

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BLACK UNITED FUND OF NEW JERSEY, :
INC., a New Jersey not-for-profit :
corporation; and NATIONAL BLACK :
UNITED FUND, INC., a New York : Civil Action No.
not-for-profit corporation, :
Plaintiffs, :
vs. :
BLACK UNITED FUND OF NEW JERSEY, :
CAMDEN COUNTY CHAPTER, INC., a :
New Jersey corporation; :
ALBERTA MARTIN; BETTY PENNYTON; :
and RANDY MARTIN, :
Defendants. :

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY
BLACK UNITED FUND OF NEW JERSEY, INC. AND NATIONAL
BLACK UNITED FUND, INC. FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs Black United Fund of New Jersey, Inc. ("Black United Fund of New Jersey" or "BUF-NJ") and National Black United Fund, Inc. ("National Black United Fund" or "NBUF") (collectively "BUF") submit this memorandum of law and accompanying Verified Complaint and Demand for Jury Trial ("Verified Complaint") in support of their motion for a preliminary injunction to enjoin and restrain a former local affiliate, the defendant Black United Fund of New Jersey, Camden County Chapter, Inc. ("BUF-NJ/Camden"), and its officers, defendants Alberta Martin, Betty Pennyton, and Randy Martin (collectively "the individual defendants") from the use of the service marks "BLACK UNITED FUND," "NATIONAL BLACK UNITED FUND," and "BLACK UNITED FUND OF NEW JERSEY," or any marks confusingly similar to them.

Defendants' use of these service marks is well documented, and indeed is admitted by them. They do not attempt to finesse the issue of this infringement; rather, they stubbornly stand on their asserted right to continue to mislead the public and undermine the goodwill associated with plaintiffs' marks. A clearer case for a preliminary injunction based on this palming off could not exist.

STATEMENT OF FACTS¹

I. The relationship among the parties

Plaintiffs are respectively the national and local arms of a nationwide family of not-for-profit charitable organizations, which solicit and distribute charitable donations and are involved in social activism. BUF-NJ is the sole New Jersey state affiliate of NBUF, and by virtue of that affiliation it contributes funds to NBUF. The state affiliate, besides its fundraising and general social activism roles, provides technical and support service for various community-based social-service organizations, some of which are directly run by BUF-NJ and others of which receive its assistance in various forms, including grants of money.

Working with the state organization of the BUF family are the various county boards. The main role of the county boards is to act as the "eyes and ears" of the state organization, usually by visiting the sites of agencies which request grants from BUF-NJ and reporting back to the state office with a funding recommendation.

The relationship between BUF-NJ and the county boards is defined by the Terms of Affiliation for County Boards (the "Agreement"), attached to the Verified Complaint as Exhibit C. For purposes of this motion, the

¹ The within facts are contained in the Verified Complaint.

Agreement contains two key terms. One is Article III(K), which provides that county boards may not raise funds independently. The second is Article III(A), which explicitly conditions the use of the name "Black United Fund" on the existence of affiliation.

Beginning in 1981, the individual defendants were members of the county board for Camden county. In June of 1993, in an attempt to revitalize the county board system, BUF-NJ took stock of various boards and decided to reorganize. Part of that reorganization was to remove board members and chairpersons from boards which had become quiescent, including the Camden board.

In a letter dated June 1, 1993 (Exhibit D to the Verified Complaint), the president of BUF-NJ, Lloyd J. Oxford, wrote to defendant Alberta Martin and expressed the organization's gratitude for her past work and dedication. At the same time, he relieved her of her responsibilities as chairperson/convener of the Camden board. In response, Alberta Martin wrote back to Mr. Oxford on June 7, 1993 (Exhibit E to the Verified Complaint), as follows:

Dear Mr. Oxford:

On behalf of the Camden County Board, its President and founder, a heartily [sic] thanks is extended for the plaque which was sent by you.

Our association of many years continues to be a learning experience and we are

grateful. Furthermore, we realized many things in growing and will continue to work for the benefit of the community.

Camden County Black United Fund was formed under the leadership of past Newark Mayor Kenneth Gibson, Alberta Martin and other individuals. Also, the Camden County Black United Fund Inc. has its own seal and 501 (c) 3 status.

It is also a fact that Camden City Black United Fund has its own seal of Incorporation and 501 (c) 3 status.

In the true spirit of "strengthen African-American Families," we will continue our services to the public. Please be advised that we will decide at a future date if necessary on changes of Officers and Chairperson/Convener of the Camden County Boards.

