

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HARLEY FLANAGAN,

Plaintiff,

-against-

JOHN MCGOWAN and MAXWELL JAYSON,

Defendants.
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Civil Action No. 18-cv-04664

VERIFIED COMPLAINT

PLAINTIFF HARLEY FLANAGAN (“Flanagan”), by his attorneys Becker & Poliakoff, LLP, as and for his Verified Complaint against defendants John McGowan and Maxwell Jayson, hereby alleges as follows:

THE PARTIES

1. Plaintiff Harley Flanagan (“Flanagan”) is a resident of the City, County, and State of New York with a business address of 224 West 30th Street, New York, New York 10001.

2. Upon information and belief, defendant John McGowan is a resident of the City, County, and State of New York with a home address of 324 E. 13th Street, New York, New York 10003-5806.

3. Upon information and belief, defendant Maxwell Jayson (together with John McGowan, the “Defendants”) is a resident of the City, County, and State of New York with a home address of 172 W. 79th Street #3G, New York, New York 10024-6419.

JURISDICTION AND VENUE

4. The causes and separate counts set forth herein arise under the trademark laws of the United States, 15 U.S.C. § 1051, *et seq.* as well as the common law of this state. Subject matter jurisdiction is proper in the Court pursuant to 28 U.S.C. § 1331, the claims herein arising under the laws of the United States. This Court has supplemental jurisdiction pursuant to 28 U.S.C. §

1367 over all state law and common law claims in this civil action.

5. This Court has personal jurisdiction over the Defendants, who are or will be found to be residing in and conducting business in this District, and are or will be performing the acts of infringement set forth in this Complaint in this District.

6. Venue is proper in this forum pursuant to 28 U.S.C. § 1391(b), in that a substantial part of the events giving rise to the claims herein have occurred, and will occur, in this District.

FACTUAL ALLEGATIONS

7. Flanagan began his musical career in 1978 (when he was 11 years old) as the drummer for his Aunt Denise's punk rock band named the Stimulators.

8. From a young age, Flanagan was always interested in starting his own band and creating his own, unique sound. In 1981, Flanagan invented the name "Cro-Mags" for his band, and started writing music and auditioning people to join.

9. At first, Flanagan was essentially a one-man band. He wrote the music and lyrics, played all the instruments including the bass, drums and guitar, sang the songs and co-produced the Cro-Mags' first demo in or about 1982-1983 with his Aunt Denise.

10. The original Cro-Mags songs that were included on the demos were "Don't Tread on Me," "Do Unto Others" (which was then titled "Wake Up"), "Dead End Kids," and "Why Don't U," all of which were the blueprint for the Cro-Mags' music and sound that Flanagan created, and was eventually recorded on the Cro-Mags' first album.

11. As is common in the music industry, starting in or about 1981, Flanagan went through several lineups of members of the Cro-Mags band before settling on the line-up that would eventually record the Cro-Mags' debut album named "Age of Quarrel" in 1986. That lineup included Flanagan, Jason McGowan, Maxwell Jayson, Doug Holland and Parris Mahew.

12. In or about 1983/1984, the Cro-Mags played their first live show at CBGB in New York City with Eric Cassanova on vocals, Flanagan on bass, Parris Mayhew on guitar and Maxwell Jayson on drums.

13. Since that first show at CBGB, Cro-Mags has recorded songs and played live shows with many different players, including but not limited to: Flanagan, Parris Mayhew, Doug Holland, Maxwell Jayson, Pete Hines, John McGowan, Gabby Abularach, Rocky George, Dave Dicenco, Rob Buckley, Gary 'G-Man' Sullivan and others.

14. There has never been any question that the Cro-Mags was, is, and has always been Flanagan's invention.

15. In 1989, the Cro-Mags released their second album entitled "Best Wishes." At that time, John McGowan and Maxwell Jayson had already left the band (for the first time) and the band consisted of two (2) song writers, Flanagan (on bass and vocals) and Parris Mayhew, along with Doug Holland on guitar and Pete Hines on drums. During that time, the Cro-Mags were touring in the United States and abroad regularly, selling records and merchandise.

