

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BAYCO PRODUCTS, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO.
	§	
ONSCENE SOLUTIONS, LLC,	§	_____
	§	
Defendant.	§	A JURY TRIAL IS DEMANDED

PLAINTIFF’S ORIGINAL COMPLAINT

PLAINTIFF BAYCO PRODUCTS, INC. (“Plaintiff Bayco”), Plaintiff, complains of ONSCENE SOLUTIONS, LLC (“OSS”), Defendant, showing as follows:

I.
PARTIES

1. Plaintiff Bayco is a corporation organized under the laws of the State of Texas, having its principal place of business at 640 S. Sanden Blvd., Wylie, Texas 75098.
2. Defendant OnScene Solutions, LLC is a limited liability company organized under the laws of the State of Colorado, with its principal place of business, on information and belief, located at 231 N. Chimney Park Drive, Windsor, Colorado 80550. Defendant OSS may be served by delivering a copy of Summons and this Complaint to its Registered Agent, Tamara Sorensen, located at 28311 Weld County Road 15, Windsor, Colorado 80550.

II.
JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331, as this of action arises at least in part under the Lanham Act, 15 U.S.C. § 1051 *et seq.* This Court also has jurisdiction under 28 U.S.C. § 1332(a)(1), as there is full diversity between the parties as they are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

4. This Court has jurisdiction over the related common law claims pursuant to the Court's pendent jurisdiction under 28 U.S.C. § 1338(b). This Court has personal jurisdiction over Defendant OSS because Defendant OSS has numerous contacts with Texas, including soliciting customers within the State of Texas via its website at www.onscenesolutions.com. Further, upon information and belief, Defendant OSS has as extensive nationwide dealer network, having no less than four dealers within the State of Texas. As such, Defendant OSS has extensive ties in and to this district and Texas. All these activities of Defendant OSS are such that the exercise of jurisdiction over Defendant OSS would not offend traditional notions of fair play and substantial justice.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Defendant OSS, a limited liability company, is subject to personal jurisdiction in the Northern District of Texas.

III.
BACKGROUND FACTS – COMMON TO ALL COUNTS

6. Plaintiff Bayco is a company that has been based in Texas since its formation in January, 1984, and has been providing lighting products to the marketplace for over 25 years.

7. Plaintiff Bayco sells a wide variety of lighting products that it sells to widespread consumer markets (i.e. sold by Walmart, Lowes Home Improvement Centers, Menards, Ace, and Do-It-Best) as well as a wide variety of public safety and industrial marketplace channels (i.e. law enforcement, firemen, aviation industry).

8. To this end, Plaintiff Bayco introduced its “NIGHTSTICK” portable lighting products in mid-2007 and since such time has enjoyed widespread acceptance of its products, in the various public safety and industrial marketplace channels. Plaintiff Bayco’s sales of its “NIGHTSTICK” lighting products, since introduction, exceed \$9,500,000 in its sales of over 450,000 lighting products. Plaintiff Bayco has engaged in widespread advertising and promotion of its lighting products under its “NIGHTSTICK” mark including advertising in nationally distributed publications such as *Law Enforcement Product News* and *Law Enforcement Technology*, showcased at industry trade shows (such as the IACP, ASIS, NAPED, AAPEX, SHOT, FDIC, NSA, Grainger, ASSE, O’Reilly Auto, Uni-Select and ACE Hardware trade shows) during the years 2007 to date, participation at industry meetings, numerous sales calls by its National Sales Team, as well as prominently featured on its website at www.baycoproducts.com and those of others, such as PoliceOne.com. Examples of advertising, industry recognition materials and selected website pages for its “NIGHTSTICK” products are attached hereto as Pleading Exhibit A.

9. Plaintiff Bayco has received much notoriety in the public safety and industrial marketplace channels for its high quality “NIGHTSTICK” lighting products.

