

SOUTHERN DISTRICT OF NEW YORK
FEDERAL DISTRICT COURT

TRESTON IRBY, RUSSEL NEAL)	
AND MARCUS SANDERS)	
)	Civil Action No.
Plaintiffs)	05-CV-9935
)	
v.)	
)	
ANTHONY THOMPSON, N-DEPTH)	
ENTERTAINMENT, COLD FRUNT)	
PRODUCTIONS LLC, ONE STOP DISTRUBTION,)	
CD UNIVERSE, AMAZON.COM, TOWER RECORDS)	
and JOHN DOES 1-4)	
)	
Defendants)	
)	

JURISDICTION

1. Federal Jurisdiction is predicated on diversity of citizenship, federal trademark law, contractual agreement and location of tort.
2. Upon information and belief, the amount in controversy exceeds One-Million Dollars (\$1,000,000.00).

PARTIES

3. Treston Irby (“Irby”) is a resident of Connecticut and resides at 1177 Reservoir Avenue, Bridgeport, Connecticut 06606.
4. Marcus Sanders (Sanders”) is a resident of Texas and resides at 5100 Hawthorne Drive, Apt. 1013, Waco, Texas 76710.
5. Russell Neal (“Neal”) is a resident of Texas and resides at 300 Woerner Road, Apt. 2133, Houston, Texas 77090.
6. Defendant Anthony Thompson (“Thompson”) is upon information and belief, a resident of Texas with a last known business address at 14001 Dallas Parkway Suite 1200, Dallas, Texas 75240.
7. Defendant Cold Frunt Productions LLC (“Cold”) is upon information and belief a business entity organized under the laws of the State of Texas with a business address at 14001 Dallas Parkway, Suite 1200, Dallas, Texas 75240.

8. Defendant N-Depth Entertainment (“N-Depth”) a/k/a, d/b/a “Thompson” or “Cold”, is upon information and belief, a business entity organized under the laws of the state of Texas or a d/b/a of Thompson with a business address at 14001 Dallas Parkway, Suite 1200, Dallas, Texas 75240.

9. Defendant One Stop Distribution (“Stop”) is upon information and belief, a business entity organized under the laws of the State of Texas with a business address at 1716 Boldgett Street, Houston, Texas 77004.

10. CD Universe (“Universe”), is a business entity organized under the laws of the State of Connecticut with a business address at 101 N. Plains Industrial Road, Wallingford, Connecticut 06492.

11. Amazon.com (“Amazon”) is a business organized under the law of the State of Washington with a business address at 1200 12th Avenue South, Suite 1200 Seattle, Washington 98144.

12. Towerrecords.com (“Tower”) is a business entity organized under the laws of the State of California with a business address at 2500 Del Monte Street, West Sacramento, California 95691.

13. John Does 1-4 are members of the new group using the name “Hi-Five.”

FACTS

14. Plaintiffs reallege paragraphs 1-13.

15. On or about 1991, Irby, Sanders, Neal and Thompson were members of the popular singing group known as “Hi-Five”. Roderick Clark (“Clark”) was also a member of Hi-Five but is not a party to this litigation.

16. Irby, Sanders, Neal, Clark and Thompson were under contract to Jive Records/Zomba Recording Corporation (“Zomba”) and made several albums including, “Hi-Five-Self Debut Album” (1990), “Keep It Goin” (1992), “Faithful” (1993) and “Hi-Five Greatest Hits (1994). All the plaintiffs did not appear on every album.

17. Many master recordings of Hi-Five continue to play on radio stations and continue to sell in their original forms and on compilation albums and soundtracks. Hi-Five toured the world for several years and sold over two million (2,000,000) albums/singles. Albums and singles performed by Hi-Five continue to be sold today in various forms.

18. The trademark/serevicemark/tradename Hi-Five is owned by Irby, Sanders, Neal, Clark and Thompson. In the contract dated May 23, 1991 with Zomba, Hi-Five and Doorbell Recordings, Inc. (“Doorbell”), Doorbell assigned the

trademark/servicemark/tradename to Irby, Neal, Sanders, Clark and Thompson in 1991 (“Contract”). (Exhibit “A”).

