

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

ZETA ESPACIAL S.A.,

a Spanish corporation located at Polígono
Industrial Can Rosés, Avda. de las
Olimpiadas 79, 08191 Rubí (Barcelona)
SPAIN

Plaintiff,

v.

IMAGININGS 3, INC., an Illinois
corporation,

Defendant.

CASE NO. _____

**COMPLAINT FOR FEDERAL AND
STATE TRADEMARK
INFRINGEMENT, UNFAIR
COMPETITION, AND TRADEMARK
DILUTION**

JURY DEMAND

Plaintiff ZETA ESPACIAL S.A. ("Zeta") for its Complaint against Defendant
IMAGININGS 3, INC. ("Imaginings") alleges as follows:

NATURE OF THE ACTION

1. This is an action for trademark infringement under Lanham Act § 32, 15 U.S.C. § 1114; unfair competition under Lanham Act § 43(a)(1), 15 U.S.C. § 1125(a)(1) and under 815 ILCS 510/2; trademark dilution under Lanham Act § 43(c), 15 U.S.C. § 1125(c) and under 756 ILCS 1036/65; and common law trademark infringement and unfair competition.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332, 1338, and 1367. Zeta's claims are, in part, based on violations of the Lanham Act,

as amended, 15 U.S.C. § 1051, *et seq.* This Court has jurisdiction over Zeta's Illinois State law claims under 28 U.S.C. §§ 1332, 1338(b), and 1367.

3. Venue is proper in this District under 28 U.S.C. § 1391.

THE PARTIES

4. Plaintiff Zeta is a corporation organized under the laws of Spain with its principal place of business at Polígono Industrial Can Rosés, Avda. de las Olimpiadas 79, 08191 Rubí (Barcelona) SPAIN.

5. Upon information and belief, Defendant Imaginings 3, Inc. is an Illinois corporation with a principal place of business at 6401 W. Gross Point Rd., Niles, IL 60714-4507.

6. Upon information and belief, Defendant operates under the fictional assumed business name Flix Candy and/or Flix Imaginings 3.

FACTUAL BACKGROUND

7. Zeta offers a wide variety of confectionery products sold throughout the world and throughout the United States, including in the Northern District of Illinois.

8. Zeta was founded in 1979 and since then has been a leading manufacturer and seller of carbonated confectionary products (popping candy) in various forms.

9. Zeta owns common law rights to and several federal registrations covering the trade mark POP ROCKS and POP ROCKS and design (collectively the "POP ROCKS Mark") as used in connection with a variety of goods including particularly but not limited to various popping candy products.

10. Zeta's federal trademark registrations covering the POP ROCKS Mark include registration

Nos.: 2782160; 3411913; 2911341; 2776423; 3294618; 1380669; 3455689; 3268725; 3414829; 3411913; and 2740996 (collectively the "POP ROCKS Registrations").

11. Zeta's POP ROCKS Mark is famous.
12. Zeta has used its POP ROCKS Mark in commerce in the United States.
13. Defendant Imaginings manufactures and sells various candy and confectionary products including carbonated popping candy.
14. Upon information and belief the internet domain name flixcandy.com is registered to Defendant and Defendant owns and operates a website at this address including an online store from which customers may purchase its products.
15. Defendant supplies its products to wholesalers located throughout the United States.
16. Defendant has used the phrase "Rock'N'Pop" in connection with the sale, offering for sale, distribution, and advertising of carbonated popping candy.
17. Defendant's commercial use of "Rock'N'Pop" in connection with carbonated popping candy is likely to cause confusion, or to cause mistake or deception as to the affiliation, connection or association of Zeta with Defendant or as to the origin, sponsorship, or approval by Zeta of Defendant's commercial activities.
18. Defendant's commercial use of "Rock'N'Pop" in connection with carbonated popping candy is likely to dilute Zeta's POP ROCKS Mark.
19. Upon information and belief, Defendant's use of "Rock'N'Pop" has been in knowing and willful disregard of Zeta's rights and has continued after notice from Zeta.
20. Defendant's infringement and unfair competition as set forth above are and have been willful such that this action is exceptional under 15 U.S.C. § 1117(a).

**COUNT I
TRADEMARK INFRINGEMENT UNDER THE LANHAM ACT**

21. Plaintiff Zeta re-alleges each allegation set forth in the previous paragraphs.
22. Defendant's use of "Rock'N'Pop" in connection carbonated popping candy is likely to cause confusion, mistake, and deception regarding the origin or sponsorship of Defendant's goods and constitutes infringement of Zeta's POP ROCKS Registrations in violation of 15 U.S.C. § 1114.
23. The intentional nature of Defendant's aforementioned acts makes this an exceptional case pursuant to 15 U.S.C. § 1117(a).

