


United States District Court
Western District Of Texas
Austin Division

FILED
2008 JUL -1 AM 11:07
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY

TRUESCENTS, LLC,
a Washington Limited Liability Company,

Plaintiff,

v.

BIG LOTS STORES, INC.,
a foreign corporation,

and

99¢ ONLY STORES, INC.,
a foreign corporation

Defendants.

Civil Action No.

A08CA 508LY

Jury Demanded

Plaintiff's Complaint

Nature Of Action

1. This is an action for injunctive relief, damages and other relief based on defendants Big Lots, Inc.'s and 99¢ Only Stores, Inc.'s infringement of Plaintiff Truescents LLC's trademarks, unfair competition, and injury to business reputation in connection with Defendant's sale of goods in violation of federal law and the law of the State of Texas.

Parties

2. Plaintiff Truescents, LLC ("Truescents") is a Washington limited liability company whose principal office is located in King County, Washington.

3. Defendant Big Lots Stores, Inc. ("Big Lots") is a foreign corporation headquartered in Columbus, Ohio. Big Lots is engaged in the business of retail sales,

including sale of personal care products. Big Lots maintains a retail outlet in Austin, Texas.

4. Defendant 99¢ Only Stores, Inc. ("99¢ Only") is a foreign corporation headquartered in City of Commerce, CA. 99¢ Only Stores is engaged in the business of retail sales, including sale of personal care products. 99¢ Only maintains a retail outlet in San Antonio, Texas.

Jurisdiction And Venue

5. This Court has subject matter jurisdiction because it is an action for federal trademark infringement, and unfair competition under 15 U.S.C. §§1114, 1115 and 1125(a), and injury to a business reputation. The Court's jurisdiction over this matter is further proper pursuant to 28 U.S.C. §§1331, and 1338 and 15 U.S.C. §1121. This Court has supplemental jurisdiction over the state law claims herein pursuant to 28 U.S.C. §1367(a) because they involve use of the same marks and are so related to the federal claims that they form part of the same case or controversy and are derived from a common nucleus of operative facts.

6. Venue is proper as Big Lots and 99¢ Only have sufficient, ongoing and systematic contacts with the State of Texas and in the Western District of Texas.

Factual Background

7. Truescents is a marketer, developer and seller of high-end personal care products: specifically, lotions, body washes, soaps and other luxury bath products. Over the past several years, Truescents invested time, money, and work in an effort to attach goodwill to its many trademarks. To accomplish this, Truescents spent substantial sums

developing, promoting, and advertising the trademarks found on the packaging and products it distributes to enable consumers to recognize and acquire Truescents' products.

8. Truescents sold its products directly to retail customers through its own website and on a wholesale basis to retailers such as Costco, Target, and others.

9. In 2007, Truescents was the sole owner of trademarks attached hereto as Exhibit A. These trademarks were registered by Truescents on the principal register of the United States Patent & Trademark Office. Truescents' registered marks are entitled to treatment under 15 U.S.C. § 1115.

10. Later in 2007, Truescents transferred some of the trademarks listed in Exhibit A to Drugstore.com. However, Truescents retained all claims, causes of action and rights of recovery related to any infringement of those trademarks including but not limited to the claims set forth in this complaint.

11. Truescents continuously used these marks in various forms and advertised and sold the products bearing these marks throughout the United States in interstate commerce and in the State of Texas.

12. Prior to 2007, Truescents contracted with a contract manufacturer, Bocchi Laboratories, Inc. ("Bocchi") to produce various personal care products for its many trademarked product lines. Truescents ended its relationship with Bocchi over issues of Bocchi's quality control and ability to timely deliver products.

13. Throughout the relationship between Truescents and Bocchi, Bocchi (a) overproduced Truescents' trademarked goods ("Inventory") without authorization from or notice to Truescents and stockpiled such goods and (b) stockpiled goods properly

rejected for failure to meet Truescents' quality specifications. After Truescents terminated the parties' relationship, Bocchi retained Truescents' Inventory without authorization from Truescents.

14. In approximately January 2007, Big Lots, and in approximately April 2007, 99¢ Only, purchased a portion of the Inventory directly from Bocchi for a fraction of its value. Although each unit purchased by Big Lots and 99¢ Only from Bocchi contained the various Truescents' trademarks and Truescents/brand contact information directly on the products which included telephone contacts for Truescents, Big Lots and 99¢ Only did not contact Truescents to determine whether Bocchi was authorized to sell Truescents' trademarked goods. Further, Big Lots and 99¢ Only knew or should have known that Bocchi was not the owner of the Truescents' trademarks when it purchased the Inventory from Bocchi.

