

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

AVS FOUNDATION and PITTSBURGH)
STEELERS, LLC)
)
Plaintiffs,)
)
vs.)
)
EUGENE BERRY ENTERPRISE, LLC and)
EUGENE BERRY)
Defendants.)

COMPLAINT IN CIVIL ACTION

AND NOW, come Plaintiffs, AVS Foundation and Pittsburgh Steelers, LLC and make this complaint in civil action, and in support thereof, aver as follows:

Parties

1. Plaintiff, AVS Foundation ("Foundation") is a Pennsylvania nonprofit Corporation with its principal place of business at 1000 Gamma Dr., Suite 106, Pittsburgh, PA 15238.
2. Plaintiff, Pittsburgh Steelers, LLC (Steelers") is a Pennsylvania limited liability company with its principal place of business at 100 Art Rooney Dr., Pittsburgh, PA 15212.
3. Defendant, Eugene Berry Enterprise, LLC (Enterprise") is a Pennsylvania limited liability company with its registered office at 204 Parkford Drive, Apartment 204, South Park, PA 15217 and its principal pace of business at P.O. Box 6251, Pittsburgh, PA 15212.
4. Defendant, Eugene Berry ("Berry") is an adult individual who, upon information and belief, resides at 204 Parkford Drive, Apartment 204, South Park, PA 15217, or,

alternatively, at 1516 Union Avenue, McKeesport, PA15132..

Jurisdiction and Venue

5. This Court has jurisdiction over this civil action for federal statutory claims, trademark infringement, unfair competition and dilution pursuant to at least 28 USC §1331 and §1338, and has supplemental jurisdiction over the Pennsylvania common law unfair competition and fraud claims that are so related to the federal claims as to form part of the same case or controversy under Article III of the United States Constitution pursuant to 28 USC § 1367..

6. Venue lies in this judicial district pursuant to 28 USC §1391 because Enterprises and Berry reside in this district and a substantial part of the events giving rise to the claims occurred in this district.

7. Foundation is a 501 (C) (3) charitable corporation. Among its charitable purposes, the Foundation supports Allegheny Valley School, a Pennsylvania nonprofit, charitable corporation that provides residences, residential care and habilitative services to more than 900 intellectually and developmentally disabled persons throughout the Commonwealth of Pennsylvania. By doing so, AVS Foundation relieves the Commonwealth of Pennsylvania of some of its burden to care for the intellectually and developmentally disabled persons imposed by the Pennsylvania Mental Health and Mental Retardation Act of 1966.

8. The Foundation is the owner of the following federal trademarks:

ITEM	MARK	REGISTRATION NUMBER
Towel	The Terrible Towel	2,128,165
Towel	Myron Cope's Official The Terrible Towel	2,123,428

Towel	Myron Cope's Official The Terrible Toddler Towel	2,386,205
Apron	Myron Cope's Official The Terrible Towel	3,391,362
Bib	Myron Cope's Official The Terrible Toddler Towel	3,267,807
Cloth Vehicle Flags	Myron Cope's Official The Terrible Towel	3,267,122
Floor Mats	Myron Cope's Official The Terrible Towel	3,137,749
Footballs	Myron Cope's Official The Terrible Towel	3,038,942
Non-Textile Wall Hangings	Myron Cope's Official The Terrible Towel	3,275,932
Pillows	Myron Cope's Official The Terrible Towel	3,164,082
Totes	Myron Cope's Official The Terrible Tote	3,828,940

9. The Foundation is the owner of Pennsylvania trademark "The Terrible", registration number 3,387,786

10 Due to more than 35 years of use in connection with the Pittsburgh Steelers football team; their visibility to fans viewing Pittsburgh Steelers football games in person or on television, in Pittsburgh and other cities; media articles about "The Terrible Towel®"; their distribution through numerous channels of commerce, and the stature of Pittsburgh sports writer and Steelers broadcaster, Myron Cope, who had the idea of "The Terrible Towel®", the marks have become widely recognized by the general consuming public of the United States as a designation of source of the goods, thus earning the status of a famous mark as set forth in 15 USC § 1125 (c)(2).

11. In fact, "The Terrible Towel®" has its own entry in Wikipedia.

12 The "Terrible Towel®" marks have acquired distinctiveness in that the general consuming public associates goods manufactured, sold and distributed under The

Terrible Towel marks as originating from a single source, namely the Foundation.

13. The Steelers holds an exclusive license to market items bearing “The Terrible Towel®” marks.

14. Photographs of various items bearing "The Terrible Towel®" marks are attached hereto as exhibits. (“Myron Cope’s Official The Terrible Towel®”, Exhibit 1; Myron Cope’s Official The Terrible Tote®, Exhibit 2; Myron Cope’s Official The Terrible Towel®” Pillow, Exhibit 3; Myron Cope’s Official The Terrible Towel®” Flag, Exhibit 4; Myron Cope’s Official The Terrible Towel®” Floor Mat, Exhibit 5, and Myron Cope’s Official The Terrible Toddler Towel®” Bib, Exhibit 6.)