10. On or about April 14, 2005, Plaintiff Bayco filed its trademark Application Serial Number 78-608546 in the United States Patent and Trademark Office (“USPTO”) in order to seek registration of the mark “NIGHTSTICK.” Subsequently, the Application matured into United States Registration Number 3,366,683 (“the ‘683 Registration”) as registered on January 8, 2008. A true and accurate copy of the ‘683 Registration is attached hereto as Pleading Exhibit B.

11. Plaintiff Bayco is the owner of all right, title and interest in and to the ‘683 Registration and the “NIGHTSTICK” mark and all related goodwill. Such registration is valid and subsisting.

IV. DEFENDANT OSS’S ACTIVITIES

A. Defendant OSS’s Sales Activities

12. Upon information and belief, Defendant OSS sells and has offered for sale its “NIGHT STIK” lighting products, which are principally sold to those in the public safety and commercial markets. Defendant OSS offers its “NIGHT STIK” principally LED based lighting products to firefighters and other public safety officials. Examples of Defendant OSS’s lighting products as detailed on its website are attached hereto as Pleading Exhibit C.

B. Defendant OSS’s “NIGHT STIK” Trademark Application

13. On or about May 20, 2005, Defendant OSS filed its application serial Number 78-634261 (“the ‘261 Application”) in the USPTO seeking to register the “NIGHT STIK” mark for “artificial lighting-illumination.”

14. In response to the filing of this application, the USPTO issued an Office Action dated December 19, 2005 wherein, *inter alia* the ‘261 Application was rejected as

having a likelihood of confusion with other identified marks. Also, Plaintiff Bayco's then pending 78-608546 Application was identified and that there "may be a likelihood of confusion between Applicant's mark" and that of Plaintiff Bayco's Application. The USPTO Trademark Examiner also noted that the filing date of Plaintiff Bayco's Application precedes the filing date of Defendant OSS's Application.

15. Upon information and belief, as of at least as early as December 19, 2005, Defendant OSS was aware of Plaintiff Bayco's intention to use the "NIGHTSTICK" mark for its various lighting products.

16. On or about March 11, 2008 the USPTO sent a "Notice of Abandonment" to Defendant OSS concerning the '261 Application for its failure to fully respond to outstanding requirements of the Trademark Examiner.

C. Defendant OSS's Inaction

17. Upon information and belief, Defendant OSS has long known of Plaintiff Bayco and its use of the "NIGHTSTICK" mark.

18. Upon information and belief, Defendant OSS has long been aware of Plaintiff Bayco's "NIGHTSTICK" mark and its marketing and advertising efforts in association with that mark. Further, Defendant OSS was well aware of the industry exposure that Plaintiff Bayco has received for its "NIGHTSTICK" mark as associated with its lighting products.

19. To date, Defendant OSS has never raised any objection to Plaintiff Bayco's use of its "NIGHTSTICK" mark.

20. Only recently, Plaintiff Bayco has discovered Defendant OSS's usage of the "NIGHT STIK" mark in association with its various lighting products.

21. Upon information and belief, as a result of sales generated by virtue of marketing efforts in the Northern District of Texas and elsewhere in association with its “NIGHT STIK” mark, Defendant OSS has misappropriated Plaintiff Bayco’s inherently distinctive, arbitrary “NIGHTSTICK” mark by adopting a confusingly similar designation for its lighting products.

22. Upon information and belief, Defendant OSS’s lighting products are of the same type of those as provided by Plaintiff Bayco. Defendant OSS’s use of the “NIGHT STIK” mark is likely to cause confusion, mistake, to deceive the public in that Defendant OSS’s goods are likely to be mistaken for or confused with Plaintiff Bayco’s goods as associated with its “NIGHTSTICK” mark. Furthermore, Defendant OSS’s use of the “NIGHT STIK” mark is likely to create the mistaken impression in the public that Defendant OSS or its products are endorsed by Plaintiff Bayco or that Defendant OSS is sponsored by, affiliated with, or in some manner associated with Plaintiff Bayco.

