

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No.: 3:11-cv-00116-JFA

HILEX POLY COMPANY, LLC,
SUPERBAG OPERATING, LTD.,
API ENTERPRISES, INC.,

Plaintiffs,

vs.

CHICOECO, INC., doing business
as CHICOBAG,

Defendant.

SECOND AMENDED COMPLAINT

(Jury Trial Requested)

ChicoBag is willfully engaged in a continuous and systematic campaign of false advertising and unfair competition. ChicoBag's advertisements and promotions of its bags are false and misleading because its statements and implied messages concerning the alleged environmental impact of plastic bags are not correct, cannot be substantiated, and are likely to deceive customers. Therefore, the Plaintiffs Hilex Poly Company, LLC, Superbag Operating, Ltd., and API Enterprises, Inc., complaining of Defendant ChicoEco, Inc., doing business as ChicoBag ("Defendant" or "ChicoBag"), allege and assert the following:

NATURE OF THE ACTION

1. This is an action seeking a preliminary injunction, permanent injunction, and damages for false advertising and unfair competition for violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the South Carolina Unfair Trade Practices Act, South Carolina Code Annotated § 39-5-10, *et seq.*

2. This action arises from ChicoBag's practices of false advertising and unfair competition in interstate commerce. ChicoBag's advertising and promotional claims are explicitly false and misleading and imply a false message regarding the environmental impact of ChicoBag products and plastic bags sold by Plaintiffs and others. ChicoBag's advertising and promotional campaigns appear nationally in print and on websites, such as www.chicobag.com. Print advertisements for ChicoBag are attached as Exhibit 1 and internet advertisements for ChicoBag are attached as Exhibit 2.

3. ChicoBag is engaged in an advertising and promotional campaign in every market nationwide and online in which ChicoBag has made and continues to make false and misleading claims about the environmental impact of ChicoBag products and plastic bags.

THE PARTIES

4. Plaintiff Hilex Poly Company, LLC ("Hilex") is a corporation organized and existing under the laws of the State of Delaware and has a place of business at 101 E. Carolina Ave., Hartsville, South Carolina, 29550-4213.

5. Plaintiff Superbag Operating, Ltd. ("Superbag") is a limited partnership organized and existing under the laws of the State of Texas and has a place of business at 9291 Baythorne Drive, Houston, Texas, 77041.

6. Plaintiff API Enterprises, Inc. ("API") is a corporation organized and existing under the laws of the State of Oklahoma and has a place of business at 4901 S I 35 Service Road, Oklahoma City, OK, 73129.

7. Upon information and belief, ChicoBag is a business entity organized and existing under the laws of the State of California and having a place of business 345 Huss Drive, Chico, California, 95928.

8. Plaintiffs and Defendant are direct competitors in the bag industry, including direct competitors in the grocery and retail segment, throughout the United States, including in the State of South Carolina.

JURISDICTION AND VENUE

9. ChicoBag has engaged in the transaction of business and committed the acts complained of herein in interstate commerce and in the District of South Carolina. Jurisdiction is based upon 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(b), and 1367. Venue is proper in this district under 28 U.S.C. § 1391(b) as the case in controversy arose in this judicial district.

10. Personal jurisdiction as to ChicoBag is invoked under the provisions of South Carolina Code Annotated § 36-2-803 *et seq.*, in that ChicoBag has established minimum contacts with the forum. ChicoBag advertises, promotes, offers for sale or has offered for sale, and/or sells or has sold textile bags in this district in a manner that violates Section 43(a) of the Lanham Act and South Carolina Code Annotated § 39-5-10 *et seq.*, and harms Plaintiffs. Such actions include advertisements, promotions, offers for sale, and sales via ChicoBag's website and at locations in South Carolina, including 14 Carrot Whole Foods in Lexington, South Carolina.

11. Jurisdiction independently is conveyed upon this Court pursuant to 28 U.S.C. § 1332 given the total diversity of the parties and the amount in controversy.

FACTUAL ALLEGATIONS

ChicoBag's False and Misleading Advertisements

12. The allegations set forth in the previous paragraphs are incorporated by reference as if fully set forth herein.

13. Defendant advertises, promotes, and sells shopping bags that it claims are environmentally superior to competing products, such as plastic bags sold by Plaintiffs and

others. Defendant's advertisements and promotional material claim that using its products will "lessen your environmental impact" and focus on the alleged "environmental damage caused by single-use paper and plastic bags."

14. To illustrate, in its advertising and promotional material, Defendant claims and/or has claimed that a reusable bag needs only to be used eleven (11) times to have a lower environmental impact than using eleven (11) disposable bags. This comparative superiority claim, which communicates that Defendant's products are superior to plastic bags, such as those sold by Plaintiffs, with regard to environmental impact, cannot be substantiated.

15. Upon information and belief, in an effort to strengthen its false and/or misleading claim that a reusable bag needs only to be used eleven (11) times to have a lower environmental impact than using eleven (11) disposable bags, ChicoBag cited the Environmental Protection Agency's website for support. However, upon information and belief, that website does not provide support for this statement.

