

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

LCO DESTINY, LLC,

Plaintiff,

v.

Civil Action No.

MICHAELS STORES, INC., a Delaware
corporation, MICHAELS STORES PROCUREMENT
COMPANY, INC., a Texas corporation, and B P
INDUSTRIES INCORPORATED, a California
corporation,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, LCO DESTINY, LLC, by and through its undersigned attorneys, hereby states its Complaint against Defendants as follows. All of the allegations and other factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

I. Parties

1. Plaintiff, LCO Destiny, LLC, (“Plaintiff”) is a limited liability company organized and existing under the laws of the State of New York and has a principal place of business at 1 Fisher Circle, Watertown, New York 13601.

2. Plaintiff believes, after an inquiry reasonable under the circumstances, as will likely have evidentiary support after a reasonable opportunity for further investigation or discovery, that Defendant, Michaels Stores, Inc. (“Defendant Michaels Stores”) is a corporation organized and existing under the laws of the State of Delaware and has a principal place of business at 8000 Bent Branch Drive, Irving, Texas 75063.

3. Plaintiff believes, after an inquiry reasonable under the circumstances, as will likely have evidentiary support after a reasonable opportunity for further investigation or discovery, that Defendant, Michaels Stores Procurement Company, Inc. (“Defendant Michaels Procurement”) is a corporation organized and existing under the laws of the State of Texas, is a subsidiary of Defendant Michaels Stores, and has a principal place of business at 8000 Bent Branch Drive, Irving, Texas 75063.

4. Plaintiff believes, after an inquiry reasonable under the circumstances, as will likely have evidentiary support after a reasonable opportunity for further investigation or discovery, that Defendant, B P Industries Incorporated (“Defendant B P”) is a corporation organized and existing under the laws of the State of California and has a principal place of business at 5300 E. Concourse, Ontario, California 91764.

II. Jurisdiction and Venue

5. This Court has jurisdiction under 15 U.S.C. § 1121, and 28 U.S.C. § 1338(a) in that this case arises under the Trademark Laws of the United States, 15 U.S.C. §§ 1051 et seq.

6. This Court has jurisdiction of the state claims herein under the provisions of 28 U.S.C. § 1338(b) in that said claims are joined with a substantial and related claim under the Trademark Laws of the United States, 15 U.S.C. §§ 1051 et seq.

7. Venue is proper under 28 U.S.C. § 1391.

III. Count One: Infringement of Federally Registered Trademark

8. Defendants have actively advertised, marketed, distributed, and sold in New York State and elsewhere picture frames under the trademark "TIMELESS ELEGANCE".

9. Plaintiff, and its predecessors-in-interest, since long prior to Defendants' activities, made, advertised, marketed, distributed, and sold picture frames under the trademark "TIMELESS" and the trademark, trade name, and domain name "TIMELESS FRAMES", and since then has been continuously making, advertising, marketing, distributing, and selling such picture frames under such trademarks, trade name, and domain name in New York State, the United States, and elsewhere. Plaintiff has used the federal trademark registration symbol ® in connection with its "TIMELESS FRAMES" products.

10. The trademark "TIMELESS" and the trademark, trade name, and domain name "TIMELESS FRAMES" are symbolic of extensive good will and consumer and trade recognition built up by Plaintiff and its predecessors-in-interest through substantial amounts of time and effort in advertising and promotion. Plaintiff has earned and enjoys protectable trademark rights in the term "TIMELESS" and protectable trademark, trade name, and domain name rights in the term "TIMELESS FRAMES".

11. Plaintiff owns all right, title, and interest in and to U.S. Trademark Registration No. 3,028,273 for the trademark "TIMELESS FRAMES" in connection with "picture frames".

12. In view of the similarity of Plaintiff's trademark "TIMELESS" and Plaintiff's trademark, trade name, and domain name "TIMELESS FRAMES" and Defendants' trademark "TIMELESS ELEGANCE", Plaintiff alleges that Defendants' trademark so resembles Plaintiff's trademarks, trade name, and domain name previously used in the United States, and not abandoned, as to be likely to cause confusion, to cause mistake, or to deceive.

13. Defendants' aforementioned activities have been in interstate commerce, have been conducted without the authority or permission of Plaintiff, are likely to cause confusion, to cause mistake, and to deceive, and infringe Plaintiff's federally registered trademark rights and Plaintiff's other rights in the trademark "TIMELESS FRAMES".

