

Federal Court



Cour fédérale

Date: 20140612

Docket: T-779-11

Citation: 2014 FC 559

Ottawa, Ontario, June 12, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

THE DRIVING ALTERNATIVE INC

Plaintiff

and

**KEYZ THANKZ INC, BRENT KILBOURN
AND TRACY WILKINS**

Defendants

JUDGMENT AND REASONS

[1] This is a motion by the Plaintiff for a judgment against the Defendants pursuant to Rules 213 and 216 of the *Federal Courts Rules*, SOR/98-106 [the Rules], according to the terms of the draft Order attached to the Plaintiff's notice of motion as Schedule A. The Plaintiff seeks relief under sections 7(b), 19, 20 and 22 of the *Trade-marks Act*, RSC, 1985, c T-13 [the Act].

[2] The Plaintiff's statement of claim was filed on May 6, 2011, alleging:

- i. trade-mark infringement of the Plaintiff's registered trade-marks KEYS PLEASE and THE DRIVING ALTERNATIVE, under registrations TMA 570,390 and TMA 542,824, contrary to section 19 and subsection 20(1) of the Act;
- ii. that the Defendants directed public attention to their services and business in such a way as to cause or to be likely to cause confusion in Canada between their services and business and the services of the Plaintiff and falsely suggesting an association between the business of the Defendants and the business of the Plaintiff, contrary to subsection 7(b) of the Act;
- iii. passing off their services in Canada as and for those of the Plaintiff, contrary to subsection 7(c) of the Act; and
- iv. depreciating the value of the goodwill of the Plaintiff's registered trade-marks, contrary to subsection 22(1) of the Act.

[3] The Plaintiff is not asserting subsection 7(c) of the Act in this motion for summary trial.

[4] The Defendants have not filed any material in response to this motion or attempted to cross-examine any of the Plaintiff's affiants. A Request to Admit was served on the Defendants on September 19, 2013, but no response was received by the Plaintiff.

[5] The Defendants filed a statement of defence and counterclaim on June 24, 2011.

[6] The Plaintiff's reply and defence to counterclaim was filed July 21, 2011.

[7] The Defendants' reply to defence to counterclaim was filed August 2, 2011.

[8] While the Defendants challenged the validity of the Plaintiff's registered trade-marks, they provided no material facts or any evidence to support their bald assertions. I give no weight to their allegations of invalidity.

I. FACTS

A. *Business of the Plaintiff*

[9] The Plaintiff is the registered owner of the registered Canadian trade-marks KEYS PLEASE (TMA 570,390) and THE DRIVING ALTERNATIVE (TMA 542,824). Both trade-marks are registered in association with the following wares and services:

- Wares: clothing and accessories, namely golf shirts, t-shirts, western shorts, novelty items, namely key chains.
- Services: Providing professional designated driving services, namely meeting customers at predetermined locations and driving them to their destinations in their own vehicles.

[10] The Plaintiff has used these trade-marks continuously since August, 1997, by providing professional designated driving services in Canada under both of these trade-marks. These services currently include a company-owned location in Calgary, Alberta, and franchise locations operated by licensees in Medicine Hat, Alberta, and Prince George, British Columbia.

Since the Plaintiff began operations, it or its licensees have operated in 17 locations in five provinces, including British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario.

[11] The Plaintiff features its trade-marks on a range of promotional material and in advertising media, including print, television, and the internet via www.thedrivingalternative.com, since 2001, and www.keysplease.net, since 2004, and a Facebook page since 2010. The trade-marks are also featured on vehicles used by the Plaintiff, the clothing of its drivers, and various sponsorships. This evidence is included in the affidavits of Ginger Greenwood and Jill Roberts.

[12] The Plaintiff has submitted evidence of third party recognition, including stories on television, radio and written media, as well as direct customer feedback. This evidence is provided in the affidavits of Ginger Greenwood and Graham Honsa.

[13] The Plaintiff produced evidence that it and its licensees had made sales in excess of \$15 million in Canada since the inception of its services in 1997. It is clear from the evidence before me that the Plaintiff's trade-marks KEY PLEASE and THE DRIVING ALTERNATIVE have both become well-known in Canada.

