

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BELL'S BREWERY, INC.,

Plaintiff,

v.

Case No.
Hon.

WINERY EXCHANGE, INC.,

Defendant.

BODMAN PLC

By: Dennis J. Levasseur (P39778)

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COMPLAINT AND DEMAND FOR JURY TRIAL

December 13, 2011

Plaintiff Bell's Brewery, Inc. ("Plaintiff"), by its attorneys, Bodman PLC, for its complaint against Defendant Winery Exchange, Inc. ("Defendant"), states as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Bell's Brewery, Inc. ("Bell's") is a Michigan corporation with its principal place of business at 8938 Krum Avenue, Galesburg, Michigan 49053.

2. Upon information and belief, Defendant Winery Exchange, Inc. is a California corporation with its principal place of business at 500 Redwood Boulevard, Suite 200, Novato, California 94947.

3. The claims set forth below arise out of Defendant's infringement of Plaintiff's federally registered trademark, false designations of origin, false representations and unfair competition in violation of Sections 32(1) and 43(a)(1) of the Trademark Act of 1946, as amended (the "Lanham Act"), 15 U.S.C. §§1114(1) and 1125(a)(1), and Section 3 of the Michigan Consumer Protection Act, M.C.L.A. §445.903(1)(a); and trademark infringement and unfair competition under common law.

4. This Court has subject matter jurisdiction over this action under to 28 U.S.C. §§1331-32 and 1338 and supplemental jurisdiction under 28 U.S.C. §1367.

5. Upon information and belief, this Court has personal jurisdiction over Defendant because it has committed tortious acts and caused injury as described herein in the State of Michigan, and have engaged in and transacted business in the State of Michigan.

6. Venue is proper in this District under 28 U.S.C. §§1391(b) and (c).

PLAINTIFF'S BREWERY AND ITS WELL-KNOWN TRADEMARK

7. Plaintiff is a premier craft brewery that is dedicated to brewing flavorful, quality craft beer, porter, ale, stout and malt liquor.

8. For more than 25 years, Plaintiff has sold beer, lager, porter, ale, stout and malt liquor under the trademark BELL'S (the "BELL'S Mark").

9. Plaintiff's beer is available for purchase in eighteen states (Michigan, Indiana, Ohio, Pennsylvania, Kentucky, Missouri, Illinois, Wisconsin, Minnesota, South Carolina, North Carolina, North Dakota, Florida, Virginia, Arizona, Georgia, Alabama, Iowa) and the District of Columbia, through virtually every type of outlet that sells beer, including national supermarkets (e.g. Kroger and Whole Foods), grocery stores, delicatessens, convenience stores, mom-and-pop stores, mass merchandisers, wholesale club stores, beer festivals, music festivals, other types of festivals, restaurants, cafes and bars.

10. By virtue of its continuous and substantial use of the BELL'S Mark, the quality of Plaintiff's goods provided under the BELL'S Mark and unsolicited media attention in connection with Plaintiff's BELL'S products, the BELL'S Mark has come to symbolize substantial, valuable goodwill with respect to beer, ale, porter, stout, and malt liquor. Plaintiff's BELL'S branded products enjoy widespread recognition and popularity and Bell's is a nationally-recognized maker of superior craft brews which are much sought after by consumers who appreciate the quality unique to BELL'S branded alcoholic beverages.

11. As a natural consequence of the immediate consumer acceptance of, and avowed devotion to, Plaintiff's BELL'S beer and related alcoholic beverages when Plaintiff's BELL'S alcoholic products first came to market, Plaintiff began to offer to consumers BELL'S posters, BELL'S bumper stickers, BELL'S temporary tattoos, BELL'S bags, BELL'S umbrellas, and a host of similar merchandise including but not limited to, T-shirts, jerseys, baseball caps, golf discs and playing cards, all prominently featuring the BELL'S brand. BELL'S merchandise has been continuously offered and sold to the public since 1985 at bars, cafes, beer festivals, via

Bell's website and/or through Bell's brick and mortar General Store location in Kalamazoo, Michigan.

