

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION – TOLEDO

Spangler Candy Company
400 North Portland Street
Bryan, Ohio 43506

Plaintiff,

-vs-

Tootsie Roll Industries, LLC
7401 South Cicero Avenue
Chicago, Illinois 60629

Defendant.

) Case No.

) Judge

) **COMPLAINT**

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Plaintiff, Spangler Candy Company (“Spangler”), for its Complaint against defendant, Tootsie Roll Industries, LLC (“Tootsie”), says that:

PARTIES

1. Plaintiff, Spangler, is a corporation organized under the laws of the State of Ohio that manufactures and sells candy products, including suckers and lollipops, in interstate commerce, and it has its principal place of business at 400 North Portland Street, Bryan, Ohio 43506.

2. Defendant, Tootsie, is a limited liability company that manufactures and sells candy products, including suckers and lollipops, in interstate commerce and, on information and belief, its principal place of business is at 7401 South Cicero Avenue, Chicago, Illinois 60629.

JURISDICTION AND VENUE

3. This is an action for trademark infringement and unfair competition pursuant to § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and, therefore, the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1338.

4. This Court has personal jurisdiction over Tootsie under Ohio's Long Arm Statute, Ohio Rev. Code § 2703.382, because Tootsie, directly and through agents, transacts business in Ohio; because it derives substantial revenue from its sale of candy to consumers in Ohio; because it has an interactive website that allows consumers in Ohio to purchase Tootsie's candy products directly from Tootsie that it delivers to consumers in Ohio; because Tootsie's infringement of Spangler's trade dress, whether such infringement took place in Ohio or elsewhere in the United States, has caused and is causing damage to Spangler in Ohio; and because Spangler's claim for relief against Tootsie arises out of activities that are related to Tootsie's sale of candy products in Ohio.

5. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c), because the Court has personal jurisdiction over Tootsie.

FACTUAL ALLEGATIONS

A. Spangler

6. Spangler manufactures and sells a variety of candy products, including DUM DUMS®, SAF-T-POP®, CIRCUS PEANUTS, and SPANGLER® CANDY CANES,

throughout the United States and in many foreign countries and is, therefore, engaged in interstate commerce. Spangler was founded in 1906 and has manufactured and sold candy products and other confections throughout its history.

7. In 1953, Spangler acquired a lollipop business from Akron Candy Company known as DUM DUM® or DUM DUMS® (hereinafter collectively referred to as DUM DUMS®), including various trademarks relating to that business. Spangler presently owns numerous standard character and design marks relating to its DUM DUMS® lollipops that are registered with the United States Patent and Trademark Office. Spangler has continuously manufactured, marketed and sold DUM DUMS® lollipops throughout the United States and in interstate commerce since it acquired the business in 1953. DUM DUMS® lollipops are a commercial success and among the best-selling lollipop brands in the United States according to industry data.

8. Spangler markets and sells its DUM DUMS® lollipops in a variety of ways. Spangler has its own interactive website that allows consumers throughout the United States to purchase its products directly from it online. Its products are also available for purchase online through other online retailers, such as Amazon and eBay. Spangler also sells products directly to large retailers, such as Sam's Club, who resell the product at retail to consumers. In addition, Spangler uses brokers to sell products, including DUM DUMS®, to retailers of various types throughout the United States, who resell to the consuming public.

B. Spangler's Trade Dress

9. In addition to the trademarks associated with its DUM DUMS® lollipops, the packaging, i.e., the trade dress, is a very important aspect of marketing and selling the product. Spangler designs its packaging to be distinctive, so that consumers visually associate

the packaging with its DUM DUMS® products. Because a bag of lollipops is a relatively inexpensive item, consumers often do not scrutinize the packaging closely for details concerning the product before selecting it for purchase, which places greater importance on the distinctiveness of the packaging to identify the origin of the product and to differentiate it from the products of competitors.

10. From 1995 to 2011, Spangler sold DUM DUMS® in red bags with the brand in white letters, a display window located below the brand name on it and above a red bottom border, and with a yellow circle that on some bags was displayed in the lower right quadrant near or in the display window with numerals (usually dark blue in the circle). The overall visual impression created by the trade dress was distinctive and acquired distinctiveness through its use in marketing, advertising and selling DUM DUMS® over a 15-year period. Examples of this trade dress are shown in Exhibit A hereto.

