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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ASTRUD OLIVEIRA, a.k.a. ASTRUD GILBERTO, :

96 Civ. 9289 (LAP)

Plaintiff, :

SECOND AMENDED
COMPLAINT &
JURY DEMAND

vs. :

FRITO-LAY, INC., PEPSICO, INC., BBDO
WORLDWIDE, INC. & OMNICOM GROUP, INC., :

Defendants. :

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Plaintiff, Astrud Oliveira, also known as Astrud Gilberto, by her undersigned attorney, for her Second Amended Complaint against the defendants, Frito-Lay, Inc., Pepsico, Inc., BBDO Worldwide, Inc., and Omnicom Group, Inc. (collectively "Defendants"), alleges upon knowledge as to herself and her own acts, and upon information and belief with respect to all other matters, as follows:

JURISDICTION AND VENUE

1. This action is based upon the commercial advertising use by Defendants of Plaintiff's recorded singing voice in her unregistered trademark signature song without Plaintiff's permission. This Court has jurisdiction of the Lanham Act claims set forth below under 15 U.S.C. § 1121, 28 U.S.C. § 1331

and 28 U.S.C. § 1338(a), and the other claims set forth below under 28 U.S.C. §§ 1338(b) and 1367(a).

2. Venue is proper in this district under 28 U.S.C. §§ 1391 and 1400(a) because at least some of the claims arose in this district and all Defendants are doing business and/or reside in this district.

PARTIES

3. Plaintiff Astrud Oliveira is a singer and recording artist known professionally as Astrud Gilberto. She is well known to her fans and the general public for the Grammy winning recording of "The Girl From Ipanema" in 1964, which is her "signature" song. She resides in this district.

4. Defendant Frito-Lay, Inc. is a corporation with its headquarters in Texas and is a subsidiary of defendant Pepsico, Inc. Defendant Pepsico, Inc. is a corporation with its headquarters in Purchase, New York. These defendants are engaged in the marketing of snack food products nationwide, including in this district.

5. Defendant BBDO Worldwide, Inc. is a corporation with its headquarters in New York, New York, together with its corporate division BBDO New York. This defendant is a subsidiary of defendant Omnicom Group, Inc., a corporation with its headquarters in New York, New York. These defendants are engaged in the advertising business nationwide, including in this district, producing and placing advertising in various media for clients including defendants Frito-Lay, Inc. and Pepsico, Inc.

BACKGROUND FACTS

6. Plaintiff recorded the song "The Girl From Ipanema" without a contract or any formal agreement with the producers or the record company, which publicly released it on an LP album and a single containing solo lyrics sung by Plaintiff. A recording of "The Girl From Ipanema" performed by

Plaintiff is presently available to the public on a Polygram label.

7. Plaintiff won a Grammy Award for "The Girl From Ipanema" recording, which was the 1964 "Record of the Year" and began the "bossa nova" movement in the United States. The Guinness Book of World Records once estimated that more than 27 million copies of the recording had been sold worldwide and Plaintiff's version of "The Girl From Ipanema" remains a popular standard to the present day.

8. As a result of publicity, advertising and marketing efforts with respect to this recording, which has acquired secondary meaning as Plaintiff's unregistered trademark "signature" song, and with respect to subsequent albums and public performances continuing to date by Plaintiff, performing professionally as Astrud Gilberto, members of the general public are aware of Plaintiff and associate "The Girl From Ipanema" with her. "The Girl From Ipanema" is frequently used in advertisements to promote Plaintiff's public appearances, and a performance of the song is requested at virtually every such appearance. Attached as Exhibit A are representative newspaper articles regarding Plaintiff and "The Girl From Ipanema," referring to the song as Plaintiff's "signature" and "trademark," and alluding to the song's image of the "female sensual mystique."

9. Plaintiff has not assigned any of her rights, including without limitation her common law rights, in her performance or the recording of "The Girl From Ipanema," nor authorized anyone, including without limitation any record company which has released the recording for public sale, to mix her performance with anything else or to use her performance for advertising purposes without her permission.

10. Sometime in 1996, Defendants, acting through BBDO New York, produced a television commercial for Baked Lays Potato Crisps, a snack food

product of defendant Frito-Lay, Inc., with the recorded voice of Plaintiff clearly audible in the foreground performing lyrics of "The Girl From Ipanema." The commercial, as broadcast on network television nationwide including in this district on multiple occasions during 1996, utilized the falsetto voice of Frank Oz, as the voice of the Muppet character "Miss Piggy," squawking the lyrics of "The Girl From Ipanema" mixed for much of the time with the actual recorded performance of Plaintiff in the foreground. When the mixing of voices begins in the commercial, the "Miss Piggy" character is not visible, thus adding to the disconcerting nature of the odd sound on top of Plaintiff's classic performance. A VHS videotape copy of the television commercial, in the form actually broadcast by Defendants, is annexed to this complaint as Exhibit B.

