

THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

CLAUDIA CROFT,  
(an individual)

and

SHEER DELIGHT, INC.  
(a Florida Corporation)  
Plaintiffs,

v.

CASE NO. 8:09cv 863-126  
MAP

BE WILD, INC.,  
(a New York Corporation)

and

BRIAN COHEN,  
(an individual)  
Defendants.

JURY TRIAL REQUESTED

**COMPLAINT**

Plaintiffs, Claudia Croft, (hereinafter "Croft") and Sheer Delight, Inc., (hereinafter "Sheer Delight"), hereby bring this complaint against the Defendants Be Wild, Inc., (hereinafter "Be Wild") and Brian Cohen (hereinafter "Cohen"), and allege as follows:

**THE PARTIES**

(1) Plaintiff Claudia Croft is an individual residing in the County of Hillsborough, State of Florida.

(2) Plaintiff Sheer Delight, Inc. is a Florida corporation, organized under the laws of the State of Florida, having its

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TAMPA, FLORIDA

principle place of business at 7433 Pelican Drive, Tampa, Florida, 33635, and its agent for service being Claudia Croft, located at 7433 Pelican Drive, Tampa, Florida, 33635.

(3) Defendant Be Wild, Inc. is a New York Corporation engaged in the advertising and sales of, among other items, adult body jewelry. Be Wild's principle Office is located at 3205 Denton Drive, in Merrick, New York, 11566. On information and belief Plaintiffs allege that Be Wild sells and ships its merchandise into the Middle District of Florida. Be Wild operates a web site having the address of Bewild.com which is accessible and available within the Middle District of Florida.

(4) Brian Cohen is an individual residing in the City of Bellmore, New York. On information and belief, Cohen is a principle of Be Wild, Inc., and controls the day to day corporate activities of Be Wild, Inc., as well as the content of bewild.com.

#### **JURISDICTION AND VENUE**

(5) This is a civil action concerning Patent infringement in violation of the United States Patent Act of 1952, as amended, 35 U.S.C. § 271 et seq, Trademark infringement in violation of 15 U.S.C. 1114, et seq., and Copyright infringement, in violation of 17 U.S.C. 101 et seq. Plaintiffs also allege that the Defendants engaged in infringement of trade dress, under 15 U.S.C. 1125. In addition, Plaintiffs allege violation of Florida's Unfair Trade

Practices Act (FUTPA) Florida Statute 501.201 et seq. The Plaintiffs seek pendent jurisdiction so as to include Florida State Courts within this complaint. Plaintiffs allege that the evidence for the state claims is the same as for the federal claims, and issues to be resolved are intertwined so as to make a separate state action duplicative.

(6) The District Court for the Middle District of Florida has jurisdiction over this action pursuant to 15 U.S.C. §1121, 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a)-(b), as it involves substantial claims arising under the United States Patent Act of 1952, as amended, and 35 U.S.C. § 271 et seq.

(7) Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 (a), (b), and (c) and 1400, since Defendants either reside and do business in the Middle District of Florida, or they are foreign corporations doing business in this judicial district. The Defendants' web site, bewild.com is available and accessible within the Middle District of Florida.

(8) Venue is proper as to Brian Cohen in that, on information and belief, Brian Cohen is a principle of Be Wild, Inc., and controls the day to day operation of Be Wild, Inc., as well as the content of the web site bewild.com. The courts have found that "corporate officers who actively aid and abet their corporation's infringement may be personally liable for inducing infringement under § 271(b) regardless of whether the corporation is the alter

ego of the corporate officer" Insituform Technologies, Inc. v. CAT Contracting, Inc., 385 F.3d 1360, 1375, C.A.Fed.,2004.

**THE PATENT-IN-SUIT**

(9) The Plaintiff Croft owns all right, title and interest in and to United States Patent No. 6,758,061, (the "'061" patent") entitled "Nipple Hugger Jewelry System", which was duly issued by the United States Patent and Trademark Office ("PTO") on July 6, 2004, and presumed valid under 35 U.S.C. § 282. The '061 patent, at all times pertinent, was, and is, enforceable. A copy of the '061 patent is attached hereto as Exhibit A. Croft manufactures her Nipple Hugger jewelry and provides Nipple Hugger jewelry to Sheer Delight for sale. Sheer Delight is owned by Croft, and is a subchapter S corporation. Sheer Delight markets and sells Croft's Nipple Hugger products. The profits of Sheer Delight pass through the subchapter S corporation, and are considered to be income of Croft.

**COUNT ONE; PATENT INFRINGEMENT**

(10) The Defendants have infringed at least one of the claims of the '061 patent either directly or under the doctrine of equivalents. The Defendants have induced and/or contributed to the infringement of, at least one of the claims of the '061 patent in this judicial district by making, using or offering for sale an

item, or items, that are covered by the property interest described by at least one the claims of the '061 patent. The Defendants' providing the items by sale to the general public either induces the public to use and infringe the '061 patent, or contributes to the public infringing at least one of the claims of the '061 patent by the public using the patent protected device.