16. After the "Best Wishes" album was released, Doug Holland and Pete Hines left the band and Parris Mayhew and Flanagan started auditioning guitarists. Ultimately, Rob Buckley joined the band as a guitarist and Dave Decenco joined as the drummer. That line-up of the Cro-Mags toured but eventually disbanded.

17. In or about 1992, Flanagan invited McGowan to rejoin the band and the Cro-Mags released their third album, "Alpha Omega" (which featured Dave Decenco on drums, Gabby Abularach and Doug Holland on guitar, Flanagan on bass and vocals, and John McGowan on vocals). At that time, John McGowan sang less than fifty percent (50%) of the band's songs on

“Alpha Omega” and Flanagan sang the rest. At that point, Flanagan was the Cro- Mags’ main vocalist as well as the Cro-Mags’ bass player.

18. When John McGowan rejoined the band, a power struggle began that led to the band’s break up again right before the release of the Cro-Mags’ next album “Near Death Experience,” which featured songs that Flanagan had written and played during the “Alpha Omega” sessions.

19. In 2000, the Cro-Mags, which were at that time comprised of Flanagan on bass and vocals, Parris Mayhew and Rocky George on guitar, and Dave Decenco on drums, released their next album called “Revenge,” which is considered by many to be one of the Cro-Mags’ very best albums to date.

20. In 2001, Flanagan again invited John McGowan to re-join the Cro-Mags, along with Doug Holland, Garry Sullivan on drums, and Rocky George on guitar. This lineup of the Cro-Mags toured the United States together until Flanagan’s first son was about to be born toward the end of 2002 and Flanagan had to stop touring to help with the baby.

21. At that time, John McGowan, without consulting Flanagan and without Flanagan’s permission, booked an entire tour as the Cro-Mags but fraudulently told promoters and venues that Flanagan was touring with the band. To make matters worse, John McGowan also used Flanagan’s image on flyers and posters to sell tickets and then lied about why Flanagan was not on stage each night that the band performed without Flanagan.

22. Since that time, John McGowan has used the “Cro-Mags” name and played songs from the “Age of Quarrel” album without Flanagan’s permission and/or knowledge.

23. Flanagan has repeatedly attempted to stop the illegal use of the name Cro-Mags and given interview after interview in the press and media calling out the fraud being perpetrated on the public but John McGowan continues to use the Cro-Mags' name without Flangan's permission.

24. Between 2002 and 2005, Flanagan had two (2) children and was the primary caregiver to those children.

25. Due to financial limitation and time, Flanagan attempted to try to stop the fraudulent practices by John McGowan with the help of his Aunt Denise and later the help of his wife, but was unable to do so.

26. At all times herein, Flanagan continued to sell Cro-Mags merchandise and recordings for which he secured federal trademarks.

27. In 2011, with his children in school, Flanagan had more time to devote to his music and he signed a new album deal with Southern Lord Records for the album "Cro-Mags" which Flanagan wrote entirely by himself and released in 2016.

28. In 2017, Flanagan also renewed the Cro-Mags merchandise trademark (which lapsed for one month) which he originally registered in 2009. The other 2010 trademark for recordings remained in good standing and both trademarks have been in good standing ever since.

29. In 2017, Flanagan started touring again in both the United States and in Europe and playing new material from the "Cro-Mags" album as well as all of the original Cro-Mags material that he wrote for "Age of Quarrel," "Best Wishes," "Alpha Omega" and "Revenge." Flanagan also entered into several new licensing deals for Cro-Mags merchandise and recordings during this period.

30. Since the creation of the Cro-Mags in 1981, Flanagan's name has never been disassociated with the Cro-Mags name and he is the only person that has been on every single Cro-Mags album.