23. The acts of Defendant OSS as alleged herein have caused, and unless restrained by the Court, will continue to cause serious and irreparable harm to Plaintiff Bayco and to the good will associated with the Plaintiff Bayco’s distinctive “NIGHTSTICK” mark. Defendant OSS’s utilization of the “NIGHT STIK” that so closely resembles Plaintiff Bayco’s “NIGHTSTICK” mark while Plaintiff Bayco continues to currently and actively expand the sale of its lighting products, if allowed to continue, may destroy and irreparably injure Plaintiff Bayco’s markets for its lighting products in association with its “NIGHTSTICK” mark in this district, in Texas, and elsewhere.

24. Plaintiff Bayco's remedy at law is not adequate to compensate it for the injury threatened since it is entitled to be in control of use of its "NIGHTSTICK" mark to advertise, market, promote and sale its products and to identify such as the source and origin of its well-known, high quality products, and all good will appertaining thereto.

25. The acts of Defendant OSS as alleged herein are without license, permission, or consent of Plaintiff Bayco.

V.

COUNT ONE—INFRINGEMENT UNDER THE LANHAM ACT

26. Plaintiff Bayco repeats and realleges paragraphs 1 through 25 of this Complaint and the acts of Defendant OSS set forth therein are incorporated herein as a pleading to this Count.

27. The unauthorized use by Defendant OSS of the "NIGHT STIK" mark in association with Defendant OSS's offering for sale, selling and advertising its lighting products in commerce constitutes an infringement of Plaintiff Bayco's federally registered "NIGHTSTICK" mark of the '683 Registration, which infringement is likely to cause Plaintiff Bayco injury and damage in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

28. The unauthorized use by Defendant OSS of the "NIGHT STIK" mark with Defendant OSS's offering for sale, selling and advertising its lighting products in commerce constitutes adoption of a mark that is in part identical to the "NIGHTSTICK" registered mark of Plaintiff Bayco, which constitutes a false designation of origin – a knowing false description or representation – regarding goods offered or sold by Defendant OSS in commerce and an infringement which is likely to cause Plaintiff Bayco

injury and damage in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

VI.
COUNT TWO—TRADEMARK INFRINGEMENT,
COMMON LAW VIOLATIONS, AND UNFAIR COMPETITION

29. Plaintiff Bayco repeats and realleges paragraphs 1 through 28 of this Complaint and the acts of Defendant OSS set forth therein are incorporated herein as a pleading to this Count.

30. Upon information and belief, Defendant OSS has infringed and continues to infringe upon Plaintiff Bayco's common law trademarks by adopting and using a colorable imitation of Plaintiff Bayco's distinctive "NIGHTSTICK" mark in connection with Defendant OSS's advertising, marketing, and offering for sale its "NIGHT STIK" lighting products, knowing full well of Plaintiff Bayco's prior rights in and to its common law "NIGHTSTICK" mark.

31. Upon information and belief, Defendant OSS has intentionally selected the "NIGHT STIK" mark to tread upon the good will and reputation of Plaintiff Bayco in the United States that Plaintiff Bayco has developed in association with its "NIGHTSTICK" mark as utilized by Plaintiff Bayco in the advertising and sale of its lighting products. The use of the "NIGHT STIK" mark by Defendant OSS when used in connection with its lighting products offered to others is confusingly similar with Plaintiff Bayco's usage of its "NIGHTSTICK" mark.

32. Upon information and belief, Defendant OSS's adoption and use of the "NIGHT STIK" mark has enabled it to deliberately pass-off and palm-off its lighting products as those of Plaintiff Bayco with the intent to deceive and defraud the public.

33. Upon information and belief, the actions of Defendant OSS not only deceives the purchasing public but cause irreparable injury to Plaintiff Bayco's business and good will, and further damages Plaintiff Bayco's ability to expand its operations.