14. By letter dated April 17, 2007, Plaintiff's attorney notified Defendant B P's attorney of Plaintiff's use of, registration of, and rights in the term "TIMELESS FRAMES" and asked for a written explanation of Defendant B P's intentions regarding any continued use of the term "TIMELESS" or any substantially similar term in connection with picture frames and related products and regarding Defendant B P's then pending application to register with the United States Patent and Trademark Office ("USPTO") the trademark "TIMELESS ELEGANCE".

15. By letter dated June 11, 2007, Defendant B P's attorney responded that Defendant B P did not wish to incur the considerable expense to litigate the matter, had decided to withdraw its application to register "TIMELESS ELEGANCE", and had decided to take immediate steps to phase out the use of "TIMELESS ELEGANCE" for its products. Defendant B P's attorney

expressed his presumption that, with such assurances by Defendant B P, the matter would be considered closed.

16. After an investigation and a reminder by Plaintiff's attorney, Defendant B P's attorney filed with the USPTO on August 9, 2007 a formal request for abandonment of Defendant B P's pending application to register "TIMELESS ELEGANCE", and the USPTO issued a formal Notice of Abandonment of the application on August 10, 2007.

17. Plaintiff relied upon the representations, promises, assurances, and agreement of Defendant B P in taking immediate steps to phase out the use of "TIMELESS ELEGANCE" for its products in refraining from immediate enforcement of its rights against Defendant B P.

18. Plaintiff believes, after an inquiry reasonable under the circumstances, and will likely have evidentiary support after a reasonable opportunity for further investigation or discovery, that Defendant B P intended and planned as of the June 11, 2007 letter that it would not take immediate steps to phase out the use of "TIMELESS ELEGANCE" for its products, but rather, knowingly and intentionally made the false representation and promise that it would take such immediate steps.

19. Plaintiff believes, after an inquiry reasonable under the circumstances, and will likely have evidentiary support after a reasonable opportunity for further investigation or discovery, that Defendant B P has continued to market, distribute, and sell picture frames under the trademark "TIMELESS ELEGANCE" to at least Defendant Michaels Stores and to Defendant Michaels Procurement, even through the date of signing the instant Complaint.

20. By letter dated September 13, 2007, Plaintiff's attorney notified an attorney for Defendant Michaels Stores about Plaintiff's registered trademark for "TIMELESS FRAMES", noted that Defendant Michaels Stores had been continuing to offer for sale and to sell picture

frames under the trademark "TIMELESS ELEGANCE", requested a written explanation regarding Defendant Michaels Stores' intentions regarding any continued use of the term "TIMELESS" or any substantially similar term in connection with picture frames and related products, and requested contact information for the supplier of such picture frames.

21. An attorney for Defendant Michaels Procurement responded to Plaintiff's attorney's September 13, 2007 letter by letter dated October 10, 2007 and refused to provide any explanation regarding plans for any continued use of the offensive trademark and refused to provide the contact information.

22. Plaintiff confirmed with Defendant B P on October 17, 2007 that Defendant B P was continuing to "sell an exclusive line of frames under the TIMELESS ELEGANCE name to Michaels."

23. Defendants' actions complained by herein have been committed willfully and intentionally, knowing of Plaintiff's rights in and registration of the trademark "TIMELESS FRAMES".

IV. Count Two: Violation of 15 U.S.C. § 1125(a)

24. Plaintiff realleges, as if fully set forth, the averments in paragraphs 1-23 of the Complaint.

25. Defendants' acts are in violation of 15 U.S.C. § 1125(a) in that Defendants have used in connection with goods or services a false designation of origin and a false or misleading description and representation which is likely to cause confusion, and to cause mistake, and to deceive as to the affiliation, connection, or association of Defendants with Plaintiff and as to the origin, sponsorship, and approval of Defendants' goods, services, and commercial activities with Plaintiff.

V. Count Three: Violation of N.Y. Gen. Bus. L. § 349

26. Plaintiff realleges, as if fully set forth, the averments in paragraphs 1-23 of this Complaint.

27. Defendants' actions constitute a deceptive act in violation of N.Y.G. Bus. L. § 349.

VI. Count Four: Violation of N.Y. Gen. Bus. L. § 350

28. Plaintiff realleges, as if fully set forth, the averments in paragraphs 1-23 of this Complaint.

29. Defendants' actions constitute false advertising in violation of N.Y. Gen. Bus. L. § 350.

VII. Count Five: Unfair Competition

30. Plaintiff realleges, as if fully set forth, the averments in paragraphs 1-23 of this Complaint.

31. Defendants' actions constitute unfair competition.

VIII. Count Six: Breach of Contract

32. Plaintiff realleges, as if fully set forth, the averments in paragraphs 1-23 of this Complaint.

33. Defendant B P has breached its agreement with Plaintiff to take immediate steps to phase out the use of "TIMELESS ELEGANCE" for its products, which has allowed Defendant B P to gain illegitimate benefits and caused Plaintiff damages.