31. To this day, when Flanagan performs at a live show, he goes by the name "Harley Cro-Mags Flanagan."

32. Defendants are, without Flanagan's permission, actively touring and performing under the name "Cro-Mags" and selling clothing merchandise bearing the Cro-Mags' name, image or logo, without Flanagan's permission and in violation of trademark law.

33. Defendants are advertising a "Cro-Mags" 2018-2019 tour that is comprised of seventeen (17) concerts that, upon information and belief, began on March 10, 2018.

34. As part of the aforementioned tour and other upcoming performances, Defendants are intentionally using old pictures of the Cro-Mags where Flanagan is featured as part of the band that is touring with Defendants in order to bolster sales of tickets for their unauthorized performances.

COUNT ONE
FEDERAL TRADEMARK INFRINGEMENT (15 U.S.C. §1114)

35. Flanagan repeats and realleges the foregoing allegations as if fully set forth herein.

36. Flanagan has two (2) registered trademarks with the United States Patent and Trademark Office.

37. On February 16, 2010, under registration number 3,749,142, Flanagan registered and trademarked the name "Cro-Mags" for, among other things, digital media featuring music, downloadable music and video ("Trademark A").

38. On January 10, 2017, under registration number 5,119,209, Flanagan registered and trademarked the name "Cro-Mags" for clothing ("Trademark B").

39. Flanagan has the common law trademark to the name Cro-Mags. (Trademark A, Trademark B, and Flanagan's common law trademarks are collectively referred to as the "Cro-Mags Trademarks").

40. The Cro-Mags Trademarks marks are highly distinctive and arbitrary, of great value throughout the United States and worldwide, and have become universally associated in the public mind with the products and services of Flanagan.

41. The Cro-Mags Trademarks are incontestable pursuant to 15 U.S.C. § 1065.

42. Defendants have constructive notice of the Cro-Mags Trademarks pursuant to 15 U.S.C. § 1072.

43. Upon information and belief, Defendants also have actual notice of Flanagan's rights in the Cro-Mags Trademarks.

44. Without Flanagan's authorization or consent, Defendants have manufactured, distributed, offered for sale, held for sale, advertised and/or sold the bootleg merchandise to the consuming public in commerce, and/or will manufacture, distribute, offer for sale, hold for sale, advertise and sell such merchandise at future performances, in direct competition with Flanagan's sale of his genuine merchandise.

45. Defendants' sale of unauthorized Cro-Mags merchandise is likely to cause and is causing confusion, mistake and deception among the general purchasing public as to the origin of the merchandise, and is likely to deceive the public into believing that their merchandise is being sold by or is associated with or otherwise is authorized by Flanagan, all to the damage and detriment of Flanagan's reputation, goodwill and sales.

46. Upon information and belief, Defendants' conduct has been or will be in malicious, fraudulent, deliberate, willful and intentional disregard of Flanagan's rights, making this an

“exceptional” case within the meaning of Section 35 of the Lanham Act, 15 U.S.C. § 1117.

47. Flanagan has no adequate remedy at law and, if Defendants’ activities are not enjoined, Flanagan will continue to suffer irreparable harm and injury to its goodwill and reputation.

48. Flanagan cannot be adequately compensated for these injuries by damages alone, and Flanagan has no adequate remedy at law for Defendants’ infringement of his rights.

49. By reason of the foregoing, Flanagan is entitled to injunctive relief, as well as attorneys’ fees and damages, which may be trebled.

COUNT TWO
UNFAIR COMPETITION AND FALSE DESIGNATION OF ORIGIN
(15 U.S.C. § 1125(a))

50. Flanagan repeats and realleges the foregoing allegations as if fully set forth herein.

51. Upon information and belief, Defendants have manufactured, distributed, offered for sale, held for sale, advertised, sold and/or will manufacture, distribute, offer for sale, hold for sale, advertise and sell merchandise which bears the Cro-Mags Trademarks at future performances, without Flanagan’s authorization, and as such, Defendants’ use is likely to cause confusion to the general purchasing public.

