

Jurisdiction and Venue

4. The jurisdiction of this Court over the subject matter of this action is predicated on 28 U.S.C. § 1338(a) as a federal question pertaining to trademarks. This Court has supplemental subject matter jurisdiction over Plaintiff's state law claim for unfair competition pursuant to 28 U.S.C. §§ 1338(b), 1367(a) because this claim is so related to the federal trademark infringement claim that it forms part of the same case or controversy under Article III of the United States Constitution.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), (c) because Defendant resides here, has committed acts of infringement here, and/or upon information and belief has its regular and established place of business here, and is thus subject to personal jurisdiction in this judicial district.

Background Facts

6. In-N-Out has been engaged in the business of restaurant services and other businesses since 1948, and currently has over 260 restaurant locations in California, Arizona, Nevada, Utah and Texas.

7. Since long prior to the acts of Defendant herein alleged, In-N-Out has continuously used its BOOMERANG ARROW design mark in interstate and intrastate commerce in connection with its advertising, promotion, offering to provide and providing of its products.

8. In-N-Out has offered its products under its mark, the mark having continuously appeared on In-N-Out's signage (see photos at attached Exhibit A) and on packaging for the products themselves, in substantial advertising and promotion activities. In-N-Out has extensively used and promoted the mark such that it is closely identified with the goods and services of In-N-Out and has gained widespread public recognition.

9. Plaintiff is the owner of several federal registrations of its mark, including U.S. Registration Nos. 1,646,401, 1,031,096 and 1,516,560. See attached information at Exhibits B - D.

10. These registered marks of In-N-Out are valid and subsisting, and incontestable, and are prima facie evidence of In-N-Out's exclusive right to use said marks in commerce throughout the United States on the goods and services specified therein and other goods and services related thereto.

11. As a result of the care and skill exercised by In-N-Out in the conduct of its business, the high quality of In-N-Out's products offered under its mark, and the long running extensive advertising, sale and promotion of In-N-Out's products associated with the same, the mark has acquired strong secondary meaning. The trade has used and now uses the mark to help identify In-N-Out's popular products as those of In-N-Out exclusively, and to distinguish them from the products of others.

12. Recently In-N-Out became aware of Defendant Pappas Restaurants' highly similar use of the boomerang arrow signage outside of its location in the Houston Airport. See attached photograph of said signage at Exhibit E. In-N-Out, through counsel, directed letters to Defendant and had discussions by telephone and email with Defendant's attorney but no satisfactory resolution was reached.

13. The use by Defendant of In-N-Out's mark is likely to cause confusion, mistake or deception, as those encountering Defendant's signage may mistakenly assume, at least initially, that its restaurant is in some way sponsored, endorsed, approved by or connected with In-N-Out when in fact it is not.

14. Upon information and belief, Defendant has performed the aforesaid acts with wrongful purposes and knowledge to inappropriately trade upon In-N-Out's extensive goodwill including using In-N-Out's mark to draw attention to their restaurant.

15. In-N-Out's mark is wholly associated with In-N-Out due to its long use thereof, and as such In-N-Out is deserving of having its mark adequately protected with respect to the conduct of its business.

Count I
Trademark Infringement Under Federal Law

16. In-N-Out incorporates by reference the allegations contained in paragraphs 1-16 of this Complaint and incorporates them herein.

17. By the aforesaid acts, Defendant has infringed upon In-N-Out's federal trademark rights described by its trademark registrations, in violation of Section 32 of the Lanham Act, 15 U.S.C. §1114.

18. Upon information and belief, Defendant's acts have been willful and in conscious disregard of the trademark rights of In-N-Out.

19. In-N-Out has suffered, is suffering, and will continue to suffer irreparable injury for which In-N-Out has no adequate remedy at law.

20. In-N-Out is entitled to a preliminary injunction to be made permanent upon entry of final judgment, preventing Defendant's further infringement.

Count II
Unfair Competition Under Texas Law

21. In-N-Out incorporates by reference the allegations contained in paragraphs 1-23 as though fully set forth herein.

22. Defendant's acts complained of herein constitute unfair competition under the laws of the State of Texas.

23. Upon information and belief, Defendant's acts complained of herein were intentional, wanton, willful, guided by an evil hand and mind, and committed in bad faith and with the intent to confuse and deceive the public.

24. Defendant's acts complained of herein have caused and, unless enjoined, will continue to cause In-N-Out irreparable harm for which there is no adequate remedy at law.

Demand For Jury Trial

25. Plaintiff hereby requests trial by jury on all claims asserted triable by a jury.

Prayer

WHEREFORE, In-N-Out prays for judgment including the following:

a. An Order preliminarily and permanently enjoining Defendant and its officers, agents, servants, employees, attorneys and all persons in active concert or participating with any of them from using the boomerang arrow mark or colorable imitations thereof, in any manner including on signage, in any graphic display or advertising for their restaurants or otherwise infringing plaintiff's federally registered marks and/or committing further acts of unfair competition under Texas law.

b. A finding that this is an exceptional case; and

c. An Order that Defendant pay to In-N-Out all reasonable attorneys' fees and costs of this action pursuant to 15 U.S.C. § 1117.

Respectfully submitted,

Dated: November 15, 2011.

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