(11) The Defendant's infringement of the '061 patent has been deliberate, willful, wanton, and with full knowledge and awareness of the '061 patent as evidenced by the printing of the patent number on the Defendants' product insert, which accompanies the product for sale. Such willfulness makes this a special case as to damages, allowing triple damages in addition to attorney's fees and costs.

(12) The Defendants' acts have caused irreparable injury and damage to the Plaintiffs, for which the Plaintiffs have no adequate remedy at law.

(13) Some of the items that are distributed by the Defendant which are alleged to infringe at least one of the claims of the '061 patent are items described as follows:

Nipple Huggers Daisy

Nipple Huggers Starburst

a copy of the Defendants' web page is hereto attached as Exhibit B.

**COUNT TWO: COPYRIGHT INFRINGEMENT**

(14) Allegations 1 through 8 are hereby incorporated by reference as if fully set herein.

(15) Plaintiff had designed and printed a package insert which was supplied with each of her nipple huggers product, a copy of Plaintiffs' package insert is herein provided, as Exhibit C. The design and insert are original to the Plaintiff.

(16) Defendants provide a package insert with their product. The package insert is substantially identical to the Plaintiffs package insert in all language, except that the Defendant removed the Plaintiffs' website address from the label and have inserted the Plaintiffs' phone number, thereby directing any and all complaints for Defendants' product, to the Plaintiffs' telephone number. The Plaintiffs include a copy of the Defendants' package insert herein as Exhibit D.

(17) The Plaintiffs have submitted a copy of the package insert to the Copyright office, and in doing so have sought copyright registration with the Copyright Office. A copy of the application for copyright registration is hereto attached as Exhibit E. Plaintiff's claim to copyright is valid, in that the work sought to be copyrighted is original, and a product of the Plaintiff's creativity and design.

(18) The Defendants' copying of the Plaintiffs text and product presentation constitutes copyright infringement under 15

U.S.C. 101 et seq.

(19) The Defendants' infringement of the Plaintiff's copyright has caused damage to the Plaintiff.

**COUNT THREE: TRADE DRESS INFRINGEMENT**

(20) Allegations 1 through 8 are hereby incorporated by reference as if fully set herein.

(21) The package and package insert used by the Defendant is non functional.

(22) The package and package insert used by the Plaintiffs is inherently distinctive. Defendants' package and insert are similar in size, shape, and content.

(23) The Defendants' package and insert is so similar to that of the Plaintiffs that it is likely to confuse the source of the Plaintiffs' product with that of the Defendants' product. This aspect is evident in the demonstrated fact that the Defendants place the Plaintiffs' phone number for purchasers who have complaints about the Defendants' products.

(24) Defendants' copying of the Plaintiffs product, package, and package insert constitutes trade dress infringement under the Lanham Act 15 U.S.C. 1125, thereby damaging the Plaintiffs.

**COUNT FOUR: UNFAIR TRADE PRACTICES**

(25) Allegations 1 through 8 are hereby incorporated by

reference as if fully set herein.

(26) Defendants' copying of the Plaintiffs product, product package and insert, along with the illegal use of the Plaintiffs' trademark.

(27) In addition, the Defendants have placed the Plaintiffs' telephone number on the Defendants' package to direct complaint calls from purchasers of the Defendants' product, to the Plaintiffs' telephone number.

(28) Defendants' actions constitute unfair trade practices under Florida Statute 501.204. Defendants' business practices evince an unfair method of competition, and unconscionable acts or practices. Defendants' business practices are unfair or deceptive, and have been declared unlawful.

(29) The Plaintiffs seek attorney's fees and costs under Fla. Stat. 501.2105, as well as damages.

**COUNT FIVE: TRADEMARK INFRINGEMENT**

(30) Allegations 1 through 8 are hereby incorporated by reference as if fully set herein.

(31) Plaintiff Croft has registered the mark "Nipple Hugger" for "wire jewelry for adorning the breast nipples of a wearer". The mark was registered on September 14, 2004, a copy of the trademark office website demonstrating registration of the mark "Nipple Huggers" is hereto attached, as Exhibit F.



(32) Plaintiff Croft manufactures nipple huggers for sale by Sheer Delight. Croft, as sole owner of Sheer Delight can and does exercise control over the items sold by Sheer Delight which bear the mark "Nipple Hugger", as well as the quality of each of the products.

(33) Plaintiffs use the designation, or registered mark, in interstate commerce, and in connection with the goods described in the trademark registration.