11. In 2011, Spangler updated its distinctive packaging to use in marketing, advertising and selling its DUM DUMS® lollipops. As shown in Exhibit B hereto, this trade dress is made up of several graphic elements that in combination create a distinctive overall impression that identifies the DUM DUMS® lollipops with the trade dress. The trade dress is comprised of the bag's principal color, red, with the brand name in white letters; a display window showing the product, located in the lower half of the bag below the brand name and above a red bottom border of the bag; and a yellow oval located on the lower right hand side of the bag that covers a portion of the display window and has large blue numerals inside the yellow oval. The combination of (1) colors of the bag; (2) location of the display window; and (3) location, shape and color of the oval with the numerals creates a distinctive trade dress that is

identified with DUM DUMS® lollipops. Spangler has used the above-described trade dress continuously in interstate commerce since 2011.

12. Even assuming that the Spangler trade dress described above was not inherently distinctive when it was first used in commerce in 2011, it has acquired distinctiveness over the last seven years that it has been continuously in use in commerce, identifying it with the DUM DUMS® lollipops.

13. Spangler's trade dress for its DUM DUMS® lollipops is distinctive, particularly in the market for lollipops, and it indicates to the consuming public the source or origin of the product. Before Tootsie introduced its infringing trade dress in 2018, Spangler's bag was the only lollipop bag whose primary color was red, and the trade dress of bags of the other manufacturers or marketers of lollipops in the United States not only use different colors but also do not use the above described graphic elements of Spangler's trade dress. The trade dress of these other manufacturers and marketers create very different visual impressions than Spangler's trade dress for DUM DUMS®. Examples of the trade dress of these other manufacturers are shown in Exhibit C attached hereto. As a result of Spangler's distinctive trade dress, consumers wanting to purchase lollipops associate the origin or source of the product with Spangler.

14. Spangler markets, advertises and sells its DUM DUMS® lollipops in interstate commerce to warehouse-type retailers, like Sam's Club, where the product is displayed on pallets in pallet boxes. As shown on the right-hand side of Exhibit D, Spangler's pallet boxes are large rectangular yellow boxes with a U-shaped cutout that creates a window in which the red bags of DUM DUMS® contained in the box are displayed. The combination of the above-described yellow pallet box and the red DUM DUMS® bags creates a distinctive overall visual

impression that identifies the product displayed on the pallet as DUM DUMS® and constitutes trade dress that is owned by Spangler. Spangler has been using the yellow pallet box with a U-shaped window to market and sell bags of its DUM DUMS® lollipops since 2000.

15. Even assuming that the trade dress described in paragraph 14 above was not inherently distinctive when it was first used in commerce in 2000, it has acquired distinctiveness over the many years that it has been continuously in use in commerce, identifying it with DUM DUMS® lollipops.

16. Spangler's trade dress is nonfunctional. Although some of the components of its trade dress convey information regarding the product, the colors, shape, and/or location of the graphic elements of the trade dress are nonfunctional design elements, because they are not necessary to the use of the product, because they do not affect the cost of the product, and because other designs that convey the same information are readily available to others selling similar products.

C. Tootsie's Infringement of Spangler's Trade Dress

17. Tootsie is a well-known manufacturer of candy products, and it sells its products in interstate commerce throughout the United States. Tootsie's products can be found in grocery stores, drugstores, convenience stores, and other retail outlets in the State of Ohio. On information and belief, Tootsie directly and/or indirectly markets and sells candy products that are intended to be delivered to retail outlets in Ohio and sold to consumers in Ohio. It also has an interactive website that allows Ohio consumers to purchase candy products directly from it online. On information and belief, Tootsie derives substantial revenue from the sale of its candy products in Ohio.

18. Tootsie manufactures and sells a number of candy products, including lollipops and suckers, under the brand name CHARMS. Among the candy products that it manufactures and sells in interstate commerce throughout the United States and in the State of Ohio, are lollipops under the brand name CHARMS MINI POPS. Tootsie's CHARMS MINI POPS directly competes with Spangler's DUM DUMS® lollipops.

