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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

ZENITH PRODUCTS CORPORATION, )  
)  
Plaintiff, )  
)  
v. )  
)  
CKC INTERNATIONAL, LLC; )  
SWIFT TOWING AND SALVAGE, INC.; )  
BOBBY’S DEPARTMENT STORE, INC.; )  
S.W. GROUP LLC; NEWARE )  
CORPORATION; and JOHN DOES 1 )  
THROUGH 5 )  
)  
Defendants. )

Civil Action No. 09-103(DRD)

**FIRST AMENDED COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiff ZENITH PRODUCTS CORPORATION (“Zenith” or “Plaintiff”), by and through its undersigned counsel, for its First Amended Complaint against defendants CKC INTERNATIONAL, LLC (“CKC”); SWIFT TOWING AND SALVAGE, INC. (“Swift Towing”); BOBBY’S DEPARTMENT STORE, INC. (“Bobby’s Department Store”); S.W.

GROUP LLC (“Shopper’s World”); NEWARE CORPORATION (“Neware”); and JOHN DOES 1 THROUGH 5 (“Doe”) (collectively, “defendants”), alleges as follows:

**NATURE OF ACTION**

1. This action is for (i) infringement and contributory infringement of federally registered trademarks in violation of Section 32 of the Lanham Trademark Act, 15 U.S.C. § 1114; (ii) the use of false designations of origin, false descriptions and unfair competition in violation of Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a); (iii) federal dilution in violation of Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(c); (iv) related claims of breach of contract, common law trademark infringement and unfair competition, deceptive trade practices, and injury to business reputation and dilution under applicable state law; and (v) breach of contract.

**THE PARTIES**

2. Plaintiff Zenith is a Delaware corporation with its principal place of business at 400 Lukens Drive, New Castle, Delaware 19720.

3. Upon information and belief, defendant CKC is a New York limited liability corporation with a principal place of business at 7 Slater Drive, Elizabeth, New Jersey 07206.

4. Upon information and belief, defendant Swift Towing is a Delaware corporation with a principal place of business at 1001 South Chapel Street, Newark, Delaware 19702.

5. Upon information and belief, defendant Shoppers World is a New York corporation with a principal place of business at 9 East 40th Street, New York, New York 10016.

6. Upon information and belief, defendant Bobby's Department Store is a New Jersey corporation with a principal place of business at 1628 Church Avenue, Brooklyn, New York 11226.

7. Upon information and belief, defendant Neware is a Delaware corporation with a principal place of business at 217 Lisa Drive, #B, New Castle, Delaware 19720.

8. The true names or capacities, whether individual, corporate or otherwise, of defendants John Doe 1 through 5 ("Doe") are currently unknown to Zenith, which therefore sues such defendants by such fictitious names. When their true names and capacities are discovered, Zenith will amend this Complaint by inserting their true names and capacities. Upon information and belief, Doe knowingly and wrongfully sold products labeled with Plaintiff's Marks, as defined below, into the stream of commerce, in violation of Plaintiff's rights, as set out below.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331 and 1338(a) and (b), as it involves substantial claims arising under the Lanham Trademark Act together with related unfair competition claims under applicable state law. All other claims asserted in this action arise out of the same transaction or occurrence, so that this Court has supplemental jurisdiction over all additional claims asserted in this action pursuant to 28 U.S.C. § 1367(a).

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391.

### **FACTS GIVING RISE TO THIS ACTION**

11. Zenith sells bath and storage cabinets and bathroom accessories such as metal furniture including floor stands and space savers, bath caddies, soap dishes, shower rods and toothbrush holders under the trademark ZENITH and other related trademarks.

12. The federally registered Marks are the subjects of United States Trademark Registration Numbers 1602321, 2236008, 2409231, 2691444, 2767281, 2803171, 2845855, 3212192 and 3265217. The registrations are valid and subsisting, uncancelled and unrevoked, and Zenith is the owner of them (collectively, the “Marks”).

13. The Zenith Marks are arbitrary and fanciful marks that are entitled to the highest level of protection afforded by law.

14. The Zenith Marks are associated with Zenith in the minds of consumers, the public and the trade.

15. Zenith and its predecessors have used the Zenith Marks for many years on and in connection with Zenith products.

16. The Zenith Marks identify high quality products originating with Zenith, as a result, in part, of the exacting quality control measures set out below.

