

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

ANHEUSER-BUSCH, INC.,)
)
 Plaintiff,)
)
 vs.) **Case No. 4:08cv0358 TCM**
)
 VIP PRODUCTS, LLC,)
)
 Defendant.)

MEMORANDUM AND ORDER

This is an action¹ filed by Anheuser-Busch, Incorporated ("Plaintiff") against VIP Products, LLC, ("VIP"), for trademark infringement, unfair competition, and dilution. Pending is Plaintiff's motion for a preliminary injunction, see Fed.R.Civ.P. 65, to bar VIP from manufacturing, distributing, marketing, and selling a dog squeeze toy called "Buttwiper." The Court heard testimony from four witnesses² and received evidence on the motion on August 27, 2008, and now finds and concludes as follows.

Findings of Fact

Plaintiff is a leading American brewer. Plaintiff's beers are brewed in twelve breweries in the United States alone and sold to exclusive wholesalers who then sell to retailers and other accounts. Although "Budweiser" is not its top-selling beer, it is Plaintiff's flagship brand; its label is treated with "reverence" by Plaintiff and its employees. The label is also a

¹The case is before the undersigned United States Magistrate Judge by written consent of the parties. See 28 U.S.C. § 636(c).

²Plaintiff called George Mantis; Thomas Shipley, Jr.; and Thomas Prindiville. VIP called Stephen Sacra.

registered trademark. Plaintiff has used the "Budweiser" word mark, also a registered trademark, and the "Budweiser" label design in the United States since 1876. The "Budweiser" bottle is used in much of Plaintiff's advertising. "Budweiser" is sold to 829 chain retailers across the country. (Pl. Ex. 32.) From 2000 to 2007, Plaintiff sold approximately three billion dollars of "Budweiser" to its wholesalers. (Pl. Ex. 33.) In 2008, Plaintiff spent approximately 156 million dollars in advertising in the United States on "Budweiser" alone. (Pl. Ex. 35.) Special emphasis is placed in advertising to 21 to 28 year old consumers.

Along with beer products, Plaintiff sells various non-beer items. (Pl. Exs. 40-47). These items range in character from door hangers to shirts to dog leashes and collars to beach chairs. (Id.) Each has "Budweiser" printed on it in some form. (Id.) Some of these items, including a dog bed, have a replica of the "Budweiser" label. (Id.) Other pet products are sold by Plaintiff, including food/water bowls, frisbees, balls, leashes, collars, and pet mats. (Pl. Exs. 40-47, 49-50.) Plaintiff has received \$147,500 in sales of dog items from 1980 to date. (Pl. Ex. 48.) Plaintiff does not sell or license any type of dog squeeze toy.

The main purpose of the sale of non-beer items is to place Plaintiff's trademark into consumers' hands, but not at the cost of the brand image. These branded items are sold in retail stores, grocery stores, convenience stores, and on-line. Between 2000 and 2007, revenue of 400 million dollars was received by Plaintiff from the sale of these items in the United States. (Pl. Ex. 37.) This figure does not including licensing revenue. (Id.)

Plaintiff is careful and cautious in selecting licensees with which to place its trademarks. Plaintiff's licensing agreement requires that if its licensees learn of any infringement or of the "existence, use or promotion of any mark or design similar" to Plaintiff's

licensed properties, the licensees are to report such. (Pl. Ex. 38, § 11.) Additionally, Plaintiff's employees are vigilant in advising its legal department when any possible infringement of Plaintiff's brands are discovered. Plaintiff believes that if it permits an unauthorized use of its properties, the value of those properties and licensing agreements is decreased. Also, the value of its properties would be diluted if Plaintiff's marks are placed on inferior or improper items and quality stores would be less likely to market Plaintiff's branded items.

George Mantis is the president and founder of the Mantis Group, a survey research firm that designs surveys, analyzes the results and reports its findings.³ Mr. Mantis designed and conducted a survey to determine whether VIP's product, "Buttwiper," is likely to cause confusion with Plaintiff's product, "Budweiser." (Pl. Ex. 21.) Interviews for the survey were conducted from April 16 to May 8, 2008; 327 individuals were interviewed. These individuals were volunteers found in nine shopping malls, one in each United States census division, i.e., New Jersey, Connecticut, Michigan, Illinois, Tennessee, Florida, Texas, California, and Colorado, that represent all four United States census regions, i.e., the East, Midwest, South, and West. (Pl. Ex. 26.) The individuals were 21 years of age or older,⁴ were likely to purchase a dog toy within the next six months, and were not employed by an entity

³VIP stipulated that Mr. Mantis is an expert in the field of survey research. (Pl. Ex. 19.)