19. For several years, Tootsie has been selling its CHARMS MINI POPS in a yellow bag with graphic components and an overall visual impression that was unlike the trade dress of Spangler's DUM DUMS® lollipop bags. See Exhibit E attached hereto. In 2018, Spangler was alerted by a buyer from one of its retail customers that Tootsie had "copied" Spangler's trade dress and had begun selling CHARMS MINI POPS in a bag that closely resembles Spangler's bag for its DUM DUMS® lollipops. On information and belief, CHARMS MINI POPS in this new bag are on sale at certain Costco locations, through online retail sites such as Amazon, and at other retail locations.

20. Tootsie's new packaging for its CHARMS MINI POPS is shown in a side-by-side comparison with Spangler's packaging for its DUM DUMS® lollipops on Exhibits C and F hereto. As can be seen in the side-by-side comparison with Spangler's trade dress for its DUM DUMS® bag in Exhibits C and F, Tootsie copied Spangler's distinctive trade dress for its DUM DUMS® bags and developed a bag for its CHARMS MINI POPS that is deceptively and confusingly similar to Spangler's DUM DUMS® bag. The CHARMS MINI POPS bag has several graphic elements that are very similar to or the same as those of Spangler's trade dress, and when taken in combination, create the same overall visual impression as Spangler's trade dress for its DUM DUMS® bags. The new CHARMS MINI POPS bag is red like the DUM DUMS® bag with white letters for the brand CHARMS. The location of the display window of

the new bag is in a location very similar to the display window of the DUM DUMS® bag. The graphic element in which the quantity is displayed on the new CHARMS MINI POPS bag is oval-shaped like the DUM DUMS® bag, is similarly located at the lower right of the display window, and is yellow with blue numerals like the DUM DUMS® bag. When Tootsie's CHARMS MINI POPS bags are placed alongside Spangler's DUM DUMS® bag, customers are likely to confuse the products and their source of origin.

21. As a result of Tootsie combining these graphic elements in the same manner as Spangler's trade dress to create the same distinctive overall visual impression, Tootsie's new bags for its CHARMS MINI POPS infringe Spangler's long-established trade dress for its DUM DUMS® bags. Tootsie's adoption of its new CHARMS MINI POPS bag, and its direct and unfair competition against Spangler, will necessarily and permanently alter the market and irreparably harm Spangler.

22. Tootsie also sells to large retail businesses such as Costco that display products on pallets in pallet boxes. For a number of years, Tootsie and Spangler have sold CHARMS MINI POPS and DUM DUMS®, respectively, using similar yellow pallet boxes with a U-shaped cutout to display the bags of product inside the pallet box. Until recently, there was little likelihood of confusion or mistake between Tootsie's CHARMS MINI POPS and Spangler's DUM DUMS® lollipops in these pallet displays, because the bags inside the yellow Tootsie pallet box were also yellow, whereas the DUM DUMS® bags inside Spangler's pallet box were red, thereby creating very different visual impressions. When Tootsie recently adopted red for its new bags for its CHARMS MINI POPS and began selling those bags in the yellow pallet box, the overall visual impression became the same as Spangler's pallet display for its DUM DUMS® products. As shown in Exhibit D hereto, the pallet display developed by

Tootsie's for its CHARMS MINI POPS is deceptively and confusingly similar to Spangler's DUM DUMS® pallet display.

23. Tootsie's pallet display, as shown on Exhibit D, infringes Spangler's DUM DUMS® pallet display trade dress. Tootsie's adoption of its new trade dress for its pallet displays for CHARMS MINI POPS, and its direct and unfair competition against Spangler, will necessarily and permanently alter the market and irreparably harm Spangler.

24. Spangler therefore seeks damages and injunctive relief against Tootsie's manufacture, use, sale, or offer for sale of CHARMS MINI POPS bags and its use of pallet displays that infringe Spangler's DUM DUMS® trade dress for its bags and pallet displays.