15. On or about May 13, 2011 Enterprise filed with the United States Patent and Trademark Office an application to register as a trademark “THE TERRIBLE T-SHIRT”.

16. On June 15, 2011 the Foundation’s counsel wrote to Enterprise’s attorney; informed Enterprise’s attorney of the Foundation’s trademarks; stated the Foundation’s intent to oppose the application, and ask Enterprise to withdraw its application. A true and correct copy of the June 15, 2011 letter is attached hereto as Exhibit 10..

17. Sometime during the week of August 15, 2011, Berry asked National Retail Graphics, 1200 Lebanon Road, West Mifflin, PA 15122 to print tee shirts emblazoned with the words:

The
terrible
t-shirt

A PITTSBURGH ORIGINAL

A true and correct picture of the tee shirt is attached hereto as Exhibit 7.

18. The National Retail Graphics’ employee to whom Berry spoke was familiar with

“The Terrible Towel®” trademark and asked Berry if Berry had any relation to Allegheny Valley School.

19. On or about August 18, 2011, Berry brought to National Retail Graphics a false letter of intent, a true and correct copy of which is attached hereto as Exhibit 8 and used the false letter of intent to hold Berry out as having a relationship to AVS.

20. The letter of intent is false; Berry knew that the letter of intent was false, and Berry has no relationship to AVS.

21. Upon information and belief, Enterprises has been selling the tee shirt in interstate commerce since February 2, 2011 (See Exhibit 9) and Berry continues to sell the tee shirts at least through his website at www.stopmtowels.com.

Count I – Trademark Infringement

22. Paragraphs 1 through 21 are incorporated herein.

23 Defendants’ producing and to selling the tee shirts are likely to cause confusion or to cause mistake or to deceive consumers in violation of 15 USC §1114(1) and constitute willful trademark infringement. Trademark infringement is determined by comparing respective marks for similarities in sound, sight, meaning, and commercial impression. Defendants’ use of the words emblazoned on the tee shirts falls within at least the “sight” and “meaning” categories.

24. The Foundation and the Steelers have been damaged by Defendants’ advertising, sale and distribution of the tee shirts.

Count II – Unfair Competition

25. Paragraphs 1 through 24 are incorporated herein.

26. There is a likelihood of confusion between Defendants’ tee shirts and articles

bearing true “The Terrible Towel®” marks.

27. By producing and to selling the terrible tee shirts Defendants are unfairly competing with and damaging the Foundation and the Steelers in violation of 15 USC §1125(a).

Count III – Dilution

28. Paragraphs 1 through 27 are incorporated herein by reference.

29. “The Terrible Towel®” marks have attained the status of famous marks as defined in 15 USC §1125(c)(2)(A).

30. “The Terrible Towel®” marks have acquired distinctiveness in that the general consuming public believes that goods manufactured, sold and distributed under “The Terrible Towel®” marks emanate from a single source, namely, the Foundation.

31. “The Terrible Towel®” marks are being subjected to dilution as defined in 15 USC §1125(c) through the action of the Defendants in producing and to selling the tee shirts.

Count IV – Common Law Unfair Competition

32. Paragraphs 1 through 31 are incorporated herein.

33. By producing and to selling the tee shirts, Defendants are unfairly competing with and damaging the Foundation and the Steelers in violation of Pennsylvania common-law.

Count V – Fraud

34. Paragraphs 1 through 3 are incorporated herein.

35. At all time relevant to this complaint, Berry was acting as agent for Enterprise.

36. Berry’s representing himself as having a relationship to AVS is knowingly false,

and done with the intent to induce tee shirt manufacturers to produce the tee shirts so that Enterprise is able to distribute and to sell the tee shirts in violation of the Foundation and Steelers' rights

Prayer For Relief

Wherefore, plaintiffs, AVS Foundation and Pittsburgh Steelers LLC pray for the following relief:

1. That the Court find that Defendants have created a likelihood of confusion in violation of 15 USC § 1114.
2. That the Court find that Defendants have unfairly competed with Foundation and the Steelers in violation of 15 USC §1125(a).
3. That the Court find that Defendants have caused dilution of Foundation's distinctive and famous marks.
4. That the Court find that Defendants have unfairly competed with Foundation and the Steelers in violation of Pennsylvania common law.
5. That the Court accordingly award the Foundation and the Steelers their damages under 15 USC §1117, and 18 USC § 1964(c) injunctive relief under 15 USC §1116, their attorneys' fees under 15 USC §1117 and 18 USC § 1964(c) and treble damages for willful infringement pursuant to 15 USC §1117.
6. That the Court enjoin Berry from holding himself out as having a relationship to AVS.
7. That the Court order Defendants to account to Foundation and the Steelers for all sales of and profits from the sales of the tee shirts
8. That the Court order Defendants to disgorge to the Foundation and Steelers all

profits from the sale of the knockoffs.

9. That the Court award Foundation and the Steelers expenses and costs incurred in the prosecution of these claims and such other and further of relief as the Court deems just.

Respectfully submitted,

s/Bernard M. Schneider
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