

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

MARK NUTRITIONALS, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. SA-02-CA-0088 EP
	§	
INNOVATIVE MARKETING SOLUTIONS, INC., DOING BUSINESS AS KANOODLE.COM,	§	
	§	
Defendant.	§	

FIRST AMENDED COMPLAINT

Plaintiff Mark Nutritionals, Inc. (“MNI”), through its attorneys, complains of Defendant Innovative Marketing Solutions, Inc., doing business as Kanoodle.com, and alleges as follows, upon knowledge with respect to itself and its own acts, and upon information and belief as to all other matters:

I.
NATURE OF THE ACTION

1. This is an action at law and in equity to remedy acts of, *inter alia*, (1) unfair competition under 15 U.S.C. § 1125(a); (2) trademark infringement under 15 U.S.C. § 1114(1); (3) trademark dilution under 15 U.S.C. § 1125(c); (4) trademark dilution under § 16.29 of the Texas Business and Commerce Code; (5) trademark infringement, misappropriation, deceptive trade practices and unjust enrichment under the common law of the State of Texas; and (6) tortious interference with prospective economic advantage under the common law of the State of

Texas; all caused by Defendant's unauthorized use and sale of MNI's famous and distinctive BODY SOLUTIONS® mark.

II.
THE PARTIES

2. Plaintiff MNI is a corporation organized and existing under the laws of the State of Texas with its principal place of business at 13311 San Pedro, San Antonio, Texas 78216. MNI is located and does business within this judicial district.

3. Defendant Innovative Marketing Solutions, Inc., doing business as Kanoodle.com ("Kanoodle"), is a corporation organized and existing under the laws of the State of New York with a place of business at 260 Creekside Drive, Suite 200, Amherst, New York 14228. Kanoodle is doing business in this judicial district.

III.
JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action because this action arises under the Federal Trademark Act, 15 U.S.C. §§ 1051-1127, jurisdiction being conferred in accordance with 15 U.S.C. § 1121 and 28 U.S.C. § 1331 and § 1338(a). Because this case is a civil action between citizens of different states in which the value of the matter in controversy exceeds the sum of Seventy-Five Thousand Dollars (\$75,000), exclusive of interest and costs, subject matter jurisdiction is proper pursuant to 28 U.S.C. § 1332. Supplemental jurisdiction over the causes of action under Texas state law is proper as substantially related to those causes of action over which the court has original jurisdiction, pursuant to 28 U.S.C. § 1367. Venue is proper under 28 U.S.C. § 1391(b) in that Defendant is doing and transacting business within, and has committed the tortious acts complained of herein, in this judicial district.

IV. **THE FACTS**

A. MNI'S PRODUCTS

5. MNI is a San Antonio, Texas-based national manufacturer and seller of a dietary system under the trademark BODY SOLUTIONS®. MNI has spent years developing and testing its dietary products and promoting them to the public. MNI has spent millions of dollars to make sure that its products meet the highest manufacturing standards and are effective. MNI enjoys a strong reputation in the trade and its BODY SOLUTIONS® products enjoy tremendous consumer recognition and goodwill.

6. Since at least as early as 1990, MNI and its predecessors have continuously manufactured, marketed and sold a dietary system in interstate commerce under the BODY SOLUTIONS® mark. MNI also has sold millions of dollars of its BODY SOLUTIONS® system in the last year. MNI has spent significant sums in the advertising and promotion of its BODY SOLUTIONS® system, including via a nationwide radio advertising campaign, which is often heard in San Antonio.

7. MNI is the owner of several United States trademark registrations and applications for the BODY SOLUTIONS® mark, including trademark Registration No. 2,013,742 for the mark BODY SOLUTIONS & Design, granted November 5, 1995 to SPA Health Consultants, Inc. and properly assigned and transferred to MNI, which is valid and subsisting and constitutes *prima facie* evidence of the validity of the registered mark, of the registration of said mark, of MNI's ownership of said mark, and of MNI's exclusive right to use the mark in commerce.

