Pet Chewz is operated as a mere instrumentality and/or alter ego of the sole owner, defendant James Leist.

25. Defendant Leist so dominates Pet Chewz as a corporate entity, Pet Chewz has no mind or existence of its own.

26. Defendant Leist's control over Pet Chewz has been used to commit the acts now complained of herein.

27. Defendant Leist's control and domination over Pet Chewz has proximately caused Prestige's damages.

28. Defendant Leist is individually liable for Prestige's damages due to his control and domination of Pet Chewz.

IV. COUNT I

COPYRIGHT INFRINGEMENT—17 U.S.C. § 501

29. Prestige hereby incorporates by reference the allegations set forth above.

30. On June 7, 2011, Prestige applied for a registration certificate from the United States Copyright Office. The United States Copyright Office assigned Serial No. 1-619038721 to Prestige's application. (Exhibit C.) The copyright application is entitled "Porkhide Twists" and is for the product packaging of Prestige's porkhide twists product ("Prestige Product Packaging Copyright"). The front and back sides of the product packaging are shown below:



31. At all times relevant hereto, Prestige has been the owner of copyright in the Prestige Product Packaging Copyright.

32. Without authorization, defendants have reproduced, distributed, and publicly displayed a colorable imitation of the Prestige Product Packaging Copyright as shown below:



33. Defendants knew the Prestige Product Packaging Copyright belonged to Prestige and that defendants did not have permission to exploit Prestige's works. The Defendants' actions constitute infringement of the Prestige Product Packaging Copyright.

34. The actions of the defendants as alleged above were done deliberately and intentionally.

35. As a result of defendants' wrongful conduct, defendants are liable to Prestige for copyright infringement pursuant to 17 U.S.C. § 501. Prestige seeks an injunction and damages recovery limited solely to Defendants' profits.

V. COUNT II

FEDERAL FALSE DESIGNATIONS OF ORIGIN AND UNFAIR COMPETITION AND TRADE DRESS INFRINGEMENT, 15 U.S.C. §1125(a)

36. Prestige hereby incorporates by reference the allegations set forth above.

37. Prestige has been using the same distinctive packaging for its porkhide twists product line for over ten years ("Prestige Product Packaging Trade Dress"). The Prestige Product Packaging Trade Dress includes a wide gold band on the top of the product with a picture of the company's beloved dog Palmer, who passed away, and beneath it a wide blue band containing the words "100% Natural PORKHIDE TWISTS" written in pink lettering.

38. As a result of its continual use, the Prestige Product Packaging Trade Dress has acquired secondary meaning because the public has come to believe that this distinctive packaging comes from Prestige.

39. The features of the Prestige Product Packaging Trade Dress are primarily nonfunctional and are entitled to protection under U.S. trademark law.

40. Defendants have copied the overall design and appearance of the Prestige Product Packaging Trade Dress. Defendants placed a claim on the Pet Chewz bag which states: “Pet Chewz...have been manufacturing the Porkhide Twists for Costco over 10 years.” This claim belongs solely to Prestige, who has been manufacturing porkhide twists for over 10 years. A side by side comparison of the front and back of the Prestige Product Packaging Trade Dress and the infringing Pet Chewz product packaging is found below:





41. In connection with defendants' advertisement, promotion, distribution, sales and offers of sales of its goods, defendants have used in commerce, and continue to use in commerce, the Prestige trade dress.

42. Defendants' actions purposefully trade on, misappropriate and wrongfully reap the benefit of the goodwill and reputation that have attached to the Prestige Product Packaging Trade Dress.

43. The acts and conduct of defendants constitute willful and deliberate infringement of Prestige's trade dress rights.

44. Defendants' copying of the overall design and appearance of the Prestige Product Packaging Trade Dress was intended to cause, and is likely to cause confusion, mistake, or deception as to the affiliation, connection or association of defendants' product with Prestige, or as to the origin, sponsorship, or approval of defendants' porkhide twists packaging by

Prestige, and constitutes a false or misleading representation as to the source or sponsorship of the product or a false designation of origin, all in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

45. The aforesaid conduct of defendants has caused irreparable injury to the business and goodwill of Prestige and will continue to cause irreparable harm to Prestige unless enjoined by this Court.

46. Defendants' acts constitute the use in commerce of false designations of origin and false or misleading descriptions or representations, tending to falsely or misleadingly describe or represent defendants' products as those of Prestige and trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a). Prestige seeks an injunction and damages recovery limited solely to Defendants' profits.

VI. COUNT III

STATE UNFAIR COMPETITION (STATUTORY)

47. Prestige hereby incorporates by reference the allegations set forth above.

48. Defendants' unauthorized, willful and deliberate use of the Prestige Product Packaging Trade Dress is likely to cause confusion, mistake, or deception as to the source, sponsorship, or approval of defendants' product and falsely and deceptively represent defendants' product as being sponsored by, authorized by, or provided by, Prestige, and constitutes deceptive practices and unfair competition in violation of the Michigan Consumer Protection Act, MCLA § 445.903.

49. Defendants' acts have resulted in defendants' unjust enrichment.

50. Defendants' actions as alleged herein have caused and will continue to cause irreparable damage and injury to Prestige if not enjoined by this Court.

