

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

WEEMS INDUSTRIES, INC. d/b/a LEGACY
MANUFACTURING COMPANY,

Plaintiff,

v.

PLEWS, INC.

Defendant.

Case No. 1:16-cv-109LRR

**COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff, Weems Industries, Inc. d/b/a Legacy Manufacturing Company, by and through its attorneys, and for its complaint against Defendant, Plews, Inc. alleges as follows:

PARTIES

1. Plaintiff, Weems Industries, Inc., is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business at 6509 Partners Avenue, Marion, Iowa, 52302. Weems Industries, Inc. has adopted and operates under the fictitious name Legacy Manufacturing Company.

2. Upon information and belief, Defendant, Plews, Inc., is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 1550 Franklin Grove Road, Dixon, Illinois, 61021.

JURISDICTION AND VENUE

3. This is an action for trademark infringement and unfair competition arising under sections 32(1) and 43(a) of the Lanham (Trademark) Act, 15 U.S.C. §§ 1114(a), 1125(a).

4. This Court has subject matter jurisdiction over the federal trademark infringement and unfair competition claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

5. This Court has supplemental jurisdiction over the subject matter of Plaintiff's state law claims under 28 U.S.C. § 1367(a), in that those claims are so related to the Plaintiff's federal claims that they form part of the same case or controversy.

6. This Court has personal jurisdiction over Defendant because it has contacts with and conducts business within the State of Iowa and this judicial district; Defendant has caused infringing products to be sold in this judicial district; Defendant has actively solicited other retailers to sell the infringing products in this judicial district; the causes of action asserted in this Complaint arise out of Defendant's contacts with this judicial district; and Defendant has caused tortious injury to Plaintiff in this judicial district.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Defendant has contacts with and conducts business within the State of Iowa and this judicial district; Defendant has caused infringing products to be sold in this judicial district; Defendant has actively solicited other retailers to sell the infringing products in this judicial district; the causes of action asserted in this Complaint arise out of Defendant's contacts with this judicial district; and Defendant has caused tortious injury to Plaintiff in this judicial district.

FACTUAL ALLEGATIONS

8. Plaintiff is the manufacturer of chartreuse-colored compressed air hoses, which are registered under the name "Flexzilla®."

9. Plaintiff has maintained continuous and substantially exclusive use of the chartreuse color as applied to the entire body of its compressed air hoses since early 2007.

10. On October 6, 2015, Plaintiff registered the color chartreuse as applied to the entire body of its air hoses on the Principal Register, Registration No. 4,827,169. (Exhibit A).

11. Plaintiff promotes and markets the chartreuse color as a trademark, having termed the color “ZillaGreen™” and adopting the slogan, “If it’s not ZillaGreen™, it’s not Flexzilla®”.

12. Plaintiff has invested substantial time, effort, and financial resources to develop, promote, and market its chartreuse color to the body of its compressed air hoses.

13. As a result of Plaintiff’s efforts, the chartreuse color as applied to the body of its compressed air hoses has become an asset of substantial value as a symbol of Plaintiff, its quality products, and its goodwill.

14. Plaintiff has expanded its use of the color chartreuse to water hoses, electrical cords, hose reels, pneumatic couplers, and other accessories. Accordingly, chartreuse has become Plaintiff’s signature color, which consumers associate with Plaintiff.

15. Shortly after Plaintiff adopted its chartreuse-colored trademark for air hoses, Defendant began selling a similarly-colored air hose under its Amflo brand.

16. In a letter dated May 3, 2010 Plaintiff provided notice of its chartreuse-colored trademark for air hose to Amflo and Plews, Inc.’s predecessor, Plews & Edelmann.

17. Receipt of the May 3, 2010 letter was acknowledged by Plews & Edelmann’s attorney.

18. Plaintiff has continuously and diligently pursued other entities that began producing confusingly similar chartreuse-colored air hoses as well. Through these actions, Plaintiff has been successful in protecting, policing and enforcing its rights in Plaintiff’s mark against third-party infringers.

19. Additionally, since 2007, Plaintiff has continued to develop secondary meaning in the eyes of consumers in Plaintiff's mark, leading to the subsequent registration of Plaintiff's mark on the Principal Register, Registration No. 4,827,169, on October 6, 2015.