52. By misappropriating and using the Cro-Mags Trademarks, Defendants misrepresent and falsely describe to the general public the origin and source of the merchandise and create a likelihood of confusion by ultimate purchasers as to both the source and sponsorship of such merchandise.

53. Defendants’ unlawful, unauthorized and unlicensed manufacture, distribution, offer for sale and/or sale of such merchandise creates express and implied representations that their merchandise was created, authorized or approved by Flanagan, all to Defendants’ profit and

Flanagan's great damage and injury.

54. Defendants acts are in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), in that Defendants' use of the Cro-Marks Trademarks, in connection with Defendants' goods and services sold in interstate commerce, constitutes a false designation of origin and unfair competition.

55. Upon information and belief, Defendants' conduct has been or will be in malicious, fraudulent, deliberate, willful and intentional disregard of Flanagan's rights, making this an "exceptional" case within the meaning of Section 35 of the Lanham Act, 15 U.S.C. § 1117.

56. Flanagan has no adequate remedy at law, and, if not enjoined, Defendants' activities will cause immediate and irreparable injury to Flanagan.

57. Flanagan cannot be adequately compensated for these injuries by damages alone, and Flanagan has no adequate remedy at law for Defendants' infringement of his rights.

58. Flanagan is entitled to injunctive relief, as well as attorneys' fees and damages, which may be trebled.

COUNT THREE
FEDERAL TRADEMARK DILUTION (15 U.S.C. § 1125(c))

59. Flanagan repeats and realleges the foregoing allegations as if fully set forth herein.

60. The Cro-Mags Trademarks are "famous marks" within the meaning of § 43(c) of the Lanham Act, 15 U.S.C. § 1125(c)(1) and have been famous marks prior to Defendants' conduct as alleged herein.

61. Defendants' manufacture, distribution, sale, advertisement, holding and/or offer for sale in commerce of merchandise dilutes the distinctive quality of the Cro-Mags Trademarks, and was or will be done with the willful intent to trade on Flanagan's reputations and/or to cause dilution of the Cro-Mags Trademarks.

62. Defendants' acts constitute knowing and willful violation of Flanagan's rights under section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

63. Flanagan has no adequate remedy at law and, if Defendants' activities are not enjoined, will continue to suffer irreparable harm and injury to Flanagan's goodwill and reputation.

64. Flanagan cannot be adequately compensated for these injuries by damages alone, and Flanagan has no adequate remedy at law for Defendants' infringement of its rights.

65. Flanagan is entitled to injunctive relief, as well as attorneys' fees and damages, which may be trebled.

COUNT FOUR
NEW YORK UNFAIR COMPETITION

66. Flanagan repeats and realleges the foregoing allegations as if fully set forth herein.

67. Flanagan has built up valuable goodwill in the Cro-Mags Trademarks.

68. Defendants' unauthorized use of the Cro-Mags Trademarks is likely to and does permit Defendants to palm off their own unauthorized merchandise as that of Flanagan, all to the detriment of Flanagan and the unjust enrichment of Defendants.

69. Defendants' unauthorized use of the Cro-Mags Trademarks has caused and is likely to continue to cause Flanagan damage by tarnishing the valuable reputation and image associated with Flanagan's goods by falsely labeling and making representations to the consuming public, members of which are likely to and do believe that Defendants' merchandise emanates from or is associated with Flanagan.

70. Defendants' performances under the name Cro-Mags and use of Plaintiff's likeness to promote such performances has caused and continues to cause Flanagan damage by tarnishing the valuable reputation of the Cro-Mags Trademarks.

71. Defendants' acts constitute intentional and willful unfair competition and palming

off pursuant to New York law.

72. Defendants' acts have caused and will continue to cause Plaintiff irreparable harm unless enjoined by this Court, and Flanagan has no adequate remedy at law.