⁴Due to Plaintiff's sensitivity to not interviewing individuals who are not of legal drinking age, those under the age of 21 were excluded from the survey. Mr. Mantis testified, without contradiction, that excluding those individuals who were 18, 19, or 20 years old had no real affect on the survey results because of the small portion of the adult population they represented (approximately 6%).

that profited from the sale of pet products. (Pl. Ex. 21 at 2.) Mr. Mantis testified that when creating the survey he relied on seven factors cited in the Manual of Complex Litigation and procedures described in the Federal Judicial Center Reference Guide on survey research. (Tr. at 23-24.) Those factors include (1) properly choosing the survey universe, i.e., which individuals to include; (2) obtaining a representative sample of that universe; (3) making certain that the interviewers are qualified; (4) making certain that the interviewers follow prescribed procedures; (5) making the questions in the survey clear, relevant, and non-leading; (6) making certain that the analysis plan comports with accepted statistical principles and is relevant; and (7) making certain that the entire survey process is objective. (Tr. at 24-25.)

Professional interviewing agencies conducted the questioning of individuals with the survey designed by Mr. Mantis. After a person was found to be qualified for the survey, he or she was escorted into an interview room. An interviewing specialist instructed each interviewer and sat in on his or her first several interviews to make certain the proper procedures were followed. (Pl. Ex. 24.) The process was a "double-blind survey," i.e., neither the interviewer nor the interviewee knew the purpose of the survey. The interviewees were instructed not to guess and that "I don't know" was an acceptable answer. The interviewee was shown either the test product (Pl. Ex. 28) or a control product⁵ (Pl. Ex. 29) and allowed

⁵The control product is used in confusion surveys to make certain that any confusion between the products at issue is not caused by an unrelated factor. In this case, the focus was on any confusion between "Buttweiler" and "Budweiser" and whether that confusion was caused by something unrelated to the "Budweiser" mark or trade dress. Therefore, to be effective the control product could not share any characteristics with the test product that was being tested. (Tr. at 37.) In the instant case, the control product had a different color scheme than the test product, the name was changed to something that did not have a similar sound, and the label design was modified. (Tr. at 37-38; Pl. Ex. 29.) An analogy described by Mr. Mantis is when half the test subjects are given a placebo in a drug test and the other half are given the new drug. (Tr. at 37.)

to view the items at their leisure.⁶ The interviews were conducted with the survey questions. (Pl. Ex. 24) A validation question was used to re-contact the interviewees to verify that the interview had occurred. (Pl. Ex. 27.) All the survey responses are in Plaintiff's Exhibit 30.

Analyzing those responses according to the accepted market research principles in the survey, there was a 30.3% net confusion rate. (Pl. Ex. 20; Pl Ex. 21 at 10.) In other words, one of three people interviewed mistakenly believed that VIP's "Buttwiper" is manufactured and marketed by, or with the approval of, Plaintiff or that there is some affiliation between "Buttwiper" and Plaintiff. (Pl. Ex. 21 at 11.)

Plaintiff discovered "Buttwiper" when Thomas Prindiville, Plaintiff's Group Manager of Consumer Marketing, and an associate were conducting an internet word search using the term "Budweiser Beer" on a Sears & Roebuck Company website in search for a new product – an ice chest with the "Budweiser" name attached. Along with the "Budweiser" ice chest, search results included "Buttwiper."

Stephen M. Sacra is the owner and operator of VIP. His company creates, manufactures, and sells high quality, durable dog toys. VIP sells three brands of dog toys: "Tuffy," "Mighty," and "Silly Squeakers." "Buttwiper" is with the "Silly Squeakers" brand. VIP's dog toys are high-end and cost more than most, if not all, other dog squeeze toys on the market. "Silly Squeakers's" first squeeze toy was a two-headed object called "Mr. Poop." "Buttwiper" and "Cataroma" – packaged with "Buttwiper" – were created to augment "Mr.

⁶The cost of an item is relevant to the time a potential purchaser views the item. Here, although the cost (\$20.00 for two pet toys) is not a major expense, the subjects were never rushed while they were observing the two products at issue. This is an accepted survey format.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.