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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

MP-OTHA Corporation,

Plaintiff,

vs.

As American as Doughnuts, Inc. and
Douglas E. Bagley, d.b.a. Spudnuts,

Defendants.

COMPLAINT

JURY DEMAND

Civil No. **2:11CV00241 CW**

Judge: **Clark Waddoups**

Plaintiff, MP-OTHA Corporation (hereinafter “Plaintiff”) complains against As American as Doughnuts, Inc. and Douglas E. Bagley, d.b.a. Spudnuts, (hereinafter “Defendants”) and seeks judgment and other relief. Plaintiff alleges the following:

PARTIES

1. Plaintiff is an Illinois corporation, with a principal place of business at 1849 South Lake Storey Road, Galesburg, IL 61401.

2. Plaintiff currently operates a doughnut bakery shop and restaurant in Galesburg, Illinois under the name “Spudos Donuts & More,” and markets and/or sells doughnuts, doughnut mixes, and related products throughout the United States.

3. Upon information and belief, Defendant As American as Doughnuts, Inc. (“As American”) is a Utah corporation with its principal place of business at 2001 Warm Springs Road, Salt Lake City, UT 84116.

4. Upon information and belief, Defendant Douglas E. Bagley (“Mr. Bagley”) resides at 2420 Karren Street, Salt Lake City, Utah 84124.

5. Upon information and belief, Mr. Bagley is the owner of As American and has registered a Utah DBA for “Spudnuts,” entity number 7457742-0151 (“Defendants’ DBA”). Defendants sell potato flour doughnut mixes and related products through in person and online retail channels, and also license associated marks to retail doughnut bakery shops.

JURISDICTION AND VENUE

6. This Court has federal question jurisdiction of the counts alleging infringement of Plaintiff’s registered trademark under 28 U.S.C. §1331 as the counts arise under the trademark laws of the United States at 15 U.S.C. §1114.

7. This Court has supplemental jurisdiction for the state law claims stated herein, each of which arise out of a common nucleus of operative facts with those from which the federal claims arise.

8. This Court has personal jurisdiction over Defendants based upon Defendants' places of residence, contacts, and activities within this judicial district.

9. Venue is proper under 28 U.S.C. § 1391 because (1) Defendants reside in this judicial district; and (2) a substantial part of the events giving rise to the claims occurred here.

GENERAL ALLEGATIONS

10. In the spring of 2009, Mr. Bagley claimed to Michael J. T. Patton ("Mr. Patton"), Plaintiff's owner and president, that Defendants owned trademarks for SPUDNUT DONUTS and SPUDNUT DONUTS THE GREAT TASTE IS BACK, and used this claim to induce Mr. Patton to sign a Supplier Agreement with Defendants.

11. In order to use the marks which Mr. Bagley allegedly owned, Mr. Patton signed the Supplier Agreement with Defendants on or about March 1, 2009. The agreement allegedly granted Mr. Patton a license to use Defendants' alleged trademarks in connection with Plaintiff's operation of Spudos Donuts & More, a doughnut bakery shop and restaurant, for which Plaintiff paid Defendants \$6,000. Plaintiff also paid Defendants \$8,000, separately, for an initial purchase of Defendants' doughnut mix.

12. Soon thereafter, Plaintiff was notified that Defendants had no rights in the trademarks for SPUDNUT DONUTS and SPUDNUT DONUTS THE GREAT TASTE IS BACK, which Defendants had licensed to Mr. Patton for \$6,000.

13. At about this time, Mr. Patton was also contacted and informed that Roger Grear Sr. (“Mr. Grear”) was the actual owner of United States Registered Trademark Number 2,862,270 for SPUDNUTS, and that if Plaintiff did not cease and desist use of the SPUDNUTS mark, Plaintiff would be sued for trademark infringement. Because Mr. Grear owned the SPUDNUTS mark and Defendants had no rights in any related marks, Plaintiff was forced to replace signs, menus, and other materials, the use of which Mr. Patton had ostensibly licensed from Defendants.

14. Subsequently, on December 31, 2010, Plaintiff purchased the SPUDNUTS mark and all associated good will from Mr. Grear for a sum of \$20,000. Plaintiff is the assignee of United States Registered Trademark Number 2,862,270 for SPUDNUTS and has used the SPUDNUTS mark in commerce continuously since purchasing the SPUDNUTS mark.

15. Plaintiff notified Mr. Bagley of the cease-and-desist communication regarding Mr. Grear and the SPUDNUTS mark and requested that Defendants refund Plaintiff the \$6,000 that Plaintiff had paid Defendants for use of the alleged SPUDNUT DONUTS and SPUDNUT DONUTS THE GREAT TASTE IS BACK marks under the Supplier Agreement because Defendants had no rights in the marks. Mr. Bagley refused to return the \$6,000 that Plaintiff had paid Defendants to license the SPUDNUT DONUTS and SPUDNUT DONUTS THE GREAT TASTE IS BACK marks.

16. Ernest Markisich (“Mr. Markisich”), a former customer of Defendants, informed Plaintiff that Mr. Bagley knew that Defendants had no rights in the SPUDNUTS mark even prior to signing the Supplier Agreement with Mr. Patton and also knew that a third party had ownership of the SPUDNUTS mark; in the fall of 2008, Mr. Bagley told Mr. Markisich that

Defendants had no rights in the SPUDNUTS mark. Because of his belief that the SPUDNUTS mark was owned by a third party, Mr. Bagley told Mr. Markisich that Mr. Markisich could not use SPUDNUTS or any related term in selling potato flour doughnuts.