15. Upon information and belief, Big Lots and 99¢ Only sold Truescents' product to consumers. The Inventory was purchased and sold by Big Lots and 99¢ Only without Truescents' knowledge or authorization. Truescents had no ability to inspect any of the product before Big Lots and 99¢ Only purchased and sold the goods.

16. Big Lots and 99¢ Only did not have Truescents' permission to use Truescents' trademarks or sell any products which bore Truescents' trademarks. Truescents was unaware of Big Lots' and 99¢ Only's acts until some time after the sales.

**First Claim For Relief
Federal Trademark Infringement**

17. Truescents incorporates by reference the statements and allegations in paragraphs 1 through 16.

18. Big Lots' and 99¢ Only's acts constitute multiple infringements of Truescents' trademarks in violation of 15 U.S.C. §§1114 and §1115. Big Lots' and 99¢ Only's sale of products bearing Truescents' various trademark marks have caused, and will continue to cause Truescents to suffer substantial injuries, loss of profits, and damage to its proprietary and exclusive rights to use and market products under the trademarks set forth in Exhibit A.

19. Big Lots' and 99¢ Only's acts of infringement with respect to these marks appear willful and reasonably calculated to constitute a pattern of infringement. Big Lots and 99¢ Only made profits by using these various trademarks.

20. By reason of Big Lots' and 99¢ Only's conduct, Big Lots and 99¢ Only have caused, and unless enjoined by the Court, will continue to cause immediate and irreparable harm to Truescents to which there is no adequate remedy at law, and for which Truescents is entitled to injunctive relief.

**Second Claim For Relief
Federal Unfair Competition – False Designation Of Origin**

21. Truescents incorporates by reference the statements and allegations in paragraphs 1 through 20.

22. Big Lots' and 99¢ Only's wrongful conduct constitutes unfair competition in violation of 15 U.S.C. 1125(a).

23. Big Lots and 99¢ Only used marks owned by Truescents to create a false designation of origin.

24. Truescents had no control over the nature and quality of the products distributed by Big Lots and 99¢ Only. Moreover, Truescents had no control over the type of retailer who purchased the products bearing its trademarks. Any product failures or quality issues would reflect adversely on Truescents as consumers would believe Truescents is the source of the origin of the goods. As a result of its own actions, Big Lots and 99¢ Only has hampered Truescents' continued efforts to protect Truescents' outstanding reputation for high quality.

25. Upon information and belief, Big Lots' and 99¢ Only's intention was to profit from Truescents' product and brand reputation.

26. Big Lots' and 99¢ Only's acts appear willful and reasonably calculated and constitute a pattern of infringement as Big Lots and 99¢ Only have infringed on a number of distinct trademarks owned by Truescents and sold the products bearing Truescents' trademarks.

27. By reason of Big Lots' and 99¢ Only's conduct, Big Lots and 99¢ Only have caused, and unless enjoined by the Court, will continue to cause immediate and irreparable harm to Truescents to which there is no adequate remedy at law, and for which Truescents is entitled to injunctive relief.

Third Claim For Relief
Unfair Competition Under Texas State Law

28. Truescents incorporates by reference the statements and allegations in paragraphs 1 through 27.

29. Big Lots' and 99¢ Only's wrongful conduct constitutes unfair competition in violation of Texas Common Law.

30. Big Lots and 99¢ Only used marks owned by Truescents to create a false designation of origin. Big Lots' and 99¢ Only's acts have caused injury to Truescents' business reputation and diluted the distinctive quality of the trademarks Truescents registered and owned at the time of sale and which are protected under Texas Common Law.

31. Truescents has no control over the nature and quality of the products distributed by Big Lots and 99¢ Only. Any product failures or quality issues would reflect adversely on Truescents as consumers would believe Truescents is the source of the origin of the goods. As a result of its own actions, Big Lots and 99¢ Only has hampered Truescents' continued efforts to protect its outstanding reputation for high quality.

32. Big Lots and 99¢ Only used Truescents' trademarks and sold Truescents' products with the intent to reap a benefit from the goodwill Truescents has obtained through its own work, time, and investments.

33. Big Lots' and 99¢ Only's acts appear willful and reasonably calculated and constitute a pattern of infringement as Big Lots and 99¢ Only sold Truescents' products on several different occasions.

34. By reason of Big Lots' and 99¢ Only's conduct, Big Lots and 99¢ Only has caused, and unless enjoined by the Court, will continue to cause immediate and irreparable harm to Truescents to which there is no adequate remedy at law, and for which Truescents is entitled to injunctive relief.