11. The television commercial was produced using "The Girl From Ipanema" as its theme, and includes svelte celebrity models in bathing suits to capitalize on the image evoked by the song, and is intended by Defendants to imply that one can eat Defendants' snack food product and remain thin and sensual.

12. A songwriter of "The Girl From Ipanema," who had been compensated for, and had given permission for, its use in some form in the television commercial, found the actual use by Defendants to be offensive and threatened suit against Defendants regarding the foreground use of the song and the "singing" of Frank Oz as "Miss Piggy." At the time Plaintiff's legal action was brought, Defendants were in the process of editing the commercial in an attempt to resolve the songwriter's objections.

13. This particular television advertisement was one of a series of advertisements by Defendants for the same food product involving the Muppet character "Miss Piggy." The advertisements utilized various celebrities on screen, including music personalities, each and all of whom were

compensated by Defendants for their actual or implied affiliation, connection, or association with Defendants, or for their actual or implied sponsorship or approval of Defendants' goods.

14. None of the Defendants ever sought or obtained Plaintiff's permission or consent to the use of her trademark signature song, goodwill, voice and persona in a television commercial or for any other advertising purpose, nor compensated her for the same.

FIRST CLAIM

(Violation of 15 U.S.C. § 1125(a))

15. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 14, inclusive, and incorporates them herein by this reference.

16. The foregoing acts by Defendants in producing and displaying to the public television advertisements using Plaintiff's performance of her signature song, which constitutes Plaintiff's unregistered trademark, capitalize on Plaintiff's valuable reputation and goodwill and are likely to cause confusion or to deceive as to the affiliation, connection, or association of Defendants with Plaintiff, or as to the sponsorship or approval of Defendants' goods by Plaintiff.

17. By so usurping Plaintiff's performance of her trademark song for advertisements used in interstate commerce without Plaintiff's permission, Defendants have violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

18. Defendants' unauthorized use of Plaintiff's mark in advertising has resulted in profits to Defendants and has deprived Plaintiff of revenue to which she is entitled for the value of her goodwill and use of her trademark.

19. Plaintiff is entitled to an injunction restraining Defendants, their officers, agents and employees, and all persons acting in concert with them,

from engaging in any further such acts in violation of the Lanham Act.

20. Plaintiff is entitled to recover from Defendants the damages, including attorneys' fees, she has sustained and will sustain, and any gains, profits and advantages obtained by Defendants as a result of Defendants' acts alleged above.

21. By reason of the foregoing, Plaintiff has been injured in an amount to be ascertained at trial, but in no event less than \$1,000,000.

22. Furthermore, Defendants' conduct was willful, wanton, reckless, or malicious, entitling Plaintiff to the award of exemplary damages.

SECOND CLAIM

(Violation of 15 U.S.C. § 1125(c))

23. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 14, inclusive, and incorporates them herein by this reference.

24. The foregoing acts by Defendants in producing and displaying to the public television advertisements using Plaintiff's performance of her signature song, which constitutes Plaintiff's famous trademark, as the theme of the commercial and to directly enhance the image of Defendants' product, capitalize on Plaintiff's valuable reputation and goodwill and cause dilution of the distinctive quality of the trademark.

25. By so using Plaintiff's trademark as the theme of the commercial advertisement and invoking the image conjured up by the mark to enhance the image of Defendants' product, Defendants willfully intended to trade on Plaintiff's reputation or to cause dilution of her famous mark.

26. By so usurping Plaintiff's trademark song for advertisements used in interstate commerce and causing dilution of Plaintiff's mark, Defendants have violated the Lanham Act, 15 U.S.C. § 1125(c).

27. Defendants' unauthorized use of Plaintiff's mark in advertising has resulted in profits to Defendants and has deprived Plaintiff of revenue to which she is entitled for the value of her goodwill and use of her trademark.

28. Plaintiff is entitled to an injunction restraining Defendants, their officers, agents and employees, and all persons acting in concert with them, from engaging in any further such acts in violation of the Lanham Act.

29. Plaintiff is entitled to recover from Defendants the damages, including attorneys' fees, she has sustained and will sustain, and any gains, profits and advantages obtained by Defendants as a result of Defendants' acts alleged above.

30. By reason of the foregoing, Plaintiff has been injured in an amount to be ascertained at trial, but in no event less than \$1,000,000.

31. Furthermore, Defendants' conduct was willful, wanton, reckless, or malicious, entitling Plaintiff to the award of exemplary damages.

THIRD CLAIM

(Violation of New York General Business Law § 368-d)

32. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 14, inclusive, and incorporates them herein by this reference.

33. The defendants' use of Plaintiff's performance of her trademark signature song and her voice and persona in a television commercial, and the manner and context of use, have blurred the mark's product identification and have tarnished the affirmative associations the mark has come to convey.

34. Defendants' use of Plaintiff's mark is likely to injure Plaintiff's business reputation and to dilute the distinctive quality and goodwill of Plaintiff's name, voice, persona and trademark signature song and the value of Plaintiff's proprietary rights therein.

35. By reason of the foregoing, Plaintiff has been damaged and is entitled to the remedies provided in New York General Business Law § 368-d.

