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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RESTORATION INDUSTRY)	
ASSOCIATION, INC.,)	Case No. CIV 07-0227-S-BLW
)	
Plaintiff,)	RESPONSE OF RESTORATION
)	INDUSTRY ASSOCIATION, INC. TO
vs.)	DISASTER RESTORATION, INC.'S
)	MOTION TO DISMISS FILED ON JUNE
CERTIFIED RESTORERS CONSULTING)	20, 2007
GROUP, LLC, et al.)	
)	
Defendants.)	
)	
)	

Restoration Industry Association, Inc. (“RIA” or “Plaintiff”), by and through its undersigned attorneys, responds to the Motion to Dismiss of Defendant Disaster Restoration, Inc. (“DRI”), as follows.

RESPONSE OF RESTORATION INDUSTRY ASSOCIATION, INC. TO
DISASTER RESTORATION, INC.’S MOTION TO DISMISS FILED ON
JUNE 20, 2007 - 1

INTRODUCTION

Defendant DRI's Motion to Dismiss is based entirely on the assertion that DRI neither used the CERTIFIED RESTORER mark nor was ever affiliated with defendant Certified Restorers Consulting Group LLC's ("CRCG"). This is a factual dispute, which must be viewed in the light most favorable to RIA. RIA contends and can prove that DRI in fact did use the CERTIFIED RESTORER mark and was affiliated with CRCG.

STANDARD OF REVIEW

Under a Rule 12(b)(6) motion, the trial court is to limit its review to the contents of the complaint. *Enesco Corp. v. Price/Costo WP Document*, 146 F. 3d 1083 (9th Cir. 1998). "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to plaintiff." *Id.*, citing *Argabright v. U.S.*, 35 F. 3d 472, 474 (9th Cir. 1994) (emphasis added).

Under well-established Ninth Circuit law, the district court's order of dismissal will be affirmed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1991) (emphasis added). Although the plaintiff's complaint may not make a specific request, the complaint must be construed broadly and dismissal is improper if it appears from the face of the complaint that "some relief" could be granted. *Id.* (citing *Summit Tech. v. High-Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 305 (C.D. Cal. 1996). The district court must make findings to support overcoming this presumption favoring the plaintiff.

ARGUMENT

A. The Facts as Alleged in the Complaint Make Out a Violation of the Lanham Act

As alleged sufficiently in the complaint, DRI engaged deliberately in unfair competition, false designations of origin, false and misleading descriptions of fact, and false and misleading

representations of fact by using RIA's CERTIFIED RESTORER mark without RIA's authorization in violation of 15 U.S.C., §§ 1125(a)(1) and (a)(2). *See* Complaint, ¶¶ 43-44.

Despite DRI's representations to the contrary, DRI in fact did use the CERTIFIED RESTORER mark. DRI was promoted at length on the CRCG website under defendant Michael Griggs' ("Mr. Griggs") name with contact links "send email" and "request info." *See* Exhibit A. The facts, taken in the light most favorable to RIA, sufficiently allege a violation of the Lanham Act by DRI.

B. The Facts as Alleged in the Complaint Make Out a Violation of Common Law Unfair Competition

As alleged sufficiently in the complaint, DRI has committed the tort of unfair competition against RIA, acting unfairly and deceptively, and has acted deliberately, maliciously, and with reckless disregard for RIA's rights in the use of the CERTIFIED RESTORER mark. *See* Complaint, ¶ 48. The complaint also alleges sufficiently that Mr. Griggs acted through DRI and/or CRCG to use CERTIFIED RESTORERS as part of a trade name for CRCG, and as shown in CRCG's attached website, to promote DRI individually. *See* Complaint, ¶ 28. Therefore, the facts as alleged sufficiently show that DRI "is using a term or name deceptively similar to its own and that this use is likely to confuse the public that in dealing with the defendant they are dealing with the plaintiff. *See, e.g., Cazier v. Economy Cash Stores, Inc.*, 71 Idaho 178, 188-89, 228 P.2d 436, 442 (1951). Moreover, as defendant admits, if RIA has made out a federal claim against DRI for a violation of the Lanham Act, it has also made out a claim for common law unfair competition. *See generally Woodland Furniture LLC v. Larsen*, 142 Idaho 140, 147, 124 P.3d 1016, 1023 (2005).

Defendant claims that there is no allegation that DRI used the term CERTIFIED RESTORER in a deceptive or misleading manner. RIA alleges, however, that DRI in fact did

use the CERTIFIED RESTORER mark. As indicated above, DRI was listed on the CRCG website under defendant Michael Griggs' ("Mr. Griggs") name with contact links "send email" and "request info." See Exhibit A. The facts, taken in the light most favorable to RIA, sufficiently allege common law unfair competition by DRI.

CONCLUSION

Wherefore, RIA respectfully prays that defendant DRI's motion to dismiss be denied.

DATED THIS 16th day of July, 2007.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By /s/ _____
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By /s/ _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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