20. On or about May 2, 2005, Plaintiff hired Richard Schindel ("Schindel"). At that time Schindel entered into a Noncompetition, Nondisclosure and Assignment of Inventions Agreement with Legacy Manufacturing Company (the "Agreement") (Exhibit B).

21. Schindel terminated his employment with Plaintiff on December 29, 2011 and signed a Termination Certificate, termed Exhibit A to the Agreement, on that date.

22. The Agreement included non-competition provisions wherein Schindel agreed not to work for or with certain companies in competition with Plaintiff for a period of five years following his departure.

23. One of the entities listed in the Agreement that Schindel agreed not to work for or with for a period of five years following his departure is Defendant.

24. On information and belief, Schindel made Defendant aware of the Agreement.

25. Defendant began working with Schindel in disregard of the Agreement.

26. In 2015, Plaintiff became aware that Schindel is working with Defendant.

27. Also in 2015, Plaintiff became aware that Home Depot was selling a confusingly similar, chartreuse-colored air hose under its house "Husky" brand.

28. Plaintiff contacted Home Depot in a later dated February 23, 2015 to alert it to its infringing use of the chartreuse-colored Home Depot Husky® branded hose. Plaintiff further informed Home Depot of Plaintiff's rights in the chartreuse mark in connection with air hoses and demanded Home Depot to cease and desist using the chartreuse color on the entire body of its Husky® branded air hoses.

29. Plaintiff received a communication from Defendant, on information and belief, on behalf of Home Depot, as the supplier of Home Depot's Husky® branded chartreuse-colored air hose.

30. On information and belief, Defendant has infringed Plaintiff's marks by supplying infringing hoses to third parties, including, but not limited to, Home Depot.

31. On information and belief, Defendant's relationship with Home Depot as the supplier of Home Depot's Husky® branded chartreuse-colored air hoses began after Schindel started work with Defendant.

32. Around the same time, Defendant began selling a chartreuse-colored Ultra Air® premium hybrid air hose under its Amflo™ brand.

33. Defendant is selling confusingly similar chartreuse-colored compressed air hoses, under its Amflo™ brand to retail stores including, but not limited to, Home Depot and Walmart stores within this judicial district in Iowa.

34. Defendant continues to add infringing products to its product line.

35. Defendant continues to supply infringing products to the product lines of others as illustrated through the Home Depot Husky® branded chartreuse air hose Defendant supplies to Home Depot.

36. On information and belief, Defendant is utilizing proprietary information of Plaintiff's.

37. On information and belief, said proprietary information has been obtained through Defendant's work with Schindel.

38. On information and belief, such proprietary information includes, but is not limited to information regarding Plaintiff's suppliers.

39. On information and belief, Defendant is using such proprietary information regarding Plaintiff's suppliers to produce its infringing AmfloTM Ultra Air[®] chartreuse-colored air hose products.

40. Plaintiff is aware of at least one distributor who has expressed actual confusion regarding the chartreuse-colored Husky[®] hose.

41. Defendant intentionally and willfully uses the chartreuse color for the entire body of its compressed air hoses in order to knock-off and infringe Plaintiff's trademark and to capitalize on the known quality of Plaintiff's products and Plaintiff's goodwill.

42. On information and belief, Defendant has used Plaintiff's proprietary information obtained through Defendant's work with Schindel to interfere with Plaintiff's prospective business.

43. Defendant intentionally and willfully contributed to the use of the chartreuse color for the entire body of Home Depot's Husky[®] branded air hoses in order to cause others to infringe Plaintiff's trademark and to capitalize on the known quality of Plaintiff's products and Plaintiff's goodwill.

44. As of the date of this Complaint, Defendant continues to use the chartreuse color for the entire body of its air hoses.

45. On information and belief, as of the date of this complaint, Defendant continues to supply Home Depot with air hoses using the chartreuse color for the entire body of the air hoses.

46. Defendant's use of Plaintiff's chartreuse-colored hose trademark despite its knowledge of the mark since 2010 demonstrates a deliberate intent to willfully infringe Plaintiff's rights and a deliberate intent to willfully contribute to the infringement by others of

Plaintiff's rights in the chartreuse color for the entire body of its air hoses and to continue wrongfully competing with Plaintiff.