17. Based upon Zenith’s extensive advertising, sales and the wide popularity of Zenith’s products, the Zenith Marks have acquired secondary meaning so that any product and advertisement bearing such marks is immediately associated by consumers, the public and the trade as being a product and affiliate of Zenith.

18. Zenith has gone to great lengths to protect its name and enforce the Zenith Marks.

19. Plaintiff has been in business for 50 years, and today sells its product to the nation’s largest retailers, including Wal-Mart, Home Depot, Lowe’s and Target, to name a few. Zenith pays these and other major retailers to advertize Zenith products throughout the year. Zenith also sells to many independent bath store chains in New York, including those that have been solicited by defendant CKC, as referenced further below.

20. Zenith's products are sold nationwide, as well as in Mexico and Canada, through tens of thousands of retail stores. In 2007, Zenith's gross sales were in excess of \$200 Million.

21. The merchandise sold by Zenith and bearing the ZENITH trademark and other Marks is manufactured by Zenith as well as by various manufacturers according to close specifications provided by Zenith.

22. Zenith maintains and enforces rigorous quality standards for the products that bear its ZENITH Marks. Before authorizing the shipment of any products received from its contract manufacturers to its distributors, Zenith inspects and tests a percentage of the product for overall appearance and quality in accordance with Zenith's standards.

23. If this inspection reveals any departures from Zenith's specifications, Zenith then inspects and tests a higher percentage of the product.

24. Following these cycles of inspection, Zenith separates good product from bad, and releases only the merchandise meeting its quality control standards to distributors and retailers for resale to consumers.

25. Because the product that does not meet Zenith's quality control standards is custom made for Zenith and bears the Zenith Marks, Zenith is particular to insure that the rejected product does not enter into the stream of commerce.

26. As a matter of policy Zenith arranges for rejected product to be destroyed, sold for scrap or otherwise disposed of in a manner that prevents any compromise among the purchasing public and the trade of the high value of the Zenith Marks.

27. This procedure of selling superficially saleable merchandise for the nominal value of scrap is costly to Zenith, but Zenith makes this investment in order to maintain the reputation of its merchandise and to protect the Zenith Marks.

28. Beginning in or about September 2008, in the course of routine quality inspection of new products, Zenith discovered that certain batches of metal products included merchandise with rust dust inside the tubes which was clearly visible when opening the packages, rendering them unacceptable for sale bearing the Zenith Marks (“Defective Product”).

29. In a humid bathroom setting where Zenith’s products are used, the Defective Product would quickly rust on the outside, resulting in consumer complaints and dissatisfaction.

30. Based on its quality control procedures, Zenith determined that the quality difference between the Defective Product and products that meet Zenith’s standards was such that consumers reaction upon encountering the rejected products bearing the Zenith Marks could injure Zenith’s goodwill.

31. The difference between the products authorized by Zenith for sale to retailers and the Defective Product was material, in that consumers would consider the quality difference relevant to a decision about whether to purchase the product.

32. For all the foregoing reasons, the Defective Product was not genuine Zenith merchandise, though it appeared superficially similar.

33. For this reason, if the Defective Product was encountered by consumers at retail, they would be confused as to the sponsorship of the Defective Product, believing them to be authorized merchandise of Zenith. In fact, inside the box are Zenith reply cards, containing Zenith’s 800 telephone number and reply address. Zenith’s policy is to replace defective

equipment, and so if customers obtained any of the Defective Product, in addition to loss of goodwill Zenith would likely incur substantial cost replacing the product with first quality product.

34. To dispose of the Defective Product, Zenith arranged with defendant Swift Towing to purchase the Defective Product for scrap and salvage.

35. Swift Towing represented itself to Zenith as a steel scrap dealer. Swift Towing's principal, Ronald Bennett, assured the Zenith representatives that Swift Towing would separate the packaging and glass from the metal. It would then sell the metal as salvage and dispose of the packaging and glass.

36. Swift Towing understood that the Defective Product it was buying from Zenith was salvage material and was not to be re-sold into the marketplace.

37. Between approximately September 5, 2008 and November 25, 2008, Zenith sold to Swift Towing approximately thirty (30) truckloads of Defective Product.

38. The Defective Product was sold to Swift Towing for a cost of \$0.12 per pound. That price was later lowered, after the 15th load, to \$0.03 per pound due to the crash in recycled steel prices in the last months of 2008. These prices were commensurate with the Defective Product being sold as waste and were entirely inconsistent with the cost of genuine Zenith products. Genuine products are sold on a per item basis rather than by weight. However, if one compared the usual retail price of an item such as a Medina® Space Saver that retails for \$39.99, which would convert to approximately \$8 per pound, it is apparent that the scrap price was a mere fraction of a cent on the dollar.