8. MNI's BODY SOLUTIONS® mark is inherently distinctive. Further, as a result of the long-term and continuous use of the BODY SOLUTIONS® mark, the commercial success in the sale of its dietary products and the dietary program offered under this mark, as well as the

substantial advertising and promotional efforts made in connection therewith, the BODY SOLUTIONS® mark is famous and enjoys enormous secondary meaning. The trade and purchasing public have come to favorably know, recognize and identify the BODY SOLUTIONS® dietary system as originating with MNI. MNI's BODY SOLUTIONS® mark has come to represent the very substantial and valuable goodwill and reputation of MNI in the dietary and nutritional supplement industry.

B. THE KANOODLE SERVICE

9. Kanoodle operates a highly trafficked search engine on the Internet at its website at *kanoodle.com*. According to Kanoodle's website, it "currently receives over 410 million searches a month." Furthermore, Kanoodle has an affiliate program allowing over 9,600 individual website operators to place the Kanoodle search engine on their own websites. Kanoodle also partners with other search engines, such as AskJeeves, Metacrawler.com, Mamma.com, Dogpile.com, CNET.com and TurboFind.com so that Kanoodle's search engine results appear on those websites. See Exhibit A. Thus, the Kanoodle search engine results are widely available to and accessed by Internet users and it enjoys significant profits from the unlawful activities complained of herein.

C. TECHNICAL BACKGROUND

10. Internet users who are searching for a specific company or product or other information, but who do not know a domain name at which it can be found, may utilize one of the numerous search engines available over the Internet to find a relevant website. Typically, a computer user makes use of a search engine by typing in a textual search term or phrase — frequently a company's name or trademark — to be searched. The search engine then checks the search term(s) against its indexed database and displays a list of web pages (the "results" page) that presumably relate to the search term or phrase. Traditional search engines rank or list the

results according to an algorithm or program that attempts to rank the results in decreasing order of relevance so that the most relevant search terms are ranked at the top of the results page where they are the first visible results. Internet users are accustomed to such relevancy ranking and there is a presumption by them that a search engine query using a company's trade names or marks will display the trademark or trade name owner's website among the more highly ranked search results. In fact, users performing search queries for a company's trade names and marks are clearly relying on the goodwill inherent in the name or mark, and are likely searching for the source of the goods corresponding to those names or marks.

11. Because Internet users expect the more relevant search results to be located at the top of the results page, they typically review, select and "click through" to only the top listed results and do not review lower ranked results. It is therefore important for websites to be highly ranked in a search result, otherwise Internet users will not see, and by extension will not visit, them.

D. DEFENDANT'S INFRINGING ACTS

12. Taking advantage of user expectations and without care for third party trademark rights, Kanoodle allows advertisers, including MNI competitors, to buy their way to the top ranked results for search queries using "keywords." Under this business method, an advertiser pays a fee to Kanoodle. In return, Kanoodle ranks the website designated by the advertiser at or near the top of the results page in response to search queries based on or incorporating the particular keywords the entity purchased. This practice is referred to as paid-placement or, as Kanoodle refers to it, "bid-for-location." In addition to paying an up-front fee in return for the placement, the advertiser pays Kanoodle a fixed amount (*e.g.*, 50 cents) each time a user conducts a search and then clicks through to the advertiser's website from the Kanoodle results page. Where there are multiple purchasers of the same keyword, Kanoodle lists the websites

according to price, with those advertisers that agree to pay more receiving a higher rank than those who pay less. See Exhibit B. Accordingly, Kanoodle profits, and in fact derives significant revenues, from the sale of keywords, including MNI's trademarks, as described in further detail below.

13. In an willful attempt to mislead users regarding its business practices, Kanoodle advertises and promotes its search engine to potential users as providing superior search results that are more relevant than the search results provided by traditional search engines because it is "designed specifically to direct [users] to the products or information they are seeking" and therefore provides more relevant results than other search engines. According to Kanoodle, "surfers who use Kanoodle.com are assured that their search results are always relevant to their needs and not cluttered with irrelevant links." See Exhibit B. Accordingly, Kanoodle exercises substantial control over search engine results and cannot therefor complain it was unaware of the acts complained of herein.