17. Mr. Markisich further informed Plaintiff that at some point, Mr. Bagley also had direct communications with Mr. Gear regarding the SPUDNUTS mark and had direct knowledge of the SPUDNUTS mark.

18. Notwithstanding Defendants' representation to Mr. Markisich and direct knowledge of the federally registered SPUDNUTS mark, Defendants continue to deliberately and willfully infringe Plaintiff's trademark by using Plaintiff's SPUDNUTS mark and variations on it.

19. Defendants use the terms "Spudnut," "Spudnut Donuts," "Original Spudnut" and "Spudnut Donuts the Great Taste is Back" in connection with the retail sale of potato flour doughnut mixes and related products and services, on retail packaging, through in person sales, through online sales at www.spudnut.com, www.spudnutdonuts.com, www.sbuddies.com, www.spudnutdonuts.blogspot.com, and in other commercial enterprises.

20. Defendants have also licensed and attempted to license these and related terms to retail doughnut shops at least in the Supplier Agreement with Mr. Patton and, upon information and belief, to other retail doughnut bakery shops. Defendants' DBA for "Spudnuts" is also identical to the SPUDNUTS mark.

21. Defendants' extensive use of Plaintiff's SPUDNUTS mark and similar marks for doughnut mixes and retail doughnut shop services is likely to cause confusion in the market,

leading potential customers of Plaintiff to believe that Plaintiff is associated with, sponsors, or endorses Defendants' products and services.

22. The foregoing conduct of the Defendants has caused and will continue to cause damage, including irreparable harm, to Plaintiff.

FIRST CLAIM FOR RELIEF
Federal Trademark Infringement
15 U.S.C. §1114

23. All prior paragraphs of the Complaint are realleged and incorporated by reference as if fully set forth herein.

24. In violation of 15 U.S.C. 1114, Defendants have violated the exclusive rights of Plaintiff as the trademark owner of the SPUDNUTS mark.

25. Defendants' commercial use of Plaintiff's SPUDNUTS mark and other similar marks is likely to confuse the relevant public.

26. Defendants' use of the SPUDNUTS mark and other similar marks is intended to cause confusion, or to cause mistake, or to deceive the public.

27. Plaintiff has been damaged by Defendants' infringement.

28. Plaintiff is entitled to recover, under 15 U.S.C. §1117, from Defendants, the gains, profits, and advantages Defendants obtained as a result of its acts.

29. Defendants' actions are causing irreparable harm to Plaintiff for which there is no adequate remedy at law, and for which Plaintiff is entitled to injunctive relief under 15 U.S.C. §1116.

SECOND CLAIM FOR RELIEF

Federal Unfair Competition and False Designation of Origin
15 U.S.C. §1125

30. All prior paragraphs of the Complaint are realleged and incorporated by reference as if fully set forth herein.

31. Defendants have used in commerce words, terms, names, and symbols likely to cause confusion, mistake, or to deceive as to the affiliation, connection, or association of Defendants with Plaintiff.

32. Defendants' use of the SPUDNUTS mark and other similar marks is likely to cause confusion, mistake, and deceive as to the association of Plaintiff with the products and services offered by Defendants.

33. Defendants' use of the SPUDNUTS mark and other similar marks misappropriates the goodwill built up by the Plaintiff and Plaintiff's predecessors in interest.

34. Unless Defendants are restrained by this court from continuing its use of the SPUDNUTS mark and other similar marks, these injuries will continue to occur.

35. Plaintiff is entitled to recover damages under 15 U.S.C. §1117 from Defendants and is entitled to injunctive relief to prevent further harm.

THIRD CLAIM FOR RELIEF

Utah Unfair Competition Law,
Utah Code Ann. §§ 13-5a-101 et seq.

36. All prior paragraphs of the Complaint are realleged and incorporated by reference as if fully set forth herein.

37. Defendants' unauthorized use of Plaintiff's SPUDNUTS mark and other similar marks to gain business is an unfair business acts in violation of Utah Code Annotated §§13-5a-101 et seq.

38. Unless Defendants are restrained from continuing these unlawful, unfair, and fraudulent business acts or practices, Plaintiff will suffer irreparable injury.

39. As a direct and proximate consequence of the acts and practices of Defendants, Plaintiff has been injured in its business and property rights, and has suffered injury and damages for which it is entitled to relief under Utah Code Annotated §13-5a-103. Plaintiff will continue to be damaged unless Defendants' activities are enjoined by this Court.

40. Plaintiff is also entitled to recover costs and attorney fees associated with this action under Utah Code Annotated §13-5a-103.

41. Because Defendants' acts are willful and malicious, Plaintiff is entitled to punitive damages under Utah Code Annotated §13-5a-103.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

42. Judgment in favor of Plaintiff finding that Defendants are liable for trademark infringement and federal and state unfair competition.

43. Judgment in favor of Plaintiff finding that Defendants must pay Plaintiff money damages in an amount to be determined at trial, enhanced damages, punitive damages, attorneys fees, and costs.

44. Judgment awarding Plaintiff the infringing domain names www.spudnut.com, www.spudnutdonuts.com, and www.spudnutdonuts.blogspot.com.

45. Injunctive relief ordering Defendants to refrain from further infringing Plaintiff's trademark.

46. An accounting for an award of any and all ascertainable damages, to be determined at trial, related to the unlawful acts of the Defendants.

47. For such further relief as the Court may deem proper.

JURY DEMAND

Plaintiff demands a trial by jury as to all issues triable by a jury in this action.

Respectfully submitted,

Date: March 11, 2011

/s/ Alan L. Edwards

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