16. In its advertising and promotional material, Defendant claims and/or has claimed that only one (1) percent of plastic bags are recycled. This numerical claim is not properly substantiated. Upon information and belief, in an effort to strengthen this false and/or misleading claim, ChicoBag cited an article as support for this statement. However, the article cited by ChicoBag does not make this statement or provide any evidence that such a claim can be substantiated.

17. In its advertising and promotional material, Defendant claims and/or has claimed that "somewhere between 500 billion and a trillion plastic bags are consumed worldwide each year." This numerical claim is not properly substantiated. Upon information and belief, in an effort to strengthen this false and/or misleading claim, ChicoBag cited an article as support for

this statement. However, the article cited by ChicoBag does not make this statement, refer to the number of bags used worldwide each year, or provide any evidence that such a claim can be substantiated.

18. In its advertising and promotional material, Defendant claims and/or has claimed that "the world's largest landfill can be found floating between Hawaii and San Francisco" and "this 'landfill' is estimated to be twice the size of Texas and thousands of pounds of our discarded trash, mostly plastics." This claim is not properly substantiated. Upon information and belief, in an effort to strengthen this false and/or misleading claim, ChicoBag cited an article as support for this statement. However, the article cited by ChicoBag does not make this statement. Moreover, the context and implication of the statement is that the "landfill" is comprised of "mostly plastic bags." That claim is false, misleading, and cannot be substantiated.

19. In its advertising and promotional material, Defendant claims and/or has claimed that "[e]ach year hundreds of thousands of sea birds and marine life die from ingestable [sic] plastics mistaken for food." This claim is not properly substantiated. Upon information and belief, in an effort to strengthen this false and/or misleading claim, ChicoBag cited a newspaper as support for this statement. However, no article in the cited newspaper made this statement or provided any evidence that such a claim can be substantiated. Moreover, the context and implication of this statement is that the referenced "ingestible plastics" are comprised of mostly plastic bags. That claim is false, misleading, and cannot be substantiated.

20. The above-described claims illustrate, but do not provide a complete list, of the false and/or misleading claims that Defendant makes and/or has made in its advertising and/or promotional material. Additional non-exhaustive examples are included in the internet advertisements attached hereto as Exhibit 3.

21. Upon information and belief, Defendant has been advertising and/or promoting in print and online the alleged environmental damage caused by plastic bags in order to demonstrate the alleged comparative superiority of the Defendant's product.

22. ChicoBag's advertisements and promotions of its bags are false and misleading because the statements and/or the implied messages concerning the alleged environmental impact of plastic bags are not correct, cannot be substantiated, and/or are likely to deceive customers.

Plaintiffs Have Sustained Irreparable Injury as a Result of ChicoBag's False and/or Misleading Statements

23. ChicoBag's statements concerning the alleged environmental impact caused by plastic bags are false and misleading. ChicoBag's actions constitute a knowing attempt by ChicoBag to misappropriate Plaintiffs' customers and potential customers.

24. ChicoBag's use of the statements concerning alleged environmental impact caused by plastic bags in the advertising and/or promotion of its products is causing and will continue to cause Plaintiffs to suffer irreparable injury to their goodwill and reputations, for which Plaintiffs have no adequate remedy at law.

25. The irreparable injury caused by these actions is especially potent because ChicoBag and Plaintiffs are direct competitors. Whether a bag causes environmental damage is a material issue to consumers interested in purchasing and/or using shopping bags.

26. Plaintiffs have lost and believe that they will continue to lose sales of their plastic bags as a direct result of the above-described false and/or misleading claims made by ChicoBag. Plaintiffs have been forced and will continue to be forced to expend monies to counteract the inaccuracies in ChicoBag's advertising.

FOR A FIRST CAUSE OF ACTION
(VIOLATION OF THE LANHAM ACT)

27. The allegations set forth in the previous paragraphs are incorporated by reference as if fully set forth herein.

28. Defendant's advertising and promotional claims as described above constitute false and/or misleading descriptions of fact in interstate commercial advertising and promotion, which materially misrepresent the environmental impact of plastic bags, including those sold by Plaintiffs, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

29. Defendant's advertising and promotional claims as described above constitute false and/or misleading descriptions of fact in interstate commercial advertising and promotion and convey a false and/or misleading impression which materially misrepresents the environmental impact of plastic bags, including those sold by Plaintiffs, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

30. Defendant's advertising and promotional claims as described above constitute false and/or misleading descriptions of fact in interstate commercial advertising and promotion, which materially misrepresent the environmental superiority of Defendant's products as compared with Plaintiffs' products, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

31. Defendant's advertising and promotional claims as described above constitute false and/or misleading descriptions of fact in interstate commercial advertising and promotion, and convey a false and/or misleading impression which materially misrepresents the environmental superiority of Defendant's products as compared with Plaintiffs' products, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

32. Upon information and belief, Defendant's advertising and promotional claims as described above have deceived and/or have the tendency to deceive a substantial segment of the intended audience.