34. Defendant OSS's use of the "NIGHT STIK" mark misleads and deceives the public by causing the public to believe erroneously that Defendant OSS's goods have the sponsorship or approval of Plaintiff Bayco.

35. Upon information and belief, Defendant OSS has engaged in unfair competition and continues to engage in unfair competition with Plaintiff Bayco. Defendant OSS has knowingly, willfully and fraudulently appropriated Plaintiff Bayco's "NIGHTSTICK" mark by adopting and using the "NIGHT STIK" mark in association with Defendant OSS's lighting products. The adoption by Defendant OSS of the "NIGHT STIK" mark is confusingly similar to that of Plaintiff Bayco's "NIGHTSTICK" mark, and not only is there a likelihood of confusion, but upon information and belief, actual marketplace confusion has resulted. This attempt by Defendant OSS to tread upon Plaintiff Bayco's good will and reputation and to unlawfully appropriate the benefit of Plaintiff Bayco's years of marketing exposure constitutes unfair competition by Defendant OSS.

36. The purposely deceptive use of the "NIGHT STIK" mark by Defendant OSS has caused irreparable damage to Plaintiff Bayco's reputation and good will as symbolized by its "NIGHTSTICK" mark and will continue to cause damage unless Defendant OSS is enjoined from such action.

VII.
COUNT THREE—LACHES

37. Plaintiff Bayco repeats and realleges paragraphs 1 through 36 of this Complaint and the acts of Defendant OSS set forth therein are incorporated herein as a pleading to this Count.

38. Upon information and belief, Defendant OSS has long had actual knowledge of Plaintiff Bayco's usage of its "NIGHTSTICK" mark as associated with its lighting products.

39. Upon information and belief, Defendant OSS delayed in asserting any trademark rights that it may have claimed against Plaintiff Bayco.

40. Upon information and belief, there is no excuse for the delay of Defendant OSS in asserting any rights that it may claim that it has for its "NIGHT STIK" mark in view of Plaintiff Bayco's '683 Registration, as well as Defendant OSS's actual knowledge of Plaintiff Bayco's use of its mark.

41. Defendant OSS's delay has caused undue prejudice to Plaintiff Bayco in that, among other things, Plaintiff Bayco has invested heavily in advertising and other efforts and expenses in promoting its lighting products under the "NIGHTSTICK" mark and in obtaining the resulted marketplace recognition.

42. Any claim that Defendant OSS has superior rights in and to the "NIGHT STIK" mark if any, is barred by laches.

VIII.
COUNT FOUR—WAIVER

43. Plaintiff Bayco repeats and realleges paragraphs 1 through 42 of this Complaint and the acts of Defendant OSS set forth therein are incorporated herein as a pleading to this Count.

44. As of December 19, 2005, Defendant OSS was on actual notice of Plaintiff Bayco's intent to register its "NIGHTSTICK" mark.

45. As of January 8, 2008, Defendant OSS was on constructive notice of Plaintiff Bayco's '683 Registration.

46. Given the years of inaction by Defendant OSS in asserting any trademark rights in the "NIGHT STIK" mark and intentional conduct that is inconsistent with its ownership of its claimed "NIGHT STIK" mark, all such actions constitute waiver of any trademark rights that Defendant OSS may claim to the "NIGHT STIK" mark.

IX.
COUNT FIVE—ACQUIESCENCE

47. Plaintiff Bayco repeats and realleges paragraphs 1 through 46 of this Complaint and the acts of Defendant OSS set forth therein are incorporated herein as a pleading to this Count.

48. As set forth hereinabove, Defendant OSS knew or should have known of Plaintiff Bayco's long usage of its "NIGHTSTICK" mark as associated with its lighting products.

49. After unsuccessfully attempting to secure its own "NIGHT STIK" registration, and Defendant OSS's abandonments of its Application to register its "NIGHT STIK" mark, coupled with its long awareness of Plaintiff Bayco without

controverting Plaintiff Bayco's use of its "NIGHTSTICK" mark, all such actions result in explicit, if not implicit, assurances by Defendant OSS to Plaintiff Bayco that Defendant OSS has no complaint with Plaintiff Bayco's use of its "NIGHTSTICK" mark.