19. The Contract is governed by the laws of the State of New York and only New York Courts shall have jurisdiction over any controversies arising out of the Contract.

20. Doorbell registered the trademark/servicemark/tradename with the United States Federal Trademark Office. The registered was subsequently cancelled in 1997 as the parties failed to re-register the mark due to controversies among the members of Hi-Five. (Exhibit “B”). Despite the failure to re-register, the trademark/servicemark/tradename remains owned by Irby, Clark, Sanders, Neal and Thompson.

21. In or about 1995-1997, Thompson left the group Hi-Five to pursue a solo career. He subsequently signed recording contracts with Giant Records and Bad-Boy Records. Thompson was unable to have success in his solo career similar to the success he had with Hi-Five.

22. Despite the difficulties within Hi-Five, in or about 1997, Thompson rejoined Hi-Five and began to make music again in order to make, produce a new album. The members appeared in New York City, NY studios and made never released tracks/songs. Thompson was available and performed on the tracks/songs. Subsequent to Thompson’s appearance in New York, he again left the group.

23. Upon information and belief, on or about 1997- 2003, Thompson began forming a new group under the name Hi-Five with Defendant John Does 1-4 and various others, unknowingly and without the consent of Irby, Neal and Sanders.

24. On or about October 10, 2005, Irby, Neal and Sanders learned that on or about November 2004, Thompson, Cold and N-Depth, through Defendant Stop manufactured, distributed and sold a Christmas album for a group identified as Hi-Five containing Thompson and John Does 1-4. This album was sold without the consent of Irby, Neal and Sanders.

25. On or about October 10, 2005, Irby, Neal and Sanders learned that all Defendants (except Stop), through Defendant Thompson as owner of N-Depth, intended to manufacture, distribute and sell a newly created Hi-Five album with John Does 1-4, and intend to embark on a tour across the United States. Upon information and belief, the album was scheduled to be released on October 25, 2005, entitled “The Return” of Hi-Five.

26. Irby, Neal and Sanders have been contacted by friends, family and fans seeking information related to the new unauthorized Hi-Five album, as they (friends, family and fans) were under the belief that Irby, Neal and Sanders were involved in the project including, the album, tour and marketing of the group.

27. A review of the website operated by the Defendants Thompson, Cold and N-Depth, www.hifiveonline.com, illustrates the attempted link of the new unauthorized Hi-Five with the Hi-Five that enjoyed musical success on the Zomba recording label. The website contains information from fans linking the two (2) groups and contains images of all the pre-existing Hi-Five albums including images of Irby, Neal, Clark and Sanders. Irby, Neal and Sanders have no connection to the webpage bearing the trademark/servicemark/tradename operated by the Defendants.

28. The actions of the Defendants have caused confusion among the public and have diluted the trademark/servicemark/tradename Hi-Five. The Defendants are using a similar mark which is likely to cause confusion.

29. The unauthorized Hi-Five has been performing with various artists including Paul Wall and Ace, causing confusion amongst the public and in violation of the ownership of the trademark/servicemark/tradename Hi-Five.

30. Upon information and belief, the Defendants have earned or stand to earn millions of dollars in the unauthorized use of the trademark/servicemark/tradename Hi-Five to the detriment of Irby, Neal and Sanders and have diluted intellectual property owned by Irby, Neal and Sanders. The Defendants CD Universe, Amazon.com and Tower Records sell and distribute compact discs, tapes, etc. containing the infringing trademark/servicemark/tradename in violation of the rights of Irby, Neal and Sanders.

31. On October 13, 2005 a cease and desist letter (“demand letter”) was sent to Cold and Stop and is attached as Exhibit “C”.

32. To date, the Defendants have not responded to the demand letter.

**COUNT I
BREACH OF CONTRACT AGAINST
TONY THOMPSON**

33. Plaintiffs reallege paragraphs 1-32 and 46-49.

34. Irby, Neal, Sanders, Clark and Thompson own the trademark/servicemark/tradename Hi-Five.

35. The Contract signed by the members of Hi-Five in 1991 gave ownership of the name to the members and they agreed that they would decide by majority rule how to use the trademark/servicemark/tradename. Thompson had a duty to Irby, Neal, Sanders and Clark to refrain from the use of the mark without their approval as they maintain ownership in the trademark/servicemark/tradename.