33. Defendant's false and/or misleading advertising and promotional claims are willful and intentional, and made with deceptive intent, making this an exceptional case.

34. Defendant's false and/or misleading advertising and promotional claims have caused, and will continue to cause, great, immediate, and irreparable harm to Plaintiffs' business reputations, injury to their goodwill, loss of competitive advantage, and pecuniary damages.

FOR A SECOND CAUSE OF ACTION
(VIOLATION OF THE UNFAIR TRADE PRACTICES ACT)

34. The allegations set forth in the previous paragraphs are incorporated by reference as if fully set forth herein.

35. ChicoBag's false and/or misleading advertising and/or promotional claims as described above represent unfair and deceptive trade practices in that ChicoBag has made and/or continues to make false and/or misleading claims in advertisements and promotions, including, but not limited to, the following:

- (a) falsely and/or deceptively communicating that ChicoBag's products are superior to plastic bags, such as those sold by Hilex, with regard to environmental impact;
- (b) falsely and/or deceptively claiming that a reusable bag needs only to be used eleven (11) times to have a lower environmental impact than using eleven (11) disposable bags;
- (c) falsely and/or deceptively claiming that the statement that a reusable bag needs only to be used eleven (11) times to have a lower environmental impact than using eleven (11) disposable bags was substantiated when such statement was not substantiated;
- (d) falsely and/or deceptively claiming that only one (1) percent of plastic bags are recycled;

- (e) falsely and/or deceptively claiming that the statement that only one (1) percent of plastic bags are recycled was substantiated when such statement was not substantiated;
- (f) falsely and/or deceptively claiming that "somewhere between 500 billion and a trillion plastic bags are consumed worldwide each year;"
- (g) falsely and/or deceptively claiming that the statement "somewhere between 500 billion and a trillion plastic bags are consumed worldwide each year" was substantiated when such statement was not substantiated;
- (h) falsely and/or deceptively claiming that the statements "the world's largest landfill can be found floating between Hawaii and San Francisco" and "this 'landfill' is estimated to be twice the size of Texas and thousands of pounds of our discarded trash, mostly plastics" were substantiated when such statements were not substantiated;
- (i) Conveying a false and/or misleading message that "the world's largest landfill can be found floating between Hawaii and San Francisco" is comprised of "mostly plastic bags" when such claim is false, misleading, and cannot be substantiated;
- (j) Falsely and/or deceptively claiming that the statement "[e]ach year hundreds of thousands of sea birds and marine life die from ingestable [sic] plastics mistaken for food" was substantiated when such statement was not substantiated;
- (k) Conveying a false and/or misleading message that "[e]ach year hundreds of thousands of sea birds and marine life die from ingestable [sic] plastics mistaken for food" and that such plastics are comprised mostly of plastic bags when such claim is false, misleading, and cannot be substantiated; and
- (l) Otherwise engaging in conduct that creates a likelihood of confusion or misunderstanding in violation of the South Carolina Unfair Trade Practices Act.

36. ChicoBag's conduct constitutes unfair or deceptive acts or practices in the conduct of trade or commerce as prohibited by Section 39-5-20(a) of the South Carolina Code.

37. Defendant's unfair and deceptive acts and practices impact the public generally.

38. Upon information and belief, ChicoBag's unfair and deceptive acts and practices have occurred on other occasions and/or are likely to occur absent deterrence.

39. Thus, ChicoBag's business practices create a potential for repetition of the unfair and deceptive acts described herein.

40. Plaintiffs have suffered actual, ascertainable damages as a result of ChicoBag's use of the unfair and deceptive acts described herein.

41. As a result of ChicoBag's unfair and deceptive acts, practices, and conduct, Plaintiffs are entitled to recover under the South Carolina Unfair Trade Practices Act three times actual damages, all costs of litigation, and reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Hilex Poly Company, LLC, Superbag Operating, Ltd., and API Enterprises, Inc. pray that this Court enter judgment:

A. Declaring that Defendant violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a);

B. Preliminarily and permanently enjoining Defendant, its officers, agents, employees, representatives, and all others acting in concert or participation therewith from using, airing, disseminating, or causing to be used, aired, or disseminated any advertisements regarding the alleged environmental damage caused by plastic bags and/or the alleged environmental superiority of Defendant's products, as described herein;

C. Ordering Defendant to publish corrective advertising to dispel the false, deceptive, or impliedly false impressions created by its advertising;

D. Ordering Defendant to pay to Plaintiffs the profits made by Defendant, any damages sustained by Plaintiffs, trebled, and costs of the action caused by Defendant's false and misleading advertising and promotion;

E. Ordering Defendant to pay to Plaintiffs their damages, both compensatory and statutory, and up to three times as much by reason of Defendant's false and deceptive advertising and unfair trade practices;

F. Granting Plaintiffs their costs and disbursements in this action, including reasonable attorneys' fees and expert fees;

G. Granting Plaintiffs such other and further relief identified under 15 U.S.C. §§ 1116 or 1117 that the Court deems reasonable; and

H. Granting Plaintiffs such other and further relief as this Court may deem just and proper.

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