Thank you for your interest and small token of appreciation for dedication of service. If I could be of any assistance to you, please do not hesitate to contact me personally.

Very truly yours,
[signed]
Alberta Martin.
President
Black United Fund, Inc.

Upon receipt of the June 7, 1993 letter from Alberta Martin, Mr. Oxford's office contacted the New Jersey Department of State to see if, indeed, the Camden county board had been incorporated, albeit without authorization. The state's records indicated that, in fact, on November 19, 1987, the "Black United Fund of New Jersey Inc. Camden County Chapter" was incorporated in New

Jersey. Alberta Martin was listed as president, and the other individual defendants were listed as trustees.

On June 18, Mr. Oxford again wrote to Alberta Martin (Exhibit F to the Verified Complaint), explaining that her organization's use of the BUF name was unauthorized and illegal, and instructing her to cease and desist from that use and to turn over any monies collected in the name of BUF-NJ -- both demands based on the terms of the Agreement. The letter was sent by both certified and regular mail; despite the generous offer in Alberta Martin's letter of her availability for future assistance, the certified letter was refused.

While waiting for a response from Alberta Martin, the BUF-NJ offices received a call from another woman in Camden, a social activist named Rosemary Jackson. The executive director of the Camden Urban Women's Center, a BUF-NJ grant recipient, Ms. Jackson related that Alberta Martin had called her and requested certain documentation from the Women's Center files. Ms. Jackson thought it strange that Alberta Martin did not obtain these directly from the BUF-NJ offices in Newark, and called BUF-NJ to express her confusion about BUF-NJ/Camden.

Two days later, on June 30, the Chief Executive Officer and President of NBUF, Mr. William T. Merritt, wrote his own letter (Exhibit G to the Verified Complaint) to Alberta Martin, again informing her that she was not

authorized to use the BUF name and that legal action would follow if she did not stop. He also informed her that the names "BLACK UNITED FUND" and "NATIONAL BLACK UNITED FUND" are registered service marks of NBUF. There was no response to that letter. Phone calls to the BUF-NJ/Camden office still are answered by a BUF-NJ answering machine, which tells listeners they have reached "the home of the Black United Fund."

II. The BUF service marks

The social-service and charitable activities of the National Black United Fund and the Black United Fund have been briefly sketched out above. The renown of these organizations has grown over the years such that they are well known in the African-American community at large, and, crucially, among both sources and recipients of BUF assistance. The names "BLACK UNITED FUND" and "NATIONAL BLACK UNITED FUND" are registered service marks of NBUF, which has continuously used these marks (the "NBUF marks") such that they have developed that renown. Affidavits for use of the NBUF marks have been filed with the United States Patent and Trademark Office, which registration is presently valid and outstanding (Exhibits A and B to the verified Complaint).

In addition, BUF-NJ has used the name "BLACK UNITED FUND" as an authorized licensee of NBUF, as well as using its own corporate name, "BLACK UNITED FUND OF NEW

JERSEY," such that both names have become associated with BUF-NJ in the New Jersey African-American community and among the state's charitable donors and recipient agencies. (The NBUF marks and the service mark "BLACK UNITED FUND OF NEW JERSEY" will be collectively referred to herein as the "BUF marks.")

The BUF marks are valuable assets of the BUF agencies. They tell potential donors, grantees, and other social-service and activist organizations that a given group using the marks is affiliated with NBUF, an organization whose tenets, policies and personnel are known to them. They also have a value as a desired source of identification for similarly-minded organizations which may wish to affiliate with them.

In a related vein, the BUF agencies have an obligation to their affiliated organizations to protect the BUF marks, since their use is a privilege of affiliation. In return, NBUF receives funds raised by the state offices, and BUF-NJ receives the invaluable organizational assistance rendered by active, loyal county boards.

Ultimately, the best proof of the value of the BUF marks is that defendants brashly have chosen to use them despite the severing of formal ties with plaintiffs.

LEGAL ARGUMENT

It is well established that a preliminary injunction should be granted in a trademark or service mark infringement case where the movant produces evidence of the following:

[A] the likelihood that the applicant will prevail on the merits at final hearing; [B] the extent to which the plaintiffs are being irreparably harmed by the conduct complained of; [C] the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and [D] the public interest.

Opticians Association of America v. Independent Opticians of America, 920 F.2d 187, 191-2 (3rd Cir. 1990), quoting, Bill Blass, Ltd. v. Saz Corp., 751 F.2d 152, 154 (3rd Cir. 1984).