36. Unless the defendants are enjoined and restrained from using Plaintiff's goodwill, voice, persona and trademark signature song, Plaintiff will sustain irreparable injury.

37. Plaintiff has no adequate remedy at law.

38. Furthermore, Defendants' conduct was willful, wanton, reckless, or malicious, entitling Plaintiff to the award of exemplary damages.

FOURTH CLAIM

(Violation of New York Civil Rights Law § 51)

39. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 14, inclusive, and incorporates them herein by this reference.

40. Defendants' use in advertising of Plaintiff's voice is unauthorized.

41. By engaging in such acts, Defendants have violated New York Civil Rights Law § 51 and Plaintiff is entitled to the prescribed remedies.

42. By reason of the foregoing, Plaintiff has been damaged in an amount to be ascertained at trial, but in no event less than \$1,000,000.

43. Unless the defendants are enjoined and restrained from using Plaintiff's voice, Plaintiff will sustain irreparable injury.

44. Furthermore, Defendants conduct was willful, wanton, reckless, or malicious, entitling Plaintiff to the award of exemplary damages.

FIFTH CLAIM

(Unfair Competition)

45. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 14, inclusive, and incorporates them herein by this reference.

46. Defendants' conduct alleged above in taking Plaintiff's performance of her trademark signature song and her voice and persona for advertising purposes without permission of, or compensation to, Plaintiff constitutes misappropriation of Plaintiff's property rights and unfair competition within the meaning of the common law and statutes of the various states in which Defendants are doing business.

47. These wrongful acts have proximately caused and will continue to cause Plaintiff substantial injury, including, without limitation, loss of potential customers, dilution of her goodwill, confusion of existing and potential customers, injury to her reputation, and diminution of the value of her services.

48. By reason of the foregoing, Plaintiff has been injured in an amount to be ascertained at trial, but in no event less than \$1,000,000.

49. Furthermore, Defendants' conduct was willful, wanton, reckless, or malicious, entitling Plaintiff to the award of exemplary damages.

SIXTH CLAIM

(Unjust Enrichment)

50. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 14, inclusive, and incorporates them herein by this reference.

51. As a result of Defendants' unauthorized exploitation of Plaintiff's goodwill, voice, persona and trademark signature song in television commercials without payment to Plaintiff, Defendants have been unjustly enriched at Plaintiff's expense.

52. By reason of the foregoing, Plaintiff has been injured in an amount to be ascertained at trial, but in no event less than \$1,000,000.

53. Furthermore, Defendants' conduct was willful, wanton, reckless,

or malicious, entitling Plaintiff to the award of exemplary damages.

SEVENTH CLAIM

(Defamation)

54. Plaintiff realleges each and every allegation set forth in Paragraphs 1 through 14, inclusive, and incorporates them herein by this reference.

55. Defendants' actions in mixing Plaintiff's singing voice in the performance of her trademark signature song with the squawking falsetto voice of Frank Oz as the Muppet character "Miss Piggy" and the manner of its use tends to disparage Plaintiff in the way of her profession or trade and constitutes defamation *per se* of the Plaintiff.

56. By reason of the foregoing, Plaintiff has been injured in an amount to be ascertained at trial, but in no event less than \$1,000,000.

57. Furthermore, Defendants conduct was willful, wanton, reckless, or malicious, entitling Plaintiff to the award of exemplary damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands that judgment be entered against the Defendants, jointly and severally, as follows:

(1) that Defendants, their directors and officers, agents, servants, employees, and all other persons in concert or privity or in participation with them, be enjoined from:

(a) directly or indirectly marketing goods in any way that tends to cause confusion or to deceive as to the affiliation, connection, or association of Defendants with Plaintiff, or as to the sponsorship or approval of Defendants' goods by Plaintiff.;

(b) diluting the distinctive quality and goodwill of Plaintiff's name, voice, persona and trademark signature song "The Girl From

Ipanema;" and

(c) unfairly competing with Plaintiff and her licensees;

(2) that Defendants be required to pay Plaintiff such damages as Plaintiff has sustained as a consequence of Defendants' acts that cause confusion or to deceive as to the affiliation, connection, or association of Defendants with Plaintiff, or as to the sponsorship or approval of Defendants' goods by Plaintiff, dilution of Plaintiff's goodwill, name, voice and trademark, interference with Plaintiff's right of publicity, misappropriation and unfair competition, unjust enrichment, and defamation, but in no event less than \$1,000,000 for each claim, and that Defendants be further required to pay to Plaintiff exemplary damages in an amount not less than \$1,000,000 as a consequence of Defendants' willful, wanton, reckless, or malicious conduct;

(3) that Defendants be required to pay Plaintiff's costs, expenses and reasonable attorney fees in connection with this action as provided in 17 U.S.C. § 505 and 15 U.S.C. § 1117; and

(4) that the Court grant such other and further relief to Plaintiff as this Court deems just and proper.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Dated: New York, New York

April 24, 1998.

By:



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