B. *Activities of the Defendants*

[14] From 1999 to 2001 the Defendants were licensed to operate a franchise location using the Plaintiff's trade-marks in London, Ontario. In December, 2001, the Plaintiff terminated the license for non-payment of royalties.

[15] Subsequent to the termination of the license, the Defendants continued to operate a designated driving service under the mark KEYZ PLEAZE. The Plaintiff became aware of this in 2005, and demanded by way of a letter dated September 15, 2005, that the Defendants cease using the marks THE DRIVING ALTERNATIVE, KEYS PLEASE, KEYZ PLEAZE and KEYS PLEZE.

[16] In response to this letter, the personal Defendants signed an undertaking dated October 25, 2005, to permanently cease using, among other things:

...all use of any trademarks causing or potentially causing confusion with Canadian Trademark Registration No. TMA570,390 for KEYS PLEASE...and Canadian Trademark Registration No. TMA542,824 for THE DRIVING ALTERNATIVE...in any manner whatsoever, including...all use of the trademarks THE DRIVING ALTERNATIVE, KEYS PLEASE, KEYZ PLEAZE and KEYS PLEZE and any logo bearing those trademarks or any mark confusingly similar thereto on any website and on any advertising or promotional materials...and all use of the trademarks THE DRIVING ALTERNATIVE, DRIVING ALTERNATIVE, KEYS PLEASE, KEYS PLEASE and KEYS PLEASE or any marks confusingly similar thereto to any telephone directions, including the yellow pages, the White Pages and the Canada 411 Directory.

[17] The personal Defendants also undertook that:

...all materials in our possession or placed on display by us at all locations, including without limitation, signage, advertising materials, posters, bar coasters, tent cards, brochures, invoices, letterheads, business cards, and clothing, including all credit card imprinter plates, bearing the words THE DRIVING ALTERNATIVE, KEYS PLEASE, KEYZ PLEAZE and KEYZ PLEZE or any words confusing therewith, have been retrieved and destroyed.

[18] After signing this undertaking, the personal Defendants incorporated the corporate Defendant KEYZ THANKZ on September 30, 2005 and operated a designated driving service in London, Ontario under that name. The Defendants continue to operate a website under the domain name www.keyzthankz.com.

[19] While the Defendants allege that there was a verbal consent from the Plaintiff to use KEYZ THANKZ, which the Plaintiff denies, there is no corroborative evidence beyond hearsay provided by the Defendants in support of their position. I give this evidence no weight.

[20] The Plaintiff became aware of the Defendants' activities in the fall of 2010, after receiving a substantial number of telephone calls from London, Ontario. The Plaintiff's counsel sent the Defendants a cease and desist letter on November 26, 2010, but the Defendants refused to comply with the terms of the letter, or subsequent letters sent to them in January and February, 2011.

[21] The Plaintiff retained a private investigation firm to examine the activities of the Defendants. This investigation was concluded in January, 2011. The investigation made a number of findings, including:

- a. the following statement was posted to www.keyzthankz.com [the KEYZ PLEASE Statement]:

Keyz Thankz is celebrating its tenth anniversary in business and you may recognize their name from a poster in a bar or restaurant, but if you don't you may know them as Driving Alternative or Keyz Please.

This statement appeared continuously from at least May 2010 until June 2012.

- b. the personal Defendant Tracy Wilkins identified herself on her Facebook page as the “owner of keyz please”;
- c. a representative of the corporate Defendant associated herself with KEYS PLEASE and THE DRIVING ALTERNATIVE over the telephone.

[22] While the Defendants offer their designated driving services in the greater London area, they drive customers beyond the greater London area to various cities, including Windsor, Toronto, Barrie, Oshawa and outside Ontario, to cities such as Montreal. Mr. Kilbourn admitted during discovery that they would drive customers “anywhere.”

[23] From 2005 to the present date, the KEYZ THANKZ mark has been displayed on advertising or promotional materials that have been:

- a. Distributed in bars and restaurants in London, Ontario;
- b. Displayed at events in London, Ontario that were sponsored by Keyz Thankz;
- c. Displayed on brochures, business cards, gift cards, vehicle signage, and uniforms;
- d. Featured on radio and television commercials; and
- e. Listed in London Yellow Pages telephone directories under the name KEYZ THANKZ since 2006 to the present day.