COUNT I
Federal Trademark Infringement – Principal Register

47. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

48. Plaintiff registered the color chartreuse as applied to the entire body of its air hoses on the Principal Register, Registration No. 4,827,169.

49. The chartreuse color for the entire body of Plaintiff's air hoses distinguishes Plaintiff's air hoses from its competitors and identifies Plaintiff as the air hoses' source.

50. Plaintiff has maintained continuous and substantially exclusive use of the chartreuse color for the entire body of its air hoses, and as a result, the chartreuse color has been accepted and is recognized as symbolizing Plaintiff's product.

51. Defendant's use of the chartreuse color for the body of its compressed air hoses in commerce to advertise, promote, market and sell its air hoses throughout the United States, including Iowa, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff and Defendant.

52. Defendant is intentionally and willfully using Plaintiff's marks in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

53. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with sales or distribution of its chartreuse-colored air hoses.

54. The actions of Defendant, if not enjoined, will continue.

COUNT II
Trademark Infringement – Common Law

55. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

56. The chartreuse color of Plaintiff's air hoses is a distinctive, nonfunctional mark that distinguishes Plaintiff's compressed air hoses from its competitors and identifies Plaintiff as the compressed air hoses' source.

57. Plaintiff has maintained continuous and substantially exclusive use of the chartreuse color for its air hoses since 2007, and as a result, the chartreuse color has been accepted and is recognized as symbolizing Plaintiff's product.

58. Defendant's use of the chartreuse color for the body of its air hoses in commerce to advertise, promote, market and sell its compressed air hoses throughout the United States, including Iowa, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff and Defendant.

59. Defendant is intentionally and willfully using Plaintiff's marks in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

60. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with sales or distribution of its chartreuse-colored air hoses.

61. The actions of Defendants, if not enjoined, will continue.

COUNT III
Contributory Trademark Infringement

62. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

63. Plaintiff registered the color chartreuse as applied to the entire body of its air hoses on the Principal Register, Registration No. 4,827,169.

64. The chartreuse color for the entire body of Plaintiff's air hoses is a distinctive nonfunctional mark that distinguishes Plaintiff's air hoses from its competitors and identifies Plaintiff as the air hoses' source.

65. Plaintiff has maintained continuous and substantially exclusive use of the chartreuse color for the entire body of its air hoses, and as a result, the chartreuse color has been accepted and is recognized as symbolizing Plaintiff's product.

66. Defendant's business of supplying air hoses using the chartreuse color for the body of air hoses to third party vendors and/or merchants throughout the United States, including Iowa, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff, Defendant and third party merchants.

67. Defendant is intentionally and willfully causing third party merchants to infringe Plaintiff's marks in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

68. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with sales or distribution of its chartreuse-colored air hoses.

69. The actions of Defendant, if not enjoined, will continue

COUNT IV
Interference with Contractual Relations

70. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

71. Plaintiff has a valid, binding Non-Compete Agreement with Schindel wherein Schindel agreed not to work with or for Defendant for a period of five years after leaving the employment of Plaintiff.

72. On information and belief, Defendant was made aware of the Non-Compete Agreement by Schindel.

73. On information and belief, Defendant began working with Schindel, in violation of the Non-Compete Agreement, despite being aware of the Non-Compete Agreement

74. Plaintiff's business has been damaged by Defendant's intentional and improper interference with its contractual relation with Schindel.

75. The actions of the Defendant are willful and wanton and in reckless disregard of the rights of Plaintiff, entitling Plaintiff to punitive damages.

COUNT V
Misappropriation of Trade Secrets

76. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

77. Plaintiff utilizes trade secrets in the form of confidential information, including but not limited to: technical information, processes, works of authorship, inventions, discoveries, developments, systems, computer programs, code, algorithms, formulae, methods, ideas, test data, know-how, functional and technical specifications, designs, drawings, passwords, analysis, research, business plans, marketing, sales and pricing strategies, supplier lists, customer lists, and all other information which could adversely affect a competitive advantage of the Plaintiff if disclosed.