14. Notwithstanding Kanoodle's self-serving statements, it is only after listing all the websites belonging to those advertisers that purchased keyword placements that the Kanoodle search engine displays traditionally ranked, unpurchased search engine results. Kanoodle does not explicitly or fairly advise users of its search engine that the top ranked results have been purchased through its keyword bid-for-location service or that more relevant websites may be ranked further down (or not at all) simply because they did not pay a fee to Kanoodle.

15. Notwithstanding MNI's exclusive right to control the use of its famous BODY SOLUTIONS® mark, Kanoodle actively assists competitors of MNI in what is best described as a "bait and switch" of MNI's actual and potential customers. In a typical scenario, a consumer looking for BODY SOLUTIONS® products logs onto Kanoodle.com and enters "BODY SOLUTIONS" as his search term. Kanoodle then retrieves and displays the websites of several

competitors of MNI. The consumer, assuming he has found the legitimate BODY SOLUTIONS® site, then clicks on one of the linked websites, only to arrive at a competitor's site. The consumer may not even realize that he is not at the MNI website and order a different product.

16. Kanoodle profits from this arrangement because in addition to a sign-up fee, “Kanoodle.com generates revenue each time users of its search engine click on a search result to direct them to the web site” that were displayed in response to a search using a keyword purchased by that website operator. See Exhibit B. Thus, Kanoodle has improperly and unlawfully sells the right to use MNI's famous BODY SOLUTIONS® mark —or confusingly similar terms such as BODY SOLUTIONS— as a keyword linking to websites that are not legitimately related to or entitled to use the BODY SOLUTIONS® mark in order to allow MNI competitors to be more highly ranked on Kanoodle's search engine results page. See Exhibit C.

17. For example, a January 10, 2002 search of the term “Body Solutions” on the Kanoodle search engine generated a display page in which the first six results are competitors of MNI who have paid to have their websites ranked ahead of MNI's website in response to a search of MNI's famous BODY SOLUTIONS® trademark. See Exhibit C. Conversely, MNI's website, which prominently uses the term BODY SOLUTIONS and is the only authorized source of the BODY SOLUTIONS® system, is not even ranked among the first 30 search results by the Kanoodle search engine.

18. Causing even more injury to MNI, the website descriptions generated by Kanoodle in response to search queries based on the BODY SOLUTIONS keyword are misleading, misdescriptive and confusing because they do not fairly or adequately disclose that those websites are competitors of and not related to MNI, and do not offer or sell MNI's BODY

SOLUTIONS® products. See Exhibit D. This threatens to confuse and actually does divert consumers, who were actually looking for MNI's website, to the competing websites.

19. Accordingly, Kanoodle's actions are knowing and willful and it is directly, contributorily, and vicariously liable for the resulting acts of unfair competition, trademark infringement, trademark dilution misappropriation, deceptive trade practices, unjust enrichment and tortious interference with prospective economic advantage.

V.
CAUSES OF ACTION

A. UNFAIR COMPETITION

20. MNI repeats and re-alleges each and every allegation contained in paragraphs 1-19 of this Complaint as though fully set forth herein.

21. This cause of action arises under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

22. Defendant's use and sale of the mark BODY SOLUTIONS® as alleged hereinabove is likely to cause confusion, mistake, or deception as to the affiliation, connection, or association of Defendant's advertisers with MNI or as to the origin, sponsorship, or approval of the products of Defendant's advertisers by MNI, and misrepresents the nature, characteristics, and qualities of these products, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

23. MNI is without an adequate remedy at law because Defendant's unfair competition has caused great and irreparable injury to MNI, and unless said acts are enjoined by this Court, they will continue and MNI will continue to suffer great and irreparable injury.

24. Defendant's acts of unfair competition have further caused MNI to sustain monetary damages, loss, and injury in an amount to be determined at the trial of this action,

which amount MNI believes, and therefore alleges, to be not less than ten million dollars (\$10,000,000.00).

B. TRADEMARK INFRINGEMENT

25. MNI repeats and re-alleges each and every allegation contained in paragraphs 1-24 of this Complaint as though fully set forth herein.