[24] The Plaintiff commenced this action on May 6, 2011.

II. ISSUES

[25] The issues in this motion are as follows:

- a. Is this matter within the applicable limitation period of the Federal Courts Act?
- b. Is this matter appropriate for resolution by way of summary trial?
- c. Are the personal Defendants liable as well as the corporate Defendant?
- d. Are the Defendants liable for trade-mark infringement under sections 19 and/or 20 of the Act?
- e. Do the Defendants' activities cause or are likely to cause confusion with the services offered by the Plaintiff associated with the Plaintiff's trade-marks, contrary to subsection 7(b) of the Act?
- f. Are the Defendants depreciating the value of goodwill of the Plaintiff's trade-marks, contrary to section 22 of the Act?
- g. If the Defendants are liable, what is the quantum of damages?

A. *Applicable Limitation Period*

[26] The Defendants argue that the applicable limitation period is two years under paragraph 5(1)(b) of the *Limitations Act of Ontario*, SP 2002, c24:

Discovery

5. (1) A claim is discovered on the earlier of,

(b) the day on which a reasonable person with the abilities and in the

Découverte des faits

5. (1) Les faits qui ont donné naissance à la réclamation sont découverts celui des jours suivants qui est antérieur aux autres :

b) le jour où toute personne raisonnable possédant les mêmes capacités et se trouvant

circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

dans la même situation que le titulaire du droit de réclamation aurait dû apprendre les faits visés à l'alinéa a). 2002, chap. 24, annexe B, par. 5 (1).

[27] The Plaintiff submits that the applicable period is six years under subsection 39(2) of the Federal Courts Act, RSC 1985, c F-7 [Federal Courts Act]:

Prescription and limitation on proceedings
39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Prescription — Fait survenu dans une province
39. (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

Prescription and limitation on proceedings in the Court, not in province
(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

Prescription — Fait non survenu dans la province
(2) Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une province.

[28] I agree with the Plaintiff. Section 39 of the Federal Courts Act describes the appropriate limitation period to apply, as the cause of action in this proceeding did not arise exclusively within the province of Ontario.

[29] In *Canada v Maritime Group*, [1995] 3 FC 124 [Maritime Group], the Court interpreted “cause of action” in the context of section 39 of the Federal Courts Act as including the damage suffered by a party, not just the act that caused the damage.

[30] *Maritime Group* was interpreted in the trade-mark context in *Kirkbi AG v Ritvik Holdings Inc*, 2002 FCT 585 [Kirkbi]. At issue was a trade-mark claim by the company making Lego against a company in Quebec who based their manufacturing and distribution facilities in Quebec, but sold their product across Canada. Although Kirkbi was different than the current action in that the infringing company in Kirkbi sold their product across Canada, the Court did refer to confusion occurring in consumers across Canada:

161 Based on what follows, I am satisfied that the relevant prescription period is six (6) years. I am satisfied on the evidence before me that all sales by Ritvik of its MICRO MEGA BLOKS for further retail sale throughout Canada were made "f.o.b. Ritvik's facilities in the province of Quebec. But its advertising and promotional programs have been conducted throughout Canada, the point-of-retail-sale displays have been utilized throughout Canada and, if confusion between Ritvik's product and the product of the LEGO group has occurred with resultant damage, it has largely, if not entirely, been in the minds of retail purchasers throughout Canada rather than in the minds of those who purchase at wholesale from Ritvik. Thus, I am satisfied that it simply cannot be said that all of the elements of the cause of action before me arose in Quebec or in any other particular province.

[31] The evidence of the Plaintiff established that the activities of the Defendants have caused damage to the Plaintiff beyond Ontario, including confusion in Alberta.

[32] Moreover, I agree with the Plaintiff that it seems unjust to bar, by way of a provincial statute of limitations, national trade-marks rights of the Plaintiff.

[33] Is this matter properly decided by way of summary trial?