78. Such trade secrets and confidential business information are crucial to Plaintiff's continued success and provide substantial advantages and a vital key to Plaintiff in the development, production, conditioning, and marketing of its present and future products, expansion of the chartreuse-colored trademark, and in maintaining and expanding its competitive advantage and position in the hose, cord and tool business.

79. Such trade secrets and confidential business information are the result of the expenditure of substantial funds and great effort over a considerable period of time by Plaintiff for the continuous use in the operations of its businesses.

80. Plaintiff has taken substantial precautions to protect and preserve the proprietary nature of its trade secrets and confidential business information.

81. Upon terminating his employment with Plaintiff, on information and belief, Schindel took confidential proprietary information from Plaintiff, including but not limited to customer lists and supplier lists.

82. Such trade secrets and confidential business information were and are owned by Plaintiff.

83. Such trade secrets and confidential business information were disclosed in confidence and trust to Schindel, by virtue of Schindel's written Agreement, thereby maintaining and preserving Plaintiff's rights to the exclusive use, or control of the use, of such secrets and information and disallowing Schindel from producing, using for himself, or disclosing the same to others, without Plaintiff's authority.

84. On information and belief, Schindel supplied Defendant with such trade secrets and confidential business information and Defendant, knowing the confidential nature of the information provided, misappropriated and made unauthorized use of such trade secrets and

information, in violation of Schindel's Agreement not to do so, and without the authority and consent of Plaintiff.

85. As a result of such misappropriation and unauthorized use, Defendant has gained a substantial competitive advantage in the market and Plaintiff has been, is, and will continue to be damaged in its business and property.

86. In addition, such misappropriation was willful and malicious and entitles Plaintiff to awards of exemplary damages and attorneys' fees against Defendant.

COUNT VI
Interference with Prospective Contractual Relations

87. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

88. On information and belief, Defendant began working with Schindel in 2012. Furthermore, on information and belief, Schindel sells products, including, but not limited to, Defendant's chartreuse air hose products on behalf of and under the direction of Defendant.

89. Schindel had access to proprietary information and trade secrets of Plaintiff, including, but not limited to, Plaintiff's supplier and current customer information, as part of his employment with Plaintiff.

90. Defendant's work with Schindel allowed Defendant to source a substantially identical hose bearing a confusingly similar mark to Plaintiff's mark.

91. On information and belief, Defendant intentionally and improperly interfered with at least two of Plaintiff's current and prospective business relationships, including, but not limited to, Home Depot and Walmart, through its ability to source a substantially identical hose bearing a confusingly similar mark with the information improperly provided by Schindel and improperly and intentionally utilized by Defendant.

92. Defendant's interference prevented Home Depot, Walmart, and others from entering into a contractual relationship with Plaintiff.

93. Plaintiff's business has been damaged by Defendant's intentional and improper interference with prospective business relationships.

94. The actions of Defendant are willful and wanton and in reckless disregard of the rights of Plaintiff, entitling Plaintiff to punitive damages.

COUNT VII
Federal Unfair Competition

95. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

96. Defendant's use of the chartreuse color for the body of its air hose in commerce to advertise, promote, market, supply and sell its air hoses throughout the United States including Iowa, creates a likelihood of confusion, deception, or mistake among consumers as to the source and association between Plaintiff and Defendant.

97. Plaintiff has suffered and continues to suffer damages in an amount to be proven at trial consisting of, among other things, diminution in the value of and goodwill associated with Plaintiff's trademarks, and injury to Plaintiff's business in lost revenue associated with sales or distribution of its chartreuse-colored air hoses.

98. By using the chartreuse color for the body of its air hoses and those it supplies to third party vendors and/or merchants, Defendant is intentionally and willfully using Plaintiff's marks in an attempt to capitalize on the quality of Plaintiff's products and Plaintiff's goodwill.

COUNT VIII
Iowa Unfair Competition

99. Plaintiff realleges and incorporates herein by this reference the allegations of all paragraphs set forth above as though fully set forth herein.

100. Plaintiff has a right, by fair and honest business methods, to compete with Defendant.

101. Defendant has engaged in the misappropriation of Plaintiff's trade secrets and confidential business information in violation of Plaintiff's common law and statutory rights.