26. This cause of action arises under Section 32 of the Lanham Act, 15 U.S.C. §1114.

27. Defendant's use and sale of the mark BODY SOLUTIONS® as alleged hereinabove is likely to cause confusion, mistake, or deception as to the source, sponsorship, or approval of the products of Defendant's advertisers in that others are likely to believe that Defendant's advertisers are in some way legitimately connected with, sponsored or licensed by, or otherwise related to MNI.

28. Defendant's use and sale of the BODY SOLUTIONS® mark was made with actual or constructive knowledge of MNI's rights in the BODY SOLUTIONS® mark.

29. Defendant's use and sale of the BODY SOLUTIONS® mark is without MNI's consent or permission.

30. Defendant's use and sale of the BODY SOLUTIONS® mark constitutes trademark infringement under the Lanham Act, 15 U.S.C. §1114(1).

31. MNI is without an adequate remedy at law because Defendant's trademark infringement has caused great and irreparable injury to MNI, and unless said acts are enjoined by this Court, they will continue and MNI will continue to suffer great and irreparable injury.

32. Defendant's acts of trademark infringement have further caused MNI to sustain monetary damages, loss, and injury in an amount to be determined at the trial of this action,

which amount MNI believes, and therefore alleges, to be not less than ten million dollars (\$10,000,000.00).

C. TRADEMARK DILUTION

33. MNI repeats and re-alleges each and every allegation contained in paragraphs 1-32 of this Complaint as though fully set forth herein.

34. This cause of action arises under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

35. By virtue of MNI'S extensive use, sales, advertising, and promotion of goods and services under the mark BODY SOLUTIONS® said mark has become famous throughout the United States.

36. Defendant's use and sale of the BODY SOLUTIONS® mark as alleged hereinabove constitutes dilution of the distinctive quality of the BODY SOLUTIONS® mark in violation of the Federal Trademark Dilution Act of 1995, Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

37. MNI is without an adequate remedy at law because Defendant's acts of dilution have caused great and irreparable injury to MNI, and unless said acts are enjoined by this Court, they will continue and MNI will continue to suffer great and irreparable injury.

38. Defendant has willfully diluted MNI's famous BODY SOLUTIONS® mark in violation of 15 U.S.C. § 1125(c), and MNI is therefore entitled to the remedies set forth in 15 U.S.C. § 1117(a).

D. TRADEMARK DILUTION

39. MNI repeats and realleges each and every allegation contained in paragraphs 1-38 of this Complaint as though fully set forth herein.

40. This claim arises under the Texas anti-dilution statute, Texas Business & Commerce Code § 16.29.

41. Defendant's use and sale of the BODY SOLUTIONS® mark as alleged hereinabove constitutes dilution of the distinctive quality of the BODY SOLUTIONS® mark in violation of Texas Business & Commerce Code § 16.29.

42. MNI is without an adequate remedy at law because Defendant's acts set forth herein are causing great and irreparable damage to MNI and will continue to damage MNI unless restrained by this Court.

E. TRADEMARK INFRINGEMENT, UNFAIR COMPETITION AND MISAPPROPRIATION

43. MNI repeats and realleges each and every allegation contained in paragraphs 1-42 of this Complaint as though fully set forth herein.

44. This claim is to remedy acts of trademark infringement, unfair competition, and misappropriation under the common law of the State of Texas.

45. Defendant's use and sale of the BODY SOLUTIONS® mark as alleged hereinabove is likely to cause confusion between Defendant's advertisers and/or their products and MNI and/or its products; and such use misappropriates and trades upon the fine reputation and goodwill of MNI in the BODY SOLUTIONS® mark, thereby injuring that reputation and goodwill; and unjustly diverts from MNI to Defendant the benefits arising therefrom.

46. Defendant's unlawful activities constitute trademark infringement, unfair competition, and misappropriation as proscribed by common law.

47. Defendant's acts of trademark infringement, unfair competition, and misappropriation have caused MNI to sustain monetary damage, loss and injury, in an amount to be determined at the time of trial, which amount MNI believes, and therefore alleges, to be not less than ten million dollars (\$10,000,000.00).