[34] A party may bring a motion for summary trial pursuant to rule 213 of the Rules. If this Court is satisfied that there is sufficient evidence for adjudication, it may grant judgment, regardless of the amount of evidence involved, the complexity of the issues or the existence of conflicting evidence, unless this Court is of the view that it would be unjust to do so.

[35] The appropriate circumstances for this Court to grant judgment by way of summary trial were well-stated by Justice Roger Hughes in *Teva Canada Ltd v Wyeth LLC*, 2011 FC 1169 , at para 34:

34 In the present case, I find that a summary trial and summary judgment is an appropriate way to proceed so as to secure a just, expeditious and least expensive determination of the issues before the Court. I do so for the following reasons:

- a. the issues are well defined and, while a disposition of the issues may not resolve every issue in the action, they are significant issues and their resolution will allow the action or whatever remains, to proceed more quickly or be resolved between the parties acting in good faith;
- b. the facts necessary to resolve the issues are clearly set out in the evidence;
- c. the evidence is not controversial and there are no issues as to credibility; and
- d. the questions of law, though novel, can be dealt with as easily now as they would otherwise have been after a full trial.

[36] Likewise, in *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 at paras 96, 97 [*Vuitton*], Justice James Russell held:

96 Further, the British Columbia Court of Appeal has confirmed that if the judge on a Rule 18A application can find the facts as he or she would upon a trial, the judge should give judgment, unless to do so would be unjust, regardless of complexity or conflicting evidence. In determining whether summary trial is appropriate, the court should consider factors such as the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters that arise for consideration. See *Inspiration Management Ltd. v. McDermond St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, [1989] B.C.J. No. 1003 at paragraphs 48 and 53-57 (C.A.).

97 The Federal Court has confirmed the application of such British Columbia jurisprudence to the consideration of summary trial applications. See *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.* 2010 FC 966, 87 C.P.R. (4th) 412 at paragraph 34.

[37] For the following reasons, with respect to trade-mark infringement, likelihood of confusion, passing off and depreciation of goodwill, I find that the evidence establishes the Plaintiff's case and that summary trial judgment is appropriate.

B. *Liability of the Personal Defendants*

[38] In *Mentmore Manufacturing Co v National Merchandise Manufacturing Co*, [1978] FCJ No 521 at para 28, the Federal Court of Appeal explained the circumstances in which defendants are personally liable for infringement by a company:

...there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate,

wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it.

[39] I find that the Defendant Brent Kilbourn is personally liable.

[40] I find that the Defendant Tracey Wilkins is not personally liable.

[41] Both Mr. Kilbourn and Ms. Wilkins admit that:

- a. Both were involved in the selection of the name KEYZ THANKZ; and
- b. Both were aware of the existence of the Plaintiff's trade-marks KEYS PLEASE and THE DRIVING ALTERNATIVE in 2005, at the time when Keyz Thankz was incorporated.

[42] From 2005 to today, Mr. Kilbourn has been:

- a. The sole director, officer and president of Keyz Thankz;
- b. Responsible for all major decisions regarding the business and advertising of Keyz Thankz; and
- c. Arranged for the domain name www.keyzthankz.com to be registered.

[43] On discovery, Mr. Kilbourn explained that he is the owner of Keyz Thankz and stated “I am the company” and “I oversee everything”. He described his direction and control over the corporate Defendant as follows:

- a. He is responsible for all final decisions concerning Keyz Thankz and its strategic direction and growth;
- b. He has final responsibility and oversight of financial matters relating to Keyz Thankz, including sales and revenue; and
- c. He makes final decisions with respect to marketing and advertising including the content and form of advertising, such as:
 - i. Approval of the content of the company Facebook page; and
 - ii. Responsibility for and approval of the design, layout and content of the Keyz Thankz website at www.keyzthankz.com.

[44] Notwithstanding that since 2005 Ms. Wilkins has performed managerial duties for Keyz Thankz, and is described as the manager of Keyz Thankz in the press, I do not find that the evidence establishes a course of conduct by Ms. Wilkins that shows she acted outside her duties as a manager, or that she was an officer or director of the corporate Defendant. She is not personally liable.