102. Defendant has engaged in acts of infringement of Plaintiff's chartreuse-colored air hose products, in derogation of Plaintiff's common law and statutory rights.

103. Defendant's act of infringement occurred during the conduct of trade or commerce.

104. Defendant's acts of misappropriation and infringement constitutes unfair competition.

105. As a direct and proximate result of Defendant's acts of misappropriation and infringement, Plaintiff has been damaged and is likely to be further damaged, specifically through the loss of its competitive advantage in the market and revenue associated with sales or distribution of its chartreuse-colored air hose products.

106. The actions of Defendant are willful and wanton and in reckless disregard of the rights of Plaintiff entitling Plaintiff to punitive damages.

PRAYER FOR RELIEF

WHEREFORE, in consideration of the foregoing, Plaintiff respectfully requests that this Court enter an Order granting it the following relief:

- a) Enter a judgment that Plaintiff's chartreuse-colored air hose products have been and continue to be infringed by Defendant in violation of 15 U.S.C. § 1125(a);

- b) Enter a judgment that Defendant's use of its chartreuse-colored air hose products constitutes federal unfair competition in violation of 15 U.S.C. § 1125(a);
- c) Enter a judgment that Defendant's use of its chartreuse-colored air hose products violates Plaintiff's Principal Register registration, Registration No. 4,827,169;
- d) Enter a judgment that Defendant's use of its chartreuse-colored air hose products constitutes unfair competition in violation of Iowa law;
- e) Temporarily and permanently enjoin and restrain Defendant and each of its agents, employees, officers, attorneys, successors, assigns, affiliates, and any persons in privity or acting in concert or participation with any of them from using chartreuse-colored air hose products to market, advertise, distribute or identify Defendant's products or goods and products or goods supplied by Defendant where that designation would create a likelihood of confusion, mistake or deception with Plaintiff's marks;
- f) Pursuant to 15 U.S.C. § 1116(a), direct Defendant to file with the Court and serve on Plaintiff within thirty (30) days after issuance of an injunction, a report in writing and under oath setting forth in detail the manner and form in which Defendant has complied with the injunction;
- g) Pursuant to 15 U.S.C. § 1118, require Defendant and all others acting under Defendant's authority, at its cost, be required to deliver up and destroy all products, devices, literature, advertising, labels and other materials in its possession bearing the infringing chartreuse-colored compressed air hose products;
- h) Award Plaintiff all damages it sustained as a result of Defendant's acts of infringement and unfair competition, said amount to be trebled, together with prejudgment interest, pursuant to 15 U.S.C. § 1117;
- i) Award Plaintiff all profits received by Defendant from sales and revenues of any kind made as a result of its infringing actions, said amount to be trebled, after an accounting pursuant to 15 U.S.C. § 1117;
- j) Award treble actual damages and profits pursuant to 15 U.S.C. § 1117(b) because Defendant's conduct was willful within the meaning of the Lanham Act;
- k) Award Plaintiff its attorney fees and costs pursuant to 15 U.S.C. § 1117, because of the exceptional nature of this case resulting from Defendant's deliberate infringing actions;
- l) Enter Judgment that Defendant unlawfully interfered with Plaintiff's contractual relations; enter judgment in Plaintiff's favor and award damages in an amount authorized by law, including exemplary damages; award Plaintiff reasonable attorney fees and costs against Defendant; and grant Plaintiff all other legal and equitable relief for which Plaintiff is entitled

- m) Enter Judgment that Defendant unlawfully interfered with Plaintiff's prospective contractual relations; enter judgment in Plaintiff's favor and award damages in an amount authorized by law, including exemplary damages; award Plaintiff reasonable attorney fees and costs against Defendant; and grant Plaintiff all other legal and equitable relief for which Plaintiff is entitled.
- n) Award Plaintiff damages incurred as a result of the Defendant's misappropriation of trade secrets, together with exemplary damages, court costs, attorney fees, and all other reasonable and necessary expenses incurred by Plaintiff in the prosecution of this litigation; and
- o) Grant Plaintiff such other and further relief as the Court may deem just and necessary under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted this 10th day of June 2016.

BRICK GENTRY P.C.

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