48. Defendant has engaged and continues to engage in this activity knowingly and willfully, so as to justify the assessment of increased and punitive damages against them, in an amount to be determined at the time of trial.

49. Defendant's acts of trademark infringement, unfair competition and misappropriation, unless enjoined by this Court, will continue to cause MNI to sustain irreparable damage, loss and injury, for which MNI has no adequate remedy at law.

F. TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE

50. MNI repeats and realleges each and every allegation contained in paragraphs 1-49 of this Complaint as though fully set forth herein.

51. This claim is to remedy acts of tortious interference with prospective business advantage under the common law of, *inter alia*, the State of Texas.

52. Defendant's aforesaid acts constitute intentional interference with MNI's business relations with its customers and/or potential customers for the purpose of causing injury to MNI and its business and for Defendant's commercial gain.

53. Defendant's acts of tortious interference with prospective business relations have caused MNI to sustain monetary damage, loss and injury, in an amount to be determined at the time of trial, which amount MNI believes, and therefore alleges, to be not less than ten million dollars (\$10,000,000.00).

54. Defendant has engaged and continues to engage in this activity knowingly and willfully.

55. Defendant's acts of tortious interference with prospective business advantage, unless enjoined by this Court, will continue to cause MNI to sustain irreparable damage, loss and injury, for which MNI has no adequate remedy at law.

VI.
REQUEST FOR JURY TRIAL

MNI hereby makes demand for a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure as to all issues herein so triable.

VII.
PRAYER FOR RELIEF

WHEREFORE, Plaintiff Mark Nutritionals prays that:

1. The Court finds that MNI owns valid and subsisting trademarks.
2. Defendant be held liable under each claim for relief set forth in this Complaint.
3. Defendant, its agents, servants, employees, and attorneys, and all other persons in active concert or participation with them, be enjoined from using or selling BODY SOLUTIONS (however spelled or punctuated, whether capitalized, abbreviated, singular or plural, printed or stylized, whether as one word or two, whether used alone or in combination with any word(s), punctuation or symbol(s), and whether used in caption, text, orally or otherwise), or any other reproduction, counterfeit, copy, colorable imitation or confusingly similar variation of BODY SOLUTIONS, as a trademark or service mark, trade name or domain name, or in the advertising, distribution, sale, or offering for sale of Defendant's products and/or services.
4. Defendant be ordered to cancel all "sponsored links" and any other arrangements with any Internet search engine, including Google, tied to the BODY SOLUTIONS® mark or any mark of MNI or any mark similar thereto.
5. Defendant be required to withdraw, cancel or abandon any and all registrations or applications to register any trademarks, trade names, or domain names containing BODY SOLUTIONS (however spelled or punctuated, whether capitalized, abbreviated, singular or plural, printed or stylized, whether as one word or two, whether used alone or in combination with any word(s), punctuation or symbol(s), and whether used in caption, text, orally or

otherwise), or any other reproduction, counterfeit, copy, colorable imitation or confusingly similar variation of the BODY SOLUTIONS® mark.

6. Defendant be required to pay to MNI all damages MNI has suffered by reason of Defendant's unlawful acts set forth herein, together with legal interest from the date of accrual thereof, which amount MNI believes, and therefore alleges, to be not less than ten million dollars (\$10,000,000.00).

7. Defendant be required to account for and pay to MNI all profits wrongfully derived by Defendant through its unlawful acts set forth herein, together with legal interest from the date of accrual thereof.

8. Defendant be required to pay to MNI punitive damages in an amount not less than one hundred million dollars (\$100,000,000.00), as determined by this Court, for Defendant's deliberate and willful trademark infringement and unfair competition.

9. Defendant be required to pay to MNI its reasonable attorneys' fees and disbursements incurred herein, pursuant to 15 U.S.C. § 1117 and the equity powers of this Court.

10. Defendant be required to pay to MNI the costs of this action.

11. This Court award MNI such other and further relief as this Court deems just and equitable.

Respectfully submitted,

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