Fourth Claim For Relief
Injury To Business Reputation – Texas Business and Commerce Code § 16.29

35. Truescents re-alleges the allegations set forth in paragraphs 1 through 34 as if fully set forth herein.

36. The acts complained of above are likely to injure Plaintiffs' business reputation in violation of Texas Business and Commerce Code § 16.29.

37. By reason of Big Lots' and 99¢ Only's conduct, Big Lots and 99¢ Only have caused, and unless enjoined by the Court, will continue to cause immediate and irreparable harm to Truescents to which there is no adequate remedy at law, and for which Truescents is entitled to injunctive relief.

Prayer For Relief

WHEREFORE, Truescents prays for the following relief:

38. For a permanent injunction enjoining and restraining Big Lots and 99¢ Only and their respective agents, parent companies or entities, servants, employees, successors, and assigns, and all other persons acting in concert or conspiracy with Big Lots and 99¢ Only or which are affiliated with Big Lots, and 99¢ Only from engaging in the infringing, unfair and/or damaging acts complained of above.
39. For an Order requiring Big Lots and 99¢ Only to deliver for destruction all offending materials under its possession, custody or control and to file with the Court and serve on Truescents within thirty (30) days after entry of the injunction a report, in writing, under oath, setting forth in detail the manner and form in which Big Lots and 99¢ Only have complied with the injunction.
40. For an accounting of all sales of goods and services and the corresponding profits originating from use of infringing marks and unfair methods used by Defendants.
41. For judgment against Big Lots and 99¢ Only in an amount to be proven at trial;
42. For an award of reasonable attorney fees and costs pursuant to 15, U.S.C. 1117;
43. For treble damages pursuant to 15 U.S.C. 1117; and
44. For such additional and further relief as the Court deems just and equitable.

Demand For Trial By Jury

45. Plaintiff Truescents hereby demands a trial by jury in the above-captioned cause on all triable issues.

Respectfully submitted,



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Attorneys For Plaintiff
Truescents, LLC

Exhibit A

Truescents Inventory sold by Bocchi

Trademark	Registration Number
de~luxé and design	3015721
de~luxé and design	3015720
DE~LUXE	2933419
de~luxé and design	2988101
de~luxé and design	2988100
de~luxé and design	3009407
de~luxé and design	2895366
de~luxé and design	2895365
DE~LUXE	2906264
Authentic Salon Quality Hair Care	2888048
AUTHENTIC SPA QUALITY PERSONAL CARE	2888021
CRÈME DE~LUXE LUXURY BODY CRÈME	2906267
BAIN DE~LUXE LUXURY BODY WASH	2881513
CRÈME DE~LUXE	2906263
BAIN DE~LUXE	2881511
BAIN DE~LUXE FOAMING BODY SCRUB and design	2830105
BAIN DE~LUXE FOAMING BODY SCRUB	2830104
CRÈME de~luxé luxury body crème and design	2769178
GENUINE BODY	2809406
155 SOUTH	2751302

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Truescents, LLC

DEFENDANTS

BIG LOTS STORES, INC., et al

(b) County of Residence of First Listed Plaintiff King County, Washington
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

(see attachment)

Attorneys (If Known)

A08CA 508LY

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity

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WESTERN DISTRICT OF TEXAS
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III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify) _____
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 15 U.S.C. §§1114, 1115 and 1125(a)

Brief description of cause:
 Trademark infringement, unfair competition, and injury to business reputation

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

7-1-08

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

A08CA 508LY

Civil Cover Sheet Attachment

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Truescents, LLC

AO82
(Rev. 4/90)

ORIGINAL

RECEIPT FOR PAYMENT
UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF TEXAS
at AUSTIN

427687

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Fund	
6855XX	Deposit Funds
604700	Registry Funds
	General and Special Funds
508800	Immigration Fees
085000	Attorney Admission Fees
086900	Filing Fees
322340	Sale of Publications
322350	Copy Fees
322360	Miscellaneous Fees
143500	Interest
322380	Recoveries of Court Costs
322386	Restitution to U.S. Government
121000	Conscience Fund
129900	Gifts
504100	Crime Victims Fund
613300	Unclaimed Monies
510000	Civil Filing Fee (1/2)
510100	Registry Fee

ACCOUNT	AMOUNT
086900	60 00
510000	190 00
086400	100 00
TOTAL	350.00
Case Number or Other Reference	
1:08 CV 508	

NEW CASE

TRUESSENTS LLC VS

BIG LOTS STORES INC
et al

C

\$ Checks and drafts are accepted subject to collection and full credit will only be given when the check or draft has been accepted by the financial institution on which it was drawn. 8183

DATE	Cash	Check	M.O.	Credit	DEPUTY CLERK:
7-1-2008		X			M. Harrison