As will be shown below, each of the factors enumerated by the Third Circuit is easily met here. The likelihood of success is nearly axiomatic in a palming-off case such as this one. Irreparable harm is presumed to exist where there is likelihood of confusion, and is also present when a mark's owner loses control over the mark. The harm caused to the defendants by an injunction is rendered irrelevant by their knowing and intentional use of the plaintiffs' marks. And the public interest is always served where the public is protected from confusion and deception.

A. The plaintiffs are likely to prevail on the merits of their claims.

1. **NBUF is likely to prevail on its statutory service mark infringement claims regarding the NBUF marks.**

The first and third counts of the Verified Complaint are for service mark infringement, under federal law -- Section 32(1) of the Lanham Act, 15 U.S.C. §1114(1)² -- and New Jersey statutory trademark law, N.J.S.A. § 56:3-13.16. This Court has stated that the standards under both statutes are "identical: whether a likelihood of confusion exists." Apollo Distributing Co. v. Jerry Kurtz Carpet Co., 696 F.Supp. 140, 143 (D.N.J. 1988).

It has been held that in a case of palming-off, where, as here, the infringing use of the mark is

² 15 U.S.C. §1114 (also designated as Section 32(1) of the Lanham Act) provides in pertinent part:

Any person who shall, without the consent of the registrant --

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark . . . in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; . . . shall be liable in a civil action by the registrant . . .

admitted, "likelihood of success on the merits" is established. Power Test Petroleum Distrib., Inc. v. Calcu Gas, Inc., 754 F.2d 91, 95 (2nd Cir. 1985). Even beyond this, plaintiffs readily can demonstrate the likelihood of success on their service mark claims under the Third Circuit's three-part test, consisting of proof that:

(1) the marks are valid and legally protectable; (2) the marks are owned by the plaintiff; and (3) the defendant's use of the marks to identify goods or services is likely to cause confusion concerning the origin of the goods or services.

Opticians, 920 F.2d at 192.

a. The NBUF marks are valid and legally protectable.

Under the Lanham Act, a registered mark becomes "incontestable" upon the filing of an affidavit of use between the fifth and sixth years of that mark's registration. 15 U.S.C. §§1058, 1065. Incontestability means that, subject to certain enumerated defenses not relevant here, the registration is conclusive evidence of the registrant's right to use the mark. Opticians, *id.* at 194; Pedi-Care, Inc. v. Pedi-A-Care Nursing, Inc., 656 F.Supp. 449, 453 (D.N.J. 1987). The NBUF marks have been registered since 1984, and a valid affidavit has been filed [Verified Complaint ¶9]. Certified copies of the registrations for NBUF marks are attached to the Verified Complaint as Exhibits A and B. Thus the NBUF marks meet

the first prong of the likelihood-of-success test -- that the marks be valid and legally protectable.³

b. The NBUF marks are owned by NBUF.

Under the Lanham Act, registration of an incontestable mark is conclusive evidence, not only of the validity of the mark and of its registration, but "of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." Opticians, 920 F.2d at 194 (emphasis added). Hence the NBUF marks are conclusively proved to be owned by NBUF.

c. The defendants' infringement of the NBUF marks is likely to cause confusion.

The analysis of likelihood of confusion is central to a service mark infringement case.⁴ Here defendants have taken key elements of one NBUF mark, "NATIONAL BLACK UNITED FUND," and have lifted another one, "BLACK UNITED FUND," wholesale. They have used the marks

³ The validity and protectability of the common-law service mark, "BLACK UNITED FUND OF NEW JERSEY," will be discussed infra.

⁴ Actual confusion need not be shown where the marks are identical, Opticians, 920 F.2d at 195. In any event, there has been actual confusion, as evidenced by the inquiry regarding BUF-NJ/Camden's affiliation status made by social-services activist Rosemary Jackson. Actual confusion is considered compelling evidence of likelihood of confusion. Apollo Distributing, 696 F.Supp. at 142; American Greetings Corp. v. Dan-Dee Imports, Inc., 619 F. Supp. 1204, 1223 (D.N.J. 1985).

in incorporating in the state of New Jersey. They have used them, according to Alberta Martin, in registering with the Internal Revenue Service as a tax-exempt organization. Alberta Martin signs her correspondence as president of the "Black United Fund," and defendant NJ-BUF/Camden's answering machine (ironically, also the property of NJ-BUF) still answers phone calls as "the home of the Black United Fund." [Verified Complaint, ¶¶ 13-21.] Under these facts there is no way that anyone other than plaintiffs themselves would know that defendants are not affiliated with BUF.