IX. Count Seven: Fraudulent Misrepresentation and Inducement

34. Plaintiff realleges, as if fully set forth, the averments in paragraphs 1-23 of this Complaint.

35. Defendant B P fraudulently misrepresented to Plaintiff its decision and intent to take immediate steps to phase out the use of "TIMELESS ELEGANCE" for its products and fraudulently induced Plaintiff to forego further enforcement of its rights against Defendant B P.

36. Defendant B P has illegitimately benefited from, and Plaintiff has been damaged by, Defendant B P's fraudulent misrepresentation and inducement.

X: Allegations of Inadequacy of Damages

37. By reason of Defendants' acts alleged herein, Plaintiff has and will suffer damage to its business, reputation, and good will.

38. Defendants threaten to continue to do the acts alleged herein, and unless restrained and enjoined, will continue to do so, all to Plaintiff's irreparable damage. It would be difficult to ascertain the amount of compensation which could afford Plaintiff adequate relief for such continuing acts. Plaintiff's remedy at law is not adequate to compensate it for injuries threatened.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands the following relief against each Defendant:

A. That this Court grant an injunction pursuant to the powers granted it under 15 U.S.C. § 1116, enjoining and restraining each Defendant and its directors, officers, agents, servants and employees from directly or indirectly using the trademark "TIMELESS ELEGANCE" or the term "timeless" or any term colorably similar to the term "timeless" as part of any trademark or in any manner which is likely to cause confusion, mistake or to deceive.

B. That this Court, pursuant to the power granted it under 15 U.S.C. § 1118, order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of each Defendant bearing the term "TIMELESS ELEGANCE", and all plates,

molds, matrices and other means of making the same, shall be delivered up to Plaintiff for destruction.

C. That this Court grant an injunction enjoining and restraining each Defendant and its directors, officers, agents, servants and employees from directly or indirectly using the trademark "TIMELESS ELEGANCE" or the term "timeless" or any term colorably similar to the term "timeless" as part of any trademark or in any manner which is likely to cause deception.

D. That this Court grant an injunction enjoining and restraining each Defendant and its directors, officers, agents, servants and employees from directly or indirectly using the trademark "TIMELESS ELEGANCE" or the term "timeless" as part of any trademark or in any manner which constitutes false advertising.

E. That this Court grant an injunction enjoining and restraining each Defendant and its directors, officers, agents, servants and employees from directly or indirectly using the trademark "TIMELESS ELEGANCE" or the term "timeless" or any term colorably similar to the term "timeless" as part of any trademark or in any manner which constitutes unfair competition.

F. That the Court grant a mandatory injunction compelling Defendant B P and its directors, officers, agents, servants and employees to refrain from directly or indirectly using the trademark "TIMELESS ELEGANCE" or from otherwise breaching or dishonoring Defendant B P's agreement with Plaintiff.

G. That this Court grant a mandatory injunction compelling Defendant B P and its directors, officers, agents, servants and employees to refrain from directly or indirectly using the trademark "TIMELESS ELEGANCE" and to otherwise comply with and honor its representations to Plaintiff.

H. That each Defendant be required to account to Plaintiff for any and all profits derived by Defendant from the sale of its picture frames in connection with which the trademark "TIMELESS ELEGANCE" has been used and for all damages sustained by Plaintiff by reason of said acts complained of herein.

I. That this Court award Plaintiff treble the amount of actual damages suffered by Plaintiff.

J. That punitive and exemplary damages be awarded against each Defendant and in favor of Plaintiff by reason of said acts complained of herein.

K. That costs of this action be awarded Plaintiff.

L. That this is an exceptional case and that Plaintiff be awarded its reasonable attorney fees.

M. That this Court grant such other and further relief as it shall deem fit.


DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury for all of the issues so triable.

Respectfully submitted,

HISCOCK & BARCLAY, LLP

Dated: 10/26/07
Syracuse, New York

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