(34) Defendant also uses the Plaintiff's mark in interstate commerce, as shown in Exhibit B, copy of Defendant's web page. The Defendants' use of the Plaintiff's trademark is done in connection with the same types of goods sold by the Plaintiff, as described in the trademark application, and registration.

(35) The Defendants use of the Plaintiffs mark is likely to cause confusion, mistake or deception as to the affiliation, connection, or association of the Defendants' products with the Plaintiffs.

(36) The Defendants' mark is confusingly similar to the Plaintiff's mark, and is used in the identical field of commerce, without license or permission from the Plaintiff allowing the Defendant to use the mark in any manner. Defendants use of Plaintiff's mark is likely to continue to cause members of the public to believe that the Defendant's product are offered by way of license or other agreement with Plaintiff, when, in fact, they

are not.

(37) The Defendants' use of the trademark on the bewild.com website is likely to cause consumers who are using the words "nipple huggers" to be directed to the Defendants' web site. In so attracting consumers with the use of the Plaintiff's trademark, it is likely that consumers purchase products from the Defendant, without finding the Plaintiffs' web site using the Plaintiff's trademark.

(38) The Plaintiff has been damaged, and will likely continue to be damaged, by the Defendants' actions.

(39) Defendants openly advertise their product using the Plaintiff's mark, with the Defendants' copying even including the designation of the mark being registered, being the circled "R", which is visible on the Defendants' product.

(40) Defendants trademark infringement is willful, and has caused damage to the Plaintiffs.

WHEREFORE, PLAINTIFFS CROFT AND SHEER DELIGHT seek judgment, and ask that the Court award the following:

(A) Permanently enjoining Defendant and its principals, shareholders, officers, directors, employees, successors, assigns, suppliers, agents, servants and attorneys, and all those persons in active concert, participation or privity with them, or any of them from making using selling offering for sale, or offering for others to use items that would constitute an infringement of the '061 patent;

(B) Permanently enjoining Defendant and its principals, shareholders, officers, directors, employees, successors, assigns, suppliers, agents, servants and attorneys, and all those persons in active concert, participation or privity with them, or any of them from using the Plaintiff's trademark, unless the products bearing the mark are purchased from the Plaintiffs, or are sold under license from the Plaintiff;

(C) Permanently enjoining Defendant and its principals, shareholders, officers, directors, employees, successors, assigns, suppliers, agents, servants and attorneys, and all those persons in active concert, participation or privity with them, or any of them from using the Plaintiff's copyrighted work, unless the products

bearing the copyrighted material are purchased from the Plaintiffs, or are sold under license from the Plaintiff;

(D) Awarding the Plaintiffs, pursuant to 35 U.S.C. 284, damages adequate to compensate the Plaintiff for the defendants' infringement of the '061 patent, but in no event less than a reasonable royalty, together with pre-judgment interest. The Plaintiff requests that the Court find that the Defendant acted willfully, thereby allowing the Court to award enhanced damages, pursuant to 35 U.S.C. 284;

(E) Awarding the Plaintiffs, pursuant to 17 U.S.C. 504, damages and profits, together with pre-judgment interest, to compensate the Plaintiffs for the Defendants' infringement of the Plaintiffs' copyrighted material. The Plaintiffs request that the Court award damages and profits in the amount which is adequate to compensate the Plaintiff for the defendants' infringement of the Plaintiffs' copyright. The Plaintiff requests that the Court find that the Defendant acted willfully;

(F) Awarding the Plaintiffs, pursuant to 15 U.S.C. 1117, damages and profits, together with pre-judgment interest, to compensate the Plaintiffs for the Defendants' infringement of the Plaintiffs' trademark. The Plaintiffs request that the Court award

damages and profits in the amount which is adequate to compensate the Plaintiff for the defendants' infringement of the Plaintiffs' copyright. The Plaintiff requests that the Court find that the Defendant acted willfully, and that the Court increase damages three fold, and include attorney's fees, as provided under 15 U.S.C. 1117. In addition, the Plaintiffs request that the Court also award damages for sales diverted from the Plaintiffs' web site by the Defendants' use of the Plaintiffs' mark on the Defendants' web page;

(G) Awarding attorney's fees, damages, and costs for violation of Florida's Deceptive and Unfair Trade Practices Act;

(H) Awarding damages for the Defendants' trade dress infringement. The Plaintiff requests that the Court find that the Defendant acted willfully, and that the Court increase damages three fold, and include attorney's fees, as provided under 15 U.S.C. 1117;

(H) Granting such further and other relief as the Court may deem necessary and proper.

Dated: May 6, 2009 2009

Edward P. Dutkiewicz, P.A

A handwritten signature in blue ink, appearing to read "E. P. Dutkiewicz", is written over a horizontal line. The signature is stylized and cursive.

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