In a case such as this, there is no need for complex analysis, as demonstrated in the Third Circuit's decision in Opticians:

Generally, if the overall impression created by the marks is essentially the same, "it is very probable that the marks are confusingly similar." Where the owner of the trademark and the infringer "deal in competing goods or services, the court need rarely look beyond the mark itself. In those cases the court will generally examine the registered mark . . . and compare it against the challenged mark."

Id. at 195 (citations omitted).

The Opticians case is virtually on point. An association of opticians brought an action against some of its former members and the new guild they formed, for infringement of the association's marks and for unfair competition. The new group had continued to use the

original group's marks, despite termination of their affiliation with the original association and the latter's insistence that they cease that use. The District Court denied the motion for an injunction, holding that the registration was invalid.

Reversing, the Third Circuit, making a plenary analysis of the likelihood of confusion issue, noted that in a case where two parties are concurrently using the same mark,

Very little analysis is needed . . .
"there is a great likelihood of confusion when an infringer uses the exact trademark. . . ." Thus, likelihood of confusion is inevitable when, as in this case, the identical mark is used concurrently by unrelated entities.

Id. at 195 (emphasis added), quoting, United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134, 142 (3rd Cir. 1981). Here, too, where the exact same marks -- "BLACK UNITED FUND," and its fraternal twin, "NATIONAL BLACK UNITED FUND" -- are being lifted by unaffiliated defendants, there is no need for involved analysis.

The Jaycees case is also instructive regarding defendants' likely argument that BUF-NJ/Camden is delineated from NBUF and BUF-NJ by the addition of the words, "of Camden County" in their name. In the Jaycees case too, a breakaway affiliate had to be restrained from using the parent organization's name. The court noted that there is great likelihood of confusion when an

infringer uses the exact same trademark, and that the mere addition of a geographical description (in that case, the name "Philadelphia") would not ameliorate that confusion. Id. at 142.

Similarly, in National Board of the Young Women's Christian Ass'n of the U.S.A. v. Young Women's Christian Ass'n of Charleston, South Carolina, 335 F. Supp. 615 (D.S.C. 1971) ("YWCA") -- another case involving a splintered-off affiliate wrongfully using a protected name -- the court rejected the argument that prefacing "YWCA" with "Charleston" would eliminate potential confusion. Id. at 628.

Finally, courts sometimes consider the infringer's intent in choosing a mark as a test for likelihood of confusion. The reasoning is that by purposely and knowingly using another's mark, the infringer acknowledges that he expects to profit from the resulting confusion. See, e.g., Apollo Distributing Co. v. Jerry Kurtz Carpet Co., 696 F.Supp. 140, 142 (D.N.J. 1988) (even where no malicious intent, defendants should have ceased use when put on actual notice of infringement); Mobil Oil Corp. v. Pegasus Petroleum Corp., 818 F.2d 254, 258 (2d Cir. 1987) (bad faith in infringement is compelling evidence of likelihood of confusion). Here, Alberta Martin's letter of June 7, with its "in-your-face" attitude about her

and BUF-NJ/Camden's use of the BUF marks, is the epitome of bad faith.

Considering all these factors, then, it is clear that likelihood of confusion has been established as to the NBUF marks. Furthermore, the validity and ownership of the NBUF marks are beyond cavil. Thus, as to the NBUF marks, likelihood of success is nearly certain in this case -- the type of case the Third Circuit has called "open and shut." Opticians, 920 F.2d at 195, quoting, 2 J. McCarthy, Trademarks and Unfair Competition, §23.3 (2d ed. 1984) ("McCarthy").

2. Plaintiffs are likely to prevail on their common-law service mark infringement claims regarding the BUF marks.

The foregoing analysis would be enough to prove likelihood of success of an action to protect BUF-NJ's common-law mark, "BLACK UNITED FUND OF NEW JERSEY," since, as discussed supra, the mere addition of a geographic name does not serve to distinguish a mark. Thus, "BLACK UNITED FUND OF NEW JERSEY" is entitled to the same protection as NBUF's registered mark for "BLACK UNITED FUND," and the addition of "of Camden County" would be irrelevant. In contrast to the defendants, BUF-NJ is a legitimate affiliate of NBUF, and its use of an NBUF mark is therefore authorized as a license. See generally, Jaycees, 639 F.2d at 139 (discussing licensing of properly affiliated users).

