

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (DAYTON)

THE PROCTER & GAMBLE COMPANY,)	
)	Case No.: 3:05 CV 0427 (WHR)
)	
Plaintiff,)	(Judge Walter H. Rice)
)	
v.)	
)	
McLANE COMPANY, INC., <i>et al.</i> ,)	
)	
Defendants.)	

CONSENT JUDGMENT AND PERMANENT INJUNCTION

Plaintiff The Procter & Gamble Company (“Plaintiff”), having filed its complaint herein on December 21, 2005, against McLane Company, Inc., Salado Sales and Consumer Value Products, Inc. (hereinafter collectively “Defendants”) and Defendants having consented to the entry of this Consent Judgment and Permanent Injunction without notice, to be binding on Defendants, Defendants’ agents, employees and representatives, and all persons in active concert or participation with Defendants who receive notice thereof:

NOW, THEREFORE, upon the consent of the parties hereto,





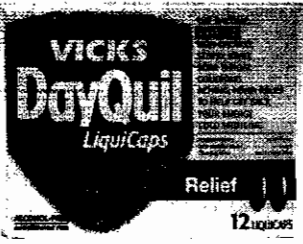

IT IS ORDERED, ADJUDGED AND DECREED, that final judgment in favor of Plaintiff and against Defendants be entered as follows:



1. This Court has jurisdiction of the subject matter of all counts of this action and over all the parties hereto.
2. The Procter & Gamble Trade Dress (as described in the Complaint filed in this action, which Complaint is attached as Exhibit A, incorporated herein and made a part hereof) is

good, valid and enforceable in law, and Plaintiff is the sole proprietor of all right, title and interest in and to the Procter & Gamble Trade Dress.

3. Defendants engaged in various acts including offering for sale and selling in commerce products which are in packages Plaintiff alleges are counterfeits and infringements of the Procter & Gamble Trade Dress which were not manufactured or authorized by Plaintiff.

Representative samples of the parties' products are as follows:

PROCTER & GAMBLE PRODUCT	CVP CORRESPONDING PRODUCT
	
	
	

PROCTER & GAMBLE PRODUCT	CVP CORRESPONDING PRODUCT
	

The four CVP products depicted above are hereinafter referred to collectively as the “Contested Products”; the first CVP product depicted above is hereinafter referred to as the “CVP Paper Towel Product” or “CVP Towels”; the second CVP product depicted above is hereinafter referred to as the “CVP Night Time Liquid Caps”; the third CVP product depicted above is hereinafter referred to as the “CVP Day Time Liquid Caps”; and the fourth CVP product depicted above is hereinafter referred to as the “CVP Bath Tissue Product” or “CVP Soft 'n Plush”.

4. The parties have agreed to resolve their differences and have entered into a Settlement Agreement. The parties have further agreed to dismiss this lawsuit pursuant to the terms set forth in the Settlement Agreement and, without admission of liability, Defendants consent to entry of this Consent Judgment And Permanent Injunction.

5. Defendants and Defendants’ respective successors, assigns, affiliates, agents, servants, employees and representatives, and all persons, firms and corporations in active concert or participation with Defendants who receive notice hereof, are hereby enjoined and restrained from:

(a) using, in any manner, the Contested Products and The Procter & Gamble Trade Dress and/or trademarks alone or in combination with any word(s) or design(s) which so resemble The Procter & Gamble Trade Dress and/or trademarks so as to be likely to cause confusion, deception, or mistake on or in connection with the advertising, offering for sale, or sale of any product not Plaintiff's product, or not authorized by Plaintiff to be sold in connection with each of The Procter & Gamble Trade Dress and/or trademarks. Without limiting the foregoing, Defendants are enjoined from:

i. using, in any manner, the "CVP Towels" packaging or any packaging substantially similar thereto. Packaging shall be deemed substantially similar to such packaging and therefore a violation of this injunction if it includes the element described below in paragraph "a," or an oval graphic in combination with any three or more of the elements listed in paragraphs "b" through "g." Nothing herein should be construed to mean that Defendants' use of fewer than the foregoing elements is authorized or approved by Procter & Gamble or the Court. If the Court finds any new packaging of Defendants' is confusingly similar to The Procter & Gamble Trade Dress, it shall be considered a violation of this injunction:

- a. The cornucopia graphic, in equity colors of green, orange, yellow and blue, which is centered on the package – specifically, the use of an identical oval shape using gradients of yellow and magenta to create an orange center, surrounded by a wide green "swoosh" and a blue accent;
- b. The overall impression of the equity color being green;
- c. The use of gradients of colors;

- d. The use of bold, black block lettering to display the brand name within the cornucopia graphic, with an initial capital letter;
- e. The upward slope of the brand name, from left to right;
- f. The use of a bowtie graphic centered to the lower half of the packaging; or
- g. The repeated use of the cornucopia graphic and bowtie graphic on the back of the package.

ii. using, in any manner, the “CVP Night Time Liquid Caps” packaging or packaging substantially similar thereto. Packaging shall be deemed substantially similar to such packaging and therefore a violation of this injunction if it includes the element described below in paragraph “a” or four or more of the elements listed in paragraphs “b” through “f.” Nothing herein should be construed to mean that Defendants’ use of fewer than the foregoing elements is authorized or approved by Procter & Gamble or the Court. If the Court finds any new packaging of Defendants’ is confusingly similar to The Procter & Gamble Trade Dress, it shall be considered a violation of this injunction:

- a. The inverted green triangle graphic known as the “shield,” outlined in blue, which uses gradient colors and is centered on the left hand side of the front of the package;
- b. The overall impression of the equity colors being green and dark blue;
- c. The placement of the “litany” of symptom relief information in a blue box on the top right hand side of the front of the package, in white lettering;