12. Plaintiff's BELL'S Mark has been used continuously and exclusively since 1985 for Plaintiff's superior beers, lagers, ales, porters, stouts and malt liquors, and has acquired secondary meaning in the eyes of the consuming public and the trade, and Plaintiff's common-law rights therein are widely recognized and well-established.

13. Plaintiff also owns U.S. Registration No. 2,749,090 issued on the Principal Register of the U.S. Patent and Trademark Office (the "USPTO") on August 12, 2003 for the trademark BELL'S & Design:



for "beer, including porter and ale, stout, and malt liquor" in International Class 32 ("Plaintiff's Registered Mark") and the goodwill appurtenant thereto. Plaintiff's registration specifies that BELL'S & Design was first used in commerce on September 19, 1985.

14. Plaintiff's Registration is incontestable, valid and subsisting, unrevoked and uncanceled pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065.

15. By virtue of its continuous and substantial use of Plaintiff's Registered Mark, the quality of Bell's goods provided under Plaintiff's Registered Mark and unsolicited media attention accorded Plaintiff's Registered Mark, Plaintiff has gained substantial, valuable goodwill with respect to Plaintiff's Registered Mark.

16. Plaintiff's promotion and use of Plaintiff's Registered Mark has caused the public

to associate Plaintiff's Registered Mark with Plaintiff and to believe that the goods provided in connection with Plaintiff's Registered Mark are exclusively associated with, or are sponsored by, Plaintiff.

DEFENDANTS' INFRINGING ACTIVITIES

17. Upon information and belief, Defendant recently began selling beer under the brand name COPPER BELL at the Whole Foods, located at 1355 Washtenaw Ave, Ann Arbor, Michigan, and other stores.

18. Defendant's packaging features the word "Bell" in large letters with the word "Copper" placed above it at approximately half the size.

19. Further, Defendant's packaging features three kettles with bell shaped caps: while Plaintiff's products feature three bells, as shows in Plaintiff's Registered Mark.



20. Defendant's use in commerce of the COPPER BELL mark in connection with its beer is likely to cause confusion among consumers and constitutes willful and intentional infringement of the proprietary trademark rights of Bell's for which only this Court can provide

equitable and monetary relief.

21. Upon information and belief, Defendant had constructive, if not actual, notice of Bell's federal registrations of the Plaintiff's Registered Mark pursuant to Section 22 of the Lanham Act, 15 U.S.C. §1072, prior to its adoption and/or use of COPPER BELL in connection with beer.

22. On June 27, 2011, Plaintiff's counsel sent a cease and desist letter to Defendant requesting Defendant to discontinue its infringement of the BELL'S Mark and acts of unfair competition.

23. Defendant did not agree to the request contained in Plaintiff's counsel's letter and continued its acts of infringement and unfair competition complained of herein.

24. Defendant's use of the COPPER BELL mark is likely to cause confusion with Plaintiff's use of its BELL'S Mark and Plaintiff's Registered Mark.

25. The products with which Defendant uses the COPPER BELL mark are identical or closely related to the products offered by Bell's under its BELL'S Mark and Plaintiff's Registered Mark.

26. Defendant's COPPER BELL beers are sold through and in the same retail stores as Plaintiff's BELL'S beers and lagers and are in close proximity thereto.

27. Defendant is in direct competition with Plaintiff.

28. Defendant's use of the COPPER BELL mark in connection with the sale, distribution, advertising and promotion of its beer, is intended to and is likely to cause confusion, mistake or deception of the trade and public, and to cause the trade and the public to believe that such products are the same as Bell's products or are authorized, endorsed, sponsored or approved by Bell's or are otherwise affiliated or connected with Bell's or the products sold under the

BELL'S Mark and/or the Plaintiff's Registered Mark.

29. Moreover, in addition to the adoption and use of the COPPER BELL mark, Defendant has applied to register COPPER BELL as a trademark with the USPTO.

30. On August 16, 2011, Plaintiff filed an opposition in the USPTO under Opposition No. 91201177 against Defendant's Application Serial No. 85/191,789 to register COPPER BELL in order to prevent registration of that mark.