39. On or about December 9, 2008, Zenith learned that Defective Product was being sold in the New York City area by several retail stores, including stores operated by defendants Shoppers World and Bobby's Department Store.

40. For example, at the Shopper's World store in Jamaica, New York, the Medina® Space Saver, Model No. 3065NNWM, selling for \$24.99, and then Three Shelf Pole Caddy, Model No. 2123NNWM, selling for \$14.99, each in Zenith's standard packaging bearing Zenith's Marks, were being sold on the showroom floor.

41. The Shoppers World price stickers indicated that the vendor was defendant CKC.

42. Zenith agents purchased samples of the Defective Product on December 17, 2008, namely the two products referenced above from defendant Shoppers World and one product, a Space Saver, Model No. BBN25, from another retailer, M&S Bargain Hunters. Zenith opened one of the products, the Medina® Space Saver, Model No. 3065NNWM, from Shoppers World, and found a significant amount of rust powder on and around the product. Upon finding a product in that condition, most consumers would immediately close the box and returned the product to the store or contact Zenith for replacement unit or refund.

43. On or about December 10, 2008, Zenith personnel confronted Swift Towing's principal, Ronald Bennett. Mr. Bennett claimed that Swift Towing had sold four (4) truckloads of Defective Product to a product wholesaler in Pittsburgh, Pennsylvania. Mr. Bennett was unwilling to identify the buyer.

44. Zenith immediately demanded that Swift Towing sell no more of the Defective Product and that Swift Towing produce an accounting of the model numbers and quantities sold.



45. Mr. Bennett agreed that Swift Towing would not sell the remaining Defective Product and would provide an accounting of what had been sold, but to date, Zenith has not received such an accounting.

46. Contrary to Mr. Bennett's agreement that Swift Towing would not sell the remaining Defective Product, upon information and belief, Swift Towing continued to sell Defective Product until at least January 9, 2009.

47. On information and belief, defendant Swift Towing actually sold eleven (11) truckloads of Defective Product to defendant Neware, located in New Castle, Delaware and not directly to a wholesaler in Pittsburgh, Pennsylvania.

48. On information and belief, Swift Towing is still in possession and control of at least nineteen (19) truckloads of Defective Product.

49. On information and belief, defendant Neware was aware that the eleven (11) truckloads of Defective Product that it purchased from Swift Towing was not genuine Zenith product. Notwithstanding this knowledge, upon information and belief, Neware nevertheless sold approximately one-half (1/2) of a truckload of Defective Product in its retail outlet in New Castle, Delaware. Additionally, upon information and belief, Neware sold nine (9) truckloads of Defective Product to defendant CKC. Furthermore, upon information and belief, Neware sold one and one-half (1 ½) truckloads of Defective Product to Penn Ave Sales in Pittsburgh, Pennsylvania.

50. On information and belief, defendant CKC is a distributor of products that compete in the market with genuine Zenith products.

51. On information and belief, CKC was aware that the Defective Product that it purchased from Neware had been sold by Zenith as scrap and was not genuine Zenith product.

52. Nevertheless, on information and belief CKC marketed and sold at least six to seven truckloads of Defective Product to retail stores for resale to consumers.

53. CKC marketed and sold such products to, among others, defendants Shoppers World, Bobby's Department Store and Doe.

54. On information and belief, defendant CKC falsely represented to one of Zenith's retail customers, Conway Stores, that it had purchased the Defective Product from a "public warehouse" where Zenith had failed to pay its rent and whose owner was selling the Defective Product to satisfy Zenith's obligation.

55. On information and belief, defendants Shoppers World, Bobby's Department Store and Doe have sold or attempted to sell Defective Product to consumers.

56. The sale of Defective Product has caused and are likely to cause serious injury to Zenith's reputation and goodwill.

### **COUNT ONE**

#### **INFRINGEMENT OF FEDERALLY REGISTERED TRADEMARKS UNDER 15 U.S.C. § 1114**

57. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

58. Defendants' use of the Marks in connection with the sale or resale in commerce of the Defective Product without the authorization of Zenith infringes Zenith's exclusive rights in its federally registered trademark in violation of § 32(1) of the Lanham Trademark Act, 15 U.S.C. § 1114(1), in that the public is likely to be confused, deceived or mistaken regarding the source or sponsorship of the Defective Product, or to believe erroneously that sale of the Defective Product is authorized by Zenith.