[45] Accordingly, in the reasons that follow, liability for the Defendants’ activities is limited to the corporate Defendant and Mr. Kilbourn.

C. *Liability under section 19 and/or 20 of the Trade-Marks Act*

[46] Subsection 6(2) of the Act establishes that confusion will result if the use of two trade-marks or trade names in the same area would likely lead to the inference that the services performed under those trade-marks were performed or marketed by the same company or by a licensee under its control.

[47] The test for whether there is a likelihood of confusion is a matter of first impression and imperfect recollection. This first impression is held in the mind of a casual consumer somewhat in a hurry, who sees the mark at a time when they have no more than an imperfect recollection of the prior trade-mark. This consumer does not pause to give the matter any detailed consideration or closely scrutinize any similarities or differences between the marks.

[48] It has also been held that geographical separation in the use of confusing marks does not alter the test for the likelihood of confusion. This is because the Canadian trade-mark regime is national in scope and the owner of a registered trade-mark is entitled to the exclusive use of its trade-mark in association with the wares or services throughout Canada. It has been further held by the Supreme Court of Canada that the use of the words “in the same area” used in subsection 6(3) of the Act means that the test for confusion is based on a hypothetical assumption that both trade-marks are used in the same area irrespective of whether this is actually the case (*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27).

[49] In determining the likelihood of confusion, subsection 6(5) of the Act lists a number of factors to be considered, including:

- a. Inherent distinctiveness and the extent to which each has become known;
- b. The length of time each has been in use;
- c. The nature of the wares, services and business;
- d. The nature of the trade; and
- e. The degree of resemblance in appearance, sound and idea suggested.

[50] I agree with the Plaintiff that with respect to the Plaintiff's use of the KEYS PLEASE trade-mark and the Defendants' use of the KEYZ THANKZ trade-mark, the evidence shows:

- i. KEYS PLEASE has a strong degree of inherent and acquired distinctiveness;
- ii. Use of the KEYS PLEASE trade-mark has been continuous since 1997 to the present date by the Plaintiff and its franchisees;
- iii. Use by the Defendants of KEYZ THANKZ since 2005 was deliberate and knowingly made for the same services, notwithstanding the personal Defendants' undertaking not to do so, executed in 2005;
- iv. The ideas suggested by both trade-marks, KEYS PLEASE and KEYZ THANKZ, are very similar, and the first words in both marks are essentially the same, both phonetically and in appearance;
- v. There is a likelihood that as a matter of first impression and imperfect recollection in the mind of an ordinary consumer of each party's designated driver services that they would confuse and wrongly believe that there is a relationship or an association between the Plaintiff and the Defendants.

[51] The Plaintiff has established that the Defendants caused a likelihood of confusion and actual confusion and have infringed the Plaintiff's registered trade-marks KEYS PLEASE and THE DRIVING ALTERNATIVE under section 20 of the Act by use of DRIVING ALTERNATIVE and KEYS PLEASE, since 2005, in:

- i. Use on the Defendants' website www.keyzthankz.com from at least May 2010 to June 2012;
- ii. Use by Tracy Wilkins on Facebook as the owner KEYS PLEASE during the relevant period;
- iii. Dispatcher(s) for the Defendants indicating to callers that the Defendants were associated with KEYS PLEASE and THE DRIVING ALTERNATIVE; and
- iv. The above uses were deliberately and knowingly made, notwithstanding the 2005 undertaking by the personal Defendants not to do so.

[52] Further, the Plaintiff has established a likelihood of confusion under section 20 of the Act, by the activities of KEYZ THANKZ since 2005:

- a. Telephone logs from July 2012 to October 2013, in which the Plaintiff's dispatchers record and summarize telephone calls from the 226 and 529 area code for London, Ontario, and surrounding areas, showing confusion between the Plaintiff's services and those offered by the Defendants.
- b. Email notes created by Ginger Greenwood, general manager of the Plaintiff, in which she recorded and summarized calls from London, Ontario, which show confusion between the Plaintiff and the Defendants;

- c. Postings of messages by the public to the Plaintiff's website