**COUNT II
UNFAIR COMPETITION UNDER THE LANHAM ACT**

24. Plaintiff Zeta re-alleges each allegation set forth in the previous paragraphs.
25. Defendant's use of "Rock'N'Pop" in connection carbonated popping candy to promote, market, or sell candy in competition with Zeta is likely to cause confusion, mistake, and deception among consumers as to affiliation, connection, or association and such use constitutes unfair competition under 15 U.S.C. § 1125(a).
26. The intentional nature of Defendant's aforementioned acts makes this an exceptional case pursuant to 15 U.S.C. § 1117(a).

**COUNT III
DILUTION UNDER THE LANHAM ACT**

27. Plaintiff Zeta re-alleges each allegation set forth in the previous paragraphs.
28. The POP ROCKS Mark is famous and widely recognized by consumers.

29. Defendant's unauthorized use of "Rock'N'Pop" in connection carbonated popping candy began after Zeta's POP ROCKS Mark became famous.

30. Defendant's unauthorized use of "Rock'N'Pop" in connection carbonated popping candy has, and will continue to have, an adverse affect upon the value and distinctive quality of the POP ROCKS Mark. Defendant's use of "Rock'N'Pop" blurs and whittles away at the distinctiveness and identity-evoking quality of the POP ROCKS Mark. Defendant's acts have diluted and are likely to continue to dilute the famous POP ROCKS Mark in violation of 15 U.S.C. § 1125(c).

31. The intentional nature of Defendant's aforementioned acts makes this an exceptional case pursuant to 15 U.S.C. § 1117(a).

**COUNT IV
DECEPTIVE TRADE PRACTICES UNDER 815 ILCS 510/2**

32. Plaintiff Zeta re-alleges each allegation set forth in the previous paragraphs.

33. Defendant's use of "Rock'N'Pop" in connection carbonated popping candy to promote, market, or sell is likely to cause confusion of or misunderstanding as to source, sponsorship, approval, or certification or as to affiliation, connection, or association and constitutes deceptive trade practice under 815 ILCS 510/2.

**COUNT V
DILUTION UNDER 756 ILCS 1036/65**

34. Plaintiff Zeta re-alleges each allegation set forth in the previous paragraphs.

35. The POP ROCKS Mark is famous and widely recognized by consumers.

36. Defendant's unauthorized use of "Rock'N'Pop" in connection carbonated popping candy

37. Defendant's unauthorized use of "Rock'N'Pop" in connection carbonated popping candy has, and will continue to have, an adverse affect upon the value and distinctive quality of the POP ROCKS Mark. Defendant's use of "Rock'N'Pop" blurs and whittles away at the distinctiveness and identity-evoking quality of the POP ROCKS Mark. Defendant's acts have diluted and are likely to continue to dilute the famous POP ROCKS Mark in violation of 756 ILCS 1036/65.

38. Defendant willfully intended to trade on the Zeta's reputation and fame.

**COUNT VI
COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION**

39. Plaintiff Zeta re-alleges each allegation set forth in the previous paragraphs.

40. Defendant's use of "Rock'N'Pop" in connection carbonated popping candy is likely to cause confusion, mistake, and deception among consumers and such use constitutes trademark infringement and unfair competition under the common law.

41. Defendant's use of "Rock'N'Pop" has been made with knowledge of Zeta's POP ROCKS mark.

JURY DEMAND

Plaintiff Zeta Espacial S.A. hereby request trial by Jury.

RELIEF REQUESTED

Wherefore Plaintiff Zeta Especial S.A. requests this Court to enter judgment against Defendant Imaginings 3, Inc. and any parent, subsidiary, or affiliate corporation or other agent,

servant, employee, or person in active concert or participation with Defendant, granting the following relief:

- a) A judgment that Defendant infringed Plaintiff's trademark rights as alleged above;
- b) A permanent injunction prohibiting further infringement;
- c) An award of damages and costs to Plaintiff pursuant to the provisions of 15 U.S.C. § 1117 including prejudgment interest from the date infringement began;
- d) An accounting of Defendant's sales of and profits from infringing goods;
- e) A judgment declaring Defendant's infringement willful and increasing the aforesaid damages by three times;
- f) A finding that this action is an exceptional case and an award of Plaintiff's attorney's fees and costs as provided by 15 U.S.C. 1117(a).
- g) Such other relief as the Court or a jury may deem just and equitable.

DATED: February 19, 2009

By: _____/s/ Kurt J. Kolar____
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