73. As a result of Defendants' wrongful acts alleged herein, Flanagan has suffered and is continuing to suffer irreparable injury.

74. Flanagan cannot be adequately compensated for these injuries by damages alone, and Flanagan has no adequate remedy at law for Defendant's wrongful conduct.

75. Flanagan is entitled to injunctive relief.

COUNT FIVE
DILUTION (NEW YORK GENERAL BUSINESS LAW § 360-L)

76. Flanagan repeats and realleges the foregoing allegations as if fully set forth herein.

77. Flanagan owns all rights, title, and interest in and to the Cro-Mags Trademarks, including all common law rights.

78. Through Flanagan's continuous and widespread use in commerce, including commerce within New York, the Cro-Mags Trademarks have become inherently distinctive within the meaning of N.Y. Gen. Bus. Law § 360-l.

79. Defendants' aforesaid acts are likely to dilute the distinctive quality of Flanagan's Cro-Mags Trademarks, thereby lessening their capacity to identify and distinguish products and services promoted and/or sold by Flanagan.

80. Defendants' aforesaid acts constitute trademark dilution in violation of N.Y. Gen. Bus. Law § 360-l.

81. Defendants' willful and deliberate acts, as aforesaid, have caused and, unless restrained by this Court, will continue to cause, irreparable harm and injury to Flanagan, including to Flanagan's goodwill, reputation, and business, for which Flanagan has no adequate remedy at

law.

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Enter a permanent injunction prohibiting Defendants from any and all uses of the Cro-Mags Trademarks, including but not limited to:

(i) performing and touring under the name of Flanagan's band, the "Cro-Mags", without specifying that Flanagan is not performing with them;

(ii) utilizing Flanagan's name, image, and likeness in connection with Defendants' performances; and

(iii) manufacturing, distributing, offering for sale, holding for sale, advertising and selling clothing merchandise bearing the "Cro-Mags" name, image or logo, without Flanagan's permission and in violation of trademark law.

B. Award damages in the amount of Defendants profits' pursuant to 15 U.S.C. § 1117(a)(1), in an amount to be determined at trial;

C. Award damages suffered by Plaintiff pursuant to 15 U.S.C. § 1117(a)(2), in an amount to be determined at trial;

D. Award the costs of the action pursuant to 15 U.S.C. § 1117(a)(3);

E. Enter an Order that this is an exceptional case and award Plaintiff its reasonable attorneys' fees pursuant to 15 U.S.C. § 1117(a);

F. Enter an Order for treble damages pursuant to 15 U.S.C. § 1117(a) due to Defendants' deliberate, willful, and fraudulent use of the Cro-Mags Trademarks; and

G. Award Plaintiff such other relief as this Court may deem just and proper.

Dated: May 25, 2018

BECKER & POLIAKOFF, LLP

A handwritten signature in cursive script that reads "Glenn Spiegel". The signature is written in dark ink and is positioned above the printed name.

Glenn Spiegel

Sarah Klein

45 Broadway, 17th Floor

New York, NY 10006

Telephone: (212) 599-3322

Facsimile: (212) 557-0295

gspiegel@beckerlawyers.com

sklein@beckerlawyers.com

VERIFICATION


STATE OF NEW YORK)

) ss.:

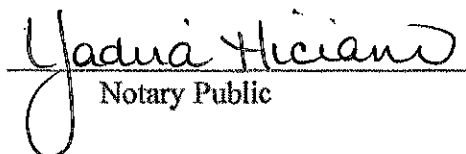
COUNTY OF New York)

HARLEY FLANAGAN, being duly sworn, deposes and says:

I am the Plaintiff in this action. I have read the foregoing verified complaint, and I know the contents thereof to be true based upon my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true. The grounds of my belief as to all matters not stated upon my personal knowledge are the documents and records maintained in my files, and my personal involvement in the dispute giving rise to this action.


HARLEY FLANAGAN

Subscribed and sworn to before me this
21st day of May, 2018


Notary Public