CLAIM FOR RELIEF
Trade Dress Infringement/Unfair Competition

25. Paragraphs 1-24 are incorporated by reference as if set forth herein in full.

26. Based on both the inherently distinctive and nonfunctional graphic elements of Spangler's DUM DUMS® trade dress of its bags and the trade dress of its DUM DUMS® pallet displays, as well as Spangler's extensive advertising, promotion and sale of DUM DUMS® lollipops employing the trade dress for its bags and pallet displays in the United States, the consuming public both accepts and recognizes Spangler's DUM DUMS® trade dress for its bags and pallet displays, and they have become assets of substantial value as a symbol of Spangler, its products, and its goodwill. As a result of Spangler's efforts, customers associate the distinctive trade dress of its DUM DUMS® bags and pallet displays with Spangler.

27. Accordingly, Spangler has established valid and enforceable trade dress rights in the above described DUM DUMS® bags and pallet displays.

28. Spangler is the owner of all right and title to the above described DUM DUMS® trade dress for its bags and pallet displays.

29. Notwithstanding Spangler's pre-existing valid and enforceable rights in the trade dress for its DUM DUMS® bags and pallet displays, Tootsie used Spangler's trade dress without permission or approval. Tootsie's unauthorized use of Spangler's trade dress includes selling and offering for sale its CHARMS MINI POPS products using Spangler's distinctive and nonfunctional trade dress in the United States.

30. Tootsie's new bags and pallet display for its CHARMS MINI POPS product copies Spangler's distinctive trade dress for its DUM DUMS® bags and pallet displays. By using Spangler's trade dress without Spangler's permission, Tootsie is unfairly benefiting from Spangler's investment in the DUM DUMS® trade dress and the reputation, success, and goodwill that Spangler has cultivated through its marketing and promotion of its DUM DUMS® products.

31. Tootsie's unauthorized use of Spangler's DUM DUMS® trade dress for its bags and pallet displays in connection with advertising and offering its CHARMS MINI POPS product for sale is likely to cause consumer confusion and mistake, and to deceive consumers as to the source, origin, or affiliation of Tootsie's products and services.

32. Tootsie's actions constitute unfair competition and false designation of origin in violation of Section 43(a) of the Lanham act, 15 U.S.C. § 1125(a).

33. Tootsie's conduct has caused and will cause great and irreparable harm to Spangler in an amount which cannot be adequately remedied by money damages, leaving Spangler with no adequate remedy at law. Therefore, Spangler is entitled to injunctive relief against Tootsie, and anyone associated therewith, to restrain further acts of unfair competition and trade dress infringement.

34. Spangler is informed and believes, and on this basis alleges, that Tootsie knew of Spangler's trade dress when it adopted its new trade dress for its CHARMS MINI POPS bags and pallet displays. Accordingly, Tootsie's infringement has been and continues to be intentional and willful.

DEMAND FOR JURY TRIAL

Spangler hereby demands a trial by jury on all issues so triable pursuant to Fed. R. Civ. P. 38.

PRAYER FOR RELIEF

WHEREFORE, Spangler prays for entry of judgment against Tootsie, as follows:

1. That judgment be entered in favor of Spangler on the claim for relief raised in the Complaint;
2. That judgment be entered awarding Spangler all damages adequate to compensate for Tootsie's infringement of its trade dress and its unfair competition, including pre-judgment and post-judgment interest at the maximum rate permitted by law;
3. That judgment be entered that Tootsie's infringement is and/or has been willful and that, pursuant to 15 U.S.C. § 1117, the award of damages to Spangler be increased up to three times in view of Tootsie's willful infringement and that Spangler be awarded its costs and reasonable attorney fees.
4. That a preliminary and permanent injunction be entered enjoining Tootsie, and its officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert with it, from infringing Spangler's trade dress;

5. That judgment be entered awarding an accounting of Tootsie's profits pursuant to 15 U.S.C. § 1117.

6. That judgment be entered awarding restitutionary relief against Tootsie and in favor of Spangler, including disgorgement of wrongfully obtained profits and any other appropriate relief;

7. For such other and further relief as the Court deems just and proper.

s/David W. Wicklund

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