Beyond this, however, the plaintiffs here claim protection of their marks as common-law service marks, including the BUF-NJ rights in the name "BLACK UNITED FUND OF NEW JERSEY." To establish common-law service mark rights, a user must establish priority of appropriation and use in the mark. Pedi-Care, supra, 656 F.Supp. at 454. NJ-BUF has done so here by developing renown among members of the African American Community at large, as well as the foundation, charity and social-service communities. As regards the NBUF marks, it is well recognized that a common-law right in a mark exists separate and independent of Lanham Act rights in the mark, id. For the same reasons, then, the NBUF marks also belong to NBUF as common-law marks under the appropriation-and-use standard.

The same tests for likelihood of confusion are applied to both statutory and common-law service mark claims. Id.; Apollo Distributing, 696 F. Supp. at 143. Thus plaintiffs are likely to succeed on their common-law claims as well.

3. Plaintiffs are likely to succeed on their statutory and common-law unfair competition claims.

Section 43(a) of the Lanham Act, 15 U.S.C. §1124(a), proscribes the use of "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact . . . which is likely

to cause confusion, or to cause mistake, or to deceive" as to the affiliation or origin of goods or services. New Jersey's unfair competition statute, N.J.S.A. §56.4-1, is essentially the same, as are the tests for determining whether there is a violation. Apollo Distributing, 696 F. Supp. at 143; American Greetings Corp. v. Dan-Dee Imports, Inc., 619 F. Supp. 1204, 1218 (D.N.J. 1985).

It is hornbook law that a showing of trademark infringement under Section 32 of the Lanham Act also demonstrates a violation of Section 43(a) of the Lanham Act, because both are based on likelihood of confusion. Id.; Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 871 (2d Cir. 1986). Thus, the palming-off of the defendants' organization as affiliated with plaintiffs also constitutes a violation of Section 43(a) and N.J.S.A. §56:4-1.

4. Plaintiffs are likely to succeed on their contributory infringement claims.

None of the individual defendants can escape liability for service mark infringement by arguing that they themselves did not actively engage in passing off BUF-NJ/Camden as affiliated with BUF-NJ or NBUF after the affiliation was terminated. Each remains a corporate officer of BUF-NJ/Camden, thus enabling it to continue to exist under an illegal and deceptive name. Even if a party does not control others involved in an infringement, it can be held responsible for that infringement if it

continues to cooperate in the activities of another whom it knows or has reason to know is engaging in trademark infringement. See, Inwood Laboratories, Inc. v. Ives Drug Co., Inc., 456 U.S. 844, 854, 102 S.Ct. 2182, _____, 72 L.Ed.2d 606, 615 (1982). All that is necessary is knowledge of the infringement. Power Test Petroleum Distrib., Inc. v. Manhattan & Queens Fuel Corp., 556 F. Supp. 392, 394 (E.D.N.Y. 1982).⁵

Considering that as corporate officers the individual defendants would be charged with knowledge of BUF-NJ/Camden's activities, and may be held personally liable for them, see In re Fleet, 95 B.R. 319, 338 (E.D. Pa. 1989), it is likely that plaintiffs would succeed in their contributory infringement and aiding and abetting causes of action against them.

B. Plaintiffs are being irreparably harmed by the ongoing infringement by defendants.

In a service mark case, a showing of likelihood of success on the merits establishes the requisite risk of irreparable harm on which to base a grant of a preliminary

⁵ As to Alberta Martin herself, she describes herself as the founder and president of BUF-NJ/Camden [Verified Complaint, Exhibit E]. Evidence unearthed during discovery may well show that she is the alter ego of BUF-NJ/Camden, so completely and fully identified with the corporation that she could be held liable for its unfair competition violations. See, e.g., In re Fleet, 95 B.R. 319, 338 (E.D. Pa. 1989). More significantly, as the one in charge of the misleading marketing and advertising for BUF-NJ/Camden, she may be held liable for her own infringing acts. See, id.

been here, "it follows that if such use continues, the public interest will be damaged." Id. at 198.

Plaintiffs have thus shown that they are likely to succeed on the merits of their various infringement claims; that they will be irreparably harmed if an injunction does not issue; that the balance of the hardships favors plaintiffs; and that the public interest favors the granting of an injunction. Thus the tests for the issuance of a preliminary injunction in service mark cases are all met.