51. Prestige has no adequate remedy at law.

**VII. COUNT IV
CIVIL CONSPIRACY**

52. Prestige hereby incorporates by reference the allegations set forth above.

53. The actions of the defendants as alleged above were done deliberately and intentionally.

54. The actions of the defendants with NINGDE and XIAPU as alleged above constitute a real agreement or confederation with a common design to destroy Prestige's reputation and business.

55. Defendants' actions as alleged herein have caused irreparable damage and injury to Prestige's business.

**VIII. COUNT V
TORTIOUS INTERFERENCE WITH A CONTRACTUAL AND BUSINESS
RELATIONSHIP**

56. Prestige hereby incorporates by reference the allegations set forth above.

57. Prestige entered into a contract with NINGDE and XIAPU.

58. Defendants were aware of the confidential, proprietary and on-going nature of the contracts and business relationships created by Prestige.

59. Defendants intentionally interfered with the contracts and relationships so as to misappropriate all benefits to himself or his own companies, thereby depriving Prestige of substantial rights and equity.

60. Defendants' actions were unjustified and wrongful *per se* and did disrupt or interfere with the business relationships thereby causing Prestige harm and damages.

IX. DEMAND FOR RELIEF

WHEREFORE, Prestige demands entry of a judgment granting relief against the defendants as follows:

A. That the Court adjudge that the defendants have violated 17 U.S.C. § 501, Prestige seeks an injunction and damages recovery limited solely to Defendants' profits;

B. That the Court adjudge that the defendants have violated 15 U.S.C. § 1125(a), Prestige seeks an injunction and damages recovery limited solely to Defendants' profits;

C. That the Court adjudge that the defendants have engaged in unfair competition in violation of the Michigan Consumer Protection Act, Prestige seeks an injunction and damages remedy limited solely to injunctive relief;

D. Defendants, its agents, servants, employees, attorneys and all those persons in active concert or participation with Defendants be preliminarily and permanently enjoined and restrained from:

(1) Using the Prestige Product Packaging Copyright and/or the Prestige Product Packaging Trade Dress or any other mark or design confusingly similar to the Prestige Product Packaging Trade Dress;

(2) Imitating, copying, making, having made, advertising, importing, distributing or selling a work or derivative work(s) using the Prestige Product Packaging Trade Dress;

(3) From advertising, displaying, or selling (whether in physical or electronic form), any and all advertisements, marketing or promotional materials, product packaging,

signage, banners, invoices, pamphlets, leaflets, flyers and the like, as well as any goods (products, samples, and the like) featuring the Prestige Product Packaging Trade Dress, or any other mark or design confusingly similar to the Prestige Product Packaging Trade Dress, or identical or substantially similar to the Prestige Product Packaging Copyright;

(4) From registering, attempting to register or maintaining any trademark, trade dress or copyright that includes the Prestige Product Packaging Trade Dress or Prestige Product Packaging Copyright, or any other mark or design confusingly similar to the Prestige Product Packaging Trade Dress, or identical or substantially similar to the Prestige Product Packaging Copyright;

(5) From committing any acts or making any statements calculated, or reasonably foreseeable consequence of which would be, to infringe any of Prestige's trademark rights, or to confuse, mislead, or deceive consumers as to sponsorship, approval or affiliation of Prestige by, with, or of defendants; and

(6) From conspiring with, aiding, assisting or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (1) through (5) above.

E. Defendants be required to deliver to the Court for destruction, or show proof of destruction of, any and all products, labels, signs, prints, advertisements, signage, packages, wrappers, catalogs, internet web pages, and any other materials in its possession or control bearing or depicting the Prestige Product Packaging Trade Dress or Prestige Product Packaging Copyright, or any other mark or design confusingly similar to the Prestige Product Packaging Trade Dress, or identical or substantially similar to the Prestige Product Packaging

Copyright. Defendants should also be required to deliver to the Court for destruction, or show proof of destruction of, all plates, molds, computer software, silk screens, matrices and other means of making the same as provided by 15 U.S.C. § 1118;

F. Defendants be required to file with this Court and to serve upon Prestige, within 30 days after entry and service on Defendants of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendants complied with the injunction;

G. That the Court adjudge that the defendants engaged in a civil conspiracy to deprive Prestige of business.

H. That the Court award Prestige damages against defendants adequate to compensate plaintiff for loss of business due to the civil conspiracy.

I. That the Court adjudge that the defendants interfered with Prestige's contractual and business relationships.

J. That the court award Prestige damages against defendants for (1) the pecuniary loss of the benefits of the contracts and business relationships, (2) consequential damages for lost business opportunities, and (3) actual harm to the reputation caused by the interference with Prestige's contractual and business relationships;

K. That Prestige recover its reasonable attorney fees;

L. That Prestige recover its costs of this action and prejudgment and post-judgment interest; and

M. That Prestige be granted such other relief as the Court may deem appropriate.

X. DEMAND FOR JURY

Plaintiff, Prestige, demands a trial by jury for all issues so triable.

Respectfully submitted,

BROOKS KUSHMAN P.C.

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Dated: June 9, 2011

Attorneys for Plaintiff