36. Defendant Thompson has breached the Contract and has used the trademark/servicemark/tradename without permission of Irby, Neal and Sanders.

37. The actions of Thompson have damaged the Plaintiffs.

**COUNT II
VIOLATION OF FEDERAL TRADEMARK
LAW AGAINST ALL DEFENDANTS**

38. Plaintiffs realleges paragraphs 1-37 and 46-49.

39. Defendants actions are in violation of Lanham Trade-Mark Act, §§ 1 et seq., 32(1)(a), 34, 15 U.S.C.A. §§ 1051-1127.

40. The mark is distinctive and has been used in commerce.

41. The Plaintiffs are the legal or equitable owner of the mark via assignment along with Thompson and Clark.

42. The Defendants are using a similar mark which is likely to cause confusion among consumers as to the source of the parties respective goods and services.

43. The Defendants have used the mark in violation of federal law and has caused confusion to the public in the selling, manufacturing and distributing of the album, Hi-Five, The Return.

44. Plaintiffs have been damaged by the actions of the Defendants.

**COUNT III
VIOLATION OF STATE OF NEW YORK
TRADEMARK/SERVICEMARK COMMON LAW
AGAINST ALL DEFENDANTS**

45. Plaintiffs reallege paragraphs 1-44.

46. Irby, Clark, Neal, Sanders and Thompson own the trademark/servicemark/tradename Hi-Five.

47. The Defendants has violated New York State law by engaging in the unauthorized use of the trademark/servicemark/tradename without the permission of Irby, Neal and Sanders and identifying themselves within that State of New York as Hi-Five. Thompson and John Does 1-4 appeared on the "Wendy Williams Show on 107.5 WBL5, in New York and various other locations in New York on or about November 4, 2005, diluting the intellectual property owned by Irby, Neal and Sanders. In addition, all Defendants caused the manufacturing, selling and distributing of albums containing the

trademark/servicemark/tradename Hi-Five in the State of New York to the detriment of the Plaintiffs.

48. Such actions by Thompson and the Defendants have caused public confusion and has devalued the trademark/servicemark/tradename Hi-Five.

49. The Defendants' actions have damaged Irby, Neal and Sanders.

**COUNT IV
VIOLATION OF FEDERAL COMMON LAW
AGAINST ALL DEFENDANTS**

50. Plaintiffs reallege paragraphs 1-49.

51. Defendants' actions are in violation of federal trademark common law.

52. The mark is distinctive and has been used in commerce.

53. The Plaintiffs are the legal or equitable owner of the mark via assignment.

54. The Defendants are using a similar mark which is likely to cause confusion among consumers as to the source of the parties respective goods and services.

55. The Defendants have used the mark in violation of federal law and has caused confusion to the public.

56. Plaintiffs have been damaged by the actions of the Defendants.

**COUNT V
REQUEST FOR PRELIMINARY AND
PERMANENT INJUNCTION
AGAINST ALL DEFENDANTS**

57. Plaintiffs reallege paragraphs 1-56.

58. Defendants' action have diluted the trademark/servicemark/tradename Hi-Five.

59. The public has been and will be confused by Defendants' use of the trademark/servicemark/tradename.

60. Defendants use of the mark/name has caused irreparable injury to Irby, Neal and Sanders.

61. Plaintiffs have a strong likelihood on the success on the merits of this action.

WHEREFORE,

The Plaintiffs demand,

1. Judgment on all counts;
2. An injunction ordering the Defendants to cease the use trademark/servicemark/tradename Hi-Five;
3. An award in excess of One-Million Dollars (\$1,000,000.00);
4. An accounting of all monies received by Defendants in the exploitation of the trademark/servicemark/tradename Hi-Five; and,
5. Any other relief this Court deems just and equitable.

PLAINTIFFS' DEMAND TRIAL BY JURY

TRESTON IRBY, RUSSEL NEAL
AND MARCUS SANDERS
By their Attorneys,

Christopher L. Brown
NYS Bar No. 2953891
Brown & Rosen LLC
Attorneys At Law
77 Franklin St. 3rd Floor
Boston,, MA 02110
617-728-9111

November 22, 2005