31. Defendant's activities are likely to result in the substitution and passing off of Defendant's products to purchasers seeking to purchase Plaintiff's BELL'S products and to injure the business reputation and dilute the distinctive quality of the BELL'S trademark and the Plaintiff's Registered Mark.

32. Defendants' activities have caused and will continue to cause irreparable harm to Bell's, the substantial goodwill embodied in its BELL'S trademark, and Plaintiff's business and profits, and Plaintiff's Registered Mark, and such actions will continue unless restrained by this Court.

33. Plaintiff has no adequate remedy at law.

COUNT I

TRADEMARK INFRINGEMENT UNDER SECTION 32(1) OF THE LANHAM ACT

34. Plaintiff repeats and realleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

35. Defendant's conduct is calculated to and is likely to deceive, mislead, and confuse the relevant trade and public as to the source or sponsorship of Defendant's goods. Defendant's conduct therefore constitutes willful trademark infringement in violation of Section 32(1) of the Lanham Act, 15 U.S.C. §1114(1).

COUNT II

**INFRINGEMENT AND USE OF FALSE DESIGNATIONS
OF ORIGIN UNDER SECTION 43(A)(1)(A) OF THE LANHAM ACT**

36. Plaintiff repeats and realleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

37. Defendant's conduct constitutes willful infringement and the knowing use of false designations of origin and false descriptions and representations in connection with products placed into the stream of commerce in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. §1125(a)(1)(A).

COUNT III

COMMON LAW TRADEMARK INFRINGEMENT

38. Plaintiff repeats and realleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

39. Defendant's conduct constitutes willful trademark infringement under common law.

COUNT IV

COMMON LAW UNFAIR COMPETITION

40. Plaintiff repeats and realleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

41. Defendant's conduct constitutes willful unfair competition by passing off, misappropriation and unprivileged imitation under common law.

COUNT V

**UNFAIR COMPETITION UNDER SECTION 3(1)(A)
OF THE MICHIGAN CONSUMER PROTECTION ACT**

42. Plaintiff repeats and realleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

43. Defendant's conduct constitutes unfair competition by passing off, misappropriation and unprivileged imitation under Section 3 of Michigan Consumer Protection Act, M.C.L.A. §445.903(1)(a).

WHEREFORE, Plaintiff prays for a judgment:

1. Preliminarily and then permanently enjoining and restraining Defendant, its officers, agents, servants, employees, attorneys, successors and assigns, and all persons or entities acting in concert or participation with them or any of them, from the distribution, offering for sale, sale, advertising and/or promotion of any beer or other alcoholic beverage product or goods or services related thereto using: (a) the trademark BELL'S, whether alone or in combination with any other word or design, or any confusingly similar variations thereof, including without limitation the term COPPER BELL, and (b) any other false designation of origin or false description or representation or any other word, name symbol or design calculated or likely to cause confusion or mistake in the mind of the trade or public or to deceive the trade or public into believing that Defendant's businesses or products are Plaintiff's businesses or products or are authorized, endorsed or sponsored by Plaintiff or are connected or affiliated in any way with Bell's Brewery or the products sold under the BELL'S Mark or Plaintiff's Registered Mark;

2. Directing Defendant to file with the Court and serve on Plaintiff's counsel, within thirty (30) days after entry of any injunction issued by the Court in this action, a sworn written statement as provided in 15 U.S.C. § 1116;

3. Directing the USPTO to deny Defendant's Application Serial No. 85/191,789 to register COPPER BELL;

4. Awarding Plaintiff damages for Defendant's acts of trademark infringement and unfair competition complained of herein;

5. Directing Defendant to account to Plaintiff for its profits arising from the conduct complained of herein;

6. Awarding Plaintiff treble damages for Defendant's willful acts of infringement of Plaintiff's Registered Mark and of false designation, descriptions and representations in violation of 15 U.S.C. §1125(a)(1)(A);

7. Awarding Plaintiff punitive damages for its common law claims and its claim under the Michigan Consumer Protection Act;

8. Awarding Plaintiff its reasonable attorneys' fees, taxable costs and disbursements of this action; and

9. Awarding Plaintiff such other and further relief as the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury pursuant to Fed. R. Civ. P. 38.

Respectfully submitted,

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December 13, 2011