- d. The use of bold, white block lettering to display the product name in the middle of the shield, with "Liquid Caps" printed in italics;
- e. The use of a blue rectangular graphic placed along the bottom of the shield, in which the type of remedy is displayed in yellow and white block lettering; and
- f. The two green capsules graphic placed in the bottom right hand corner of the front of the package, underneath which the quantity of capsules in the package, twelve, is indicated in yellow lettering.

iii. using, in any manner, the "CVP Day Time Liquid Caps" packaging or packaging substantially similar thereto. Packaging shall be deemed substantially similar to such packaging and therefore a violation of this injunction if it includes the element described below in paragraph "a" or four or more of the elements listed in paragraphs "b" through "f." Nothing herein should be construed to mean that Defendants' use of fewer than the foregoing elements is authorized or approved by Procter & Gamble or the Court. If the Court finds any new packaging of Defendants' is confusingly similar to The Procter & Gamble Trade Dress, it shall be considered a violation of this injunction:

- a. The orange shield, outlined in yellow, which uses gradient colors and is centered on the left hand side of the front of the package;
- b. The overall impression of the equity colors being orange, yellow and white;
- c. The placement of the "litany" of symptom relief information in a white box on the top right hand side of the front of the package, in blue lettering;

- d. The use of bold, white block lettering to display the product name in the middle of the shield, with "Liquid Caps" printed in italics;
- e. The use of an orange rectangular graphic placed along the bottom of the shield, in which the type of remedy is displayed in yellow and white block lettering; and
- f. The two orange capsules graphic placed in the bottom right hand corner of the front of the package, underneath which the quantity of capsules in the package, twelve, is indicated in blue lettering.

iv. using, in any manner, the "CVP Soft 'n Plush" packaging or packaging substantially similar thereto. Packaging shall be deemed substantially similar to such packaging and therefore a violation of this injunction if it includes two of the elements described below in paragraphs "a" through "c," or four or more of the elements listed in paragraphs "a" through "h." Nothing herein should be construed to mean that Defendants' use of fewer than the foregoing elements is authorized or approved by Procter & Gamble or the Court. If the Court finds any new packaging of Defendants' is confusingly similar to The Procter & Gamble Trade Dress, it shall be considered a violation of this injunction:

- a. The positioning of the brand name inside a red "swoosh" banner graphic identical or substantially similar to the "swoosh" banner graphic as it appears on Reg. No. 2,992,037, centered in the top/middle of the front of the package;
- b. The distinctive, pillowy type of the brand name across the front of the package, with a hand-drawn quality;

- c. The use of a brand mascot – specifically, an illustrated animal with soft, feathery edges, holding a roll of toilet paper, to communicate both softness and a delighted customer;
- d. The upward slope of the brand name, from left to right;
- e. The placement of the brand mascot below the “swoosh” banner graphic;
- f. The use of a blue horizon behind the “swoosh” banner graphic;
- g. The use of blue, yellow or red for almost all of the type outside the “swoosh” banner graphic; and
- h. The repeated use of the “swoosh” banner graphic and the brand mascot, together with roll quantity information, on the back and sides of the package.

(b) passing off, inducing or enabling others to sell or pass off the Contested Products and any other product (other than products produced by Plaintiff) as and for products produced by Plaintiff;

(c) engaging in any conduct which tends falsely to represent, or is likely to confuse, mislead or deceive purchasers, Defendants’ customers or members of the public to believe that the Contested Products and Defendants are connected with Plaintiff or are sponsored, approved or licensed by Plaintiff or are in some way connected or affiliated with Plaintiff;

(d) using any reproduction, counterfeit, copy or colorable imitation of any of The Procter & Gamble Trade Dress and/or trademarks in connection with the publicity, promotion, sale or advertising of products manufactured, received, acquired, imported, shipped,

purchased, sold, offered for sale or distributed by Defendants bearing a copy or colorable imitation of any of The Procter & Gamble Trade Dress and/or trademarks;

(e) affixing, applying, annexing or using in connection with the manufacture, advertising, receiving, acquisition, importation, shipment, purchase, sale, offer for sale or distribution of any goods, a false description or representation including words or other symbols tending to falsely describe or represent such goods as being Plaintiff's products and from offering such goods in commerce; and

(f) assisting, aiding or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (a) through (e), above.

6. Defendants shall promptly destroy all products, labels, signs, prints, packages, wrappers, receptacles and advertisements in Defendants' possession or control concerning the Contested Products or which otherwise use any trademark, design or trade dress similar to The Procter & Gamble Trade Dress and/or trademarks or that incorporate The Procter & Gamble Trade Dress and/or trademarks. However, the foregoing sentence shall not apply: (a) to the extent set forth in paragraph 7 or (b) to such quantities of the CVP Paper Towel Product as Defendants will consume and use in their internal operations (in company cafeterias, breakrooms, and on-site facilities.)

7. Notwithstanding paragraph 5, Defendant is permitted to sell a limited number of CVP bath tissue product by July 31, 2006. Defendants are permitted to sell through to their customers only these packages. In consideration, Defendants shall pay Plaintiffs an amount referenced in paragraph 3 of the Settlement Agreement.

8. Defendants hereby certify that, on February 6, 2006, they notified all of their customers in writing that they are not to sell the Contested Products other than the CVP Bath Tissue Product, and that said customers shall return all such products to Defendants promptly;

9. The Court shall retain jurisdiction to construe, enforce, or implement this Consent Judgment And Permanent Injunction upon the application of any party.

SO ORDERED.

Dated: February 23, 2006


UNITED STATES DISTRICT JUDGE

Approved:

s/ Charles J. Faruki by Julie E. Zink

Dated: February 13, 2006

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s/ Mary R. True by Julie E. Zink per
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Dated: February 13, 2006

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