50. Plaintiff Bayco continued to use its "NIGHTSTICK" mark in reliance upon these assurances by Defendant OSS.

51. For all of the foregoing reasons, any claims to any superior "NIGHT STIK" trademark rights by Defendant OSS are barred by acquiescence.

X.
COUNT SIX—DAMAGES

52. The amount of actual damages and lost sales sustained by Plaintiff Bayco and/or the profits of Defendant OSS under Counts One and Two hereinabove are not ascertainable at the time of filing of this Complaint but will be ascertained more clearly during pretrial discovery and will be pled with more specificity at the conclusion of discovery; however, upon information and belief, such damages are well in excess of \$75,000 exclusive of interest and costs.

XI.
PRAYER FOR RELIEF

WHEREFORE, Plaintiff Bayco prays for the following relief:

(a) That Defendant OSS, its officers, agents, servants, affiliates, employees, attorneys and representatives and all those in privity or acting in concert with Defendant OSS and each of them be permanently enjoined from directly or indirectly:

(i) using the "NIGHT STIK" mark or any other words confusingly similar thereto in association with Defendant OSS's lighting products, all of which is confusingly similar to the

“NIGHTSTICK” mark of Plaintiff Bayco as used in association with its lighting products;

- (ii) performing any act or using any word, name, style, title or mark which is likely to cause confusion, to cause mistake, to deceive, or otherwise mislead the trade or public or public into believing that Plaintiff Bayco and Defendant OSS are one and the same or in some way connected or that Plaintiff Bayco is a sponsor of Defendant OSS, or its goods, or that Defendant OSS is in some manner affiliated, associated with, or under the supervision or control of the Plaintiff Bayco, or that the products of Defendant OSS originated or is approved by Plaintiff Bayco, or is likely in any way to lead the trade or public to associate Defendant OSS with Plaintiff Bayco;
 - (iii) using any words, names, styles, titles or marks which create a likelihood of injury to business reputation of Plaintiff Bayco or a likelihood of misappropriation of Plaintiff Bayco’s “NIGHTSTICK” mark and all good will associated therewith; and
 - (iv) using any trade practices whatsoever including those complained of herein, which tend to unfairly compete with or injure Plaintiff Bayco’s business or good will;
- (b) That Defendant OSS be required to account for and pay over to Plaintiff Bayco all of its gains, profits and advantages derived by it from the activities herein complained of;

- (c) That all labels, signs, prints, packages, wrappers, receptacles and advertising that is in the possession of Defendant OSS bearing the “NIGHT STIK” mark and all plates, molds, matrices, and other means of making same, shall be delivered up for destruction pursuant to 15 U.S.C. § 1118;
- (d) That Plaintiff Bayco recover from Defendant OSS treble the amount of damages suffered by Plaintiff Bayco pursuant to 15 U.S.C. § 1115;
- (e) That the Court award punitive and exemplary damages against Defendant OSS in favor of Plaintiff Bayco by reason of Defendant OSS’s unfair competition;
- (f) That this case be deemed exceptional and that Plaintiff be awarded its reasonable attorneys’ fees pursuant to 15 U.S.C. § 1117 and other applicable laws;
- (g) That Plaintiff Bayco be awarded its costs of filing this litigation;
- (h) That any claims by Defendant OSS of any prior right in and to the “NIGHT STIK” mark be declared barred by laches, waiver and/or acquiescence; and,
- (i) That Plaintiff Bayco receive all other, further or different relief as the Court may deem just and proper.

XII.
DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b), Fed. R. Civ. P., Plaintiff Bayco demands a trial by jury in the above-identified action.

Respectfully submitted,

/s/Richard L. Schwartz
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