59. Defendants' infringements of Zenith's Marks are willful and deliberate and with an intent to reap the benefit of Zenith's goodwill.

60. Defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith monetary damages in an amount to be determined at trial.

61. In addition, defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith immediate and irreparable injury, for which Zenith has no adequate remedy at law.

## **COUNT TWO**

### **CONTRIBUTORY INFRINGEMENT OF FEDERALLY REGISTERED TRADEMARKS**

62. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

63. Defendants Swift Towing, Neware and CKC, individually and collectively, supplied Defective Product to distributors or retailers, including defendants Shopper's World, Bobby's Department Store and Doe, with the knowledge or intent that such distributors or retailers, or their customers, would infringe Zenith's exclusive rights in the Marks.

64. Defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith monetary damages in an amount to be determined at trial.

65. In addition, defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith immediate and irreparable injury, for which Zenith has no adequate remedy at law.

**COUNT THREE**

**FALSE DESIGNATIONS OF ORIGIN, FALSE REPRESENTATIONS  
AND UNFAIR COMPETITION UNDER 15 U.S.C. § 1125(A)**

66. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

67. Defendants' use in commerce of Zenith Marks constitutes a false designation of origin and misrepresents the nature of the Defective Product, in that it erroneously and explicitly designates the Defective Product as genuine products coming from or connected with Zenith.

68. Defendants' use in commerce of Zenith's Mark constitutes a false designation of origin and misrepresentation that is likely to cause confusion or mistake or to deceive as to the affiliation, connection, or association of defendants with Zenith, or as to whether Zenith has sponsored, approved or authorized defendant's sale of the Defective Product or is otherwise connected to Zenith.

69. Defendants' unauthorized aforesaid acts constitute the willful and intentional use of false designations of origin, false representations and false advertising, and unfair competition with an intent to reap the benefit of Zenith's name, goodwill and reputation, in violation of Section 43(a) of the Lanham Trademark Act, 15 U.S.C. § 1125(a).

70. Defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith monetary damages in an amount to be determined at trial.

71. In addition, defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith immediate and irreparable injury, for which Zenith has no adequate remedy at law.

**COUNT FOUR**

**FEDERAL DILUTION UNDER 15 U.S.C. § 1125(C)**

72. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

73. The Marks have become popular, recognized Marks in the northeastern United States, and by reason of Zenith's extensive advertising and use thereof, the Marks are highly distinctive of Zenith's products.

74. The Zenith Marks are famous as defined by Section 43(c) of the Lanham Trademark Act, 15 U.S.C. § 1125(c)

75. Defendants' use of the Marks in connection with their commercial activities that are unconnected to Zenith, and that are neither sponsored by Zenith nor within Zenith's control, has diluted or is likely to dilute the distinctive quality of the Marks and has caused or is likely to cause injury to Zenith's business reputation.

76. Defendants' unauthorized aforesaid acts constitute the willful and intentional dilution, or contributory dilution, of the distinctive quality of, and tremendous goodwill associated with, Zenith's famous ZENITH trademark in violation of Section 43(c) of the Lanham Trademark Act, 15 U.S.C. § 1125(c).

77. Upon information and belief, defendants' aforesaid acts have resulted in actual dilution of Zenith's famous ZENITH trademark.

78. Defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith monetary damages in an amount to be determined at trial.

79. In addition, defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith immediate and irreparable injury, for which Zenith has no adequate remedy at law.

**COUNT FIVE**

**TRADEMARK INFRINGEMENT AND UNFAIR  
COMPETITION UNDER STATE LAW**

80. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

81. Defendants' unauthorized acts constitute willful and intentional trademark infringement and unfair competition under the common and statutory laws of the States of Delaware, New Jersey and New York.

82. Defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith monetary damages in an amount to be determined at trial.

83. In addition, defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith immediate and irreparable injury, for which Zenith has no adequate remedy at law.

**COUNT SIX**

**DECEPTIVE TRADE PRACTICES UNDER STATE LAW**

84. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

85. Defendants' unauthorized acts constitute deceptive trade practices in violation of the Delaware Uniform Deceptive Trade Practices Act, 6 Del. C. §§ 2531 et seq., New Jersey Deceptive Trade Practices Laws, N.J. Stat. Ann. §56:8-2, and New York Deceptive Trade Practices Laws, N.Y. Gen. Bus. Law §349.

86. Defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith monetary damages in an amount to be determined at trial.

87. In addition, defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith immediate and irreparable injury, for which Zenith has no adequate remedy at law.

**COUNT SEVEN**

**INJURY TO BUSINESS REPUTATION  
AND DILUTION UNDER STATE LAW**

88. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

89. Defendants' acts are likely to injure Zenith's business reputation.

90. Defendants' acts are likely to dilute the distinctive quality of its ZENITH trademark in violation of the Delaware Trademark Act, 6 Del. C. § 3313, N.Y. Gen. Bus. Law § 360-1 and N.J. Stat. Ann. § 56:3-13.20.

91. Defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith monetary damages in an amount to be determined at trial.

92. In addition, defendants' aforesaid conduct has caused, and unless restrained by this Court, will continue to cause Zenith immediate and irreparable injury, for which Zenith has no adequate remedy at law.

**COUNT EIGHT**

**BREACH OF CONTRACT AS TO DEFENDANT SWIFT TOWING**

93. Zenith repeats and realleges, as if fully set forth in this paragraph, the allegations contained in the foregoing paragraphs.

94. Zenith and defendant Swift Towing entered into a valid and binding oral agreement, under which Swift Towing agreed to pay Zenith \$0.12 per pound, later modified to \$0.03 per pound, for Zenith's Defective Product, and agreed to process Zenith's Defective

Product by separating the packaging and glass from the metal and selling the metal as salvage material.

95. Swift Towing breached the agreement by failing to pay \$3,462, which is due and owing.

96. Swift Towing breached the agreement by failing to process Zenith's Defective Product as required by the agreement.

97. Swift Towing breached the agreement by selling portions of Zenith's Defective Product to Neware for resale into the marketplace.

98. As a result of said breaches, Zenith has been damaged in an amount to be proven at trial.

#### **PRAYER FOR RELIEF**

WHEREFORE, by virtue of the unlawful conduct of defendants as alleged in this Complaint, plaintiff respectfully prays that the Court:

1. declare, adjudge and decree that defendants' aforesaid acts constitute direct, contributory, and/or inducement of infringement of Zenith's federally registered trademarks in violation of 15 U.S.C. § 1114(1); the use of false designations of origin, false representations, false advertising and unfair competition in violation of 15 U.S.C. § 1125(a); federal dilution in violation of 15 U.S.C. § 1125(c); trademark infringement and unfair competition in violation of the common law of the States of Delaware, New Jersey and New York; deceptive trade practices in violation of the Delaware Uniform Deceptive Trade Practices Act, 6 Del. C. §§ 2531 et seq., New Jersey Deceptive Trade Practices Laws, N.J. Stat. Ann. §56:8-2, and New York Deceptive Trade Practices Laws, N.Y. Gen. Bus. Law §349; and injury to business reputation and dilution in violation of the Delaware Trademark Act, 6 Del. C. § 3313, N.Y. Gen. Bus. Law § 360-1 and N.J. Stat. Ann. § 56:3-13.20.



2. grant preliminarily and permanent injunctions restraining defendants, and their officers, directors, agents, servants, employees, attorneys and those persons in active concert or participation or otherwise in privity with them from engaging in further acts constituting direct, contributory, and/or inducement of trademark infringement, the use of false designations of origin, false representations, false advertising and unfair competition, dilution, injury to business reputation and deceptive trade practices;

3. order that defendants file with the Court and serve upon Zenith within thirty days after service upon defendants of this Court's injunction issued in this action, a written report, signed under oath, setting forth in detail the manner in which defendants have complied with such injunction;

4. order that defendants account to Zenith for, and that Zenith be awarded defendants' profits from, sales of Defective Product advertised, promoted, marketed, sold, offered for sale or provided under the Zenith Marks, together with such increased sum as the Court shall find just and fair in view of the willful and intentional nature of defendants' infringing and tortious acts;

5. award Zenith its damages arising out of defendants' infringing and tortious acts, together with an amount which is three times the amount found as actual damages;

6. award Zenith its damages arising out of defendant Swift Towing's breach of contract;

7. award Zenith its costs, disbursements and attorneys' fees incurred in bringing this action;

8. award Zenith punitive, statutory and multiple damages to the extent permitted by law; and

9. award Zenith such other and further relief as the Court may deem just and proper.

GOETZ FITZPATRICK LLP

By: \_\_\_\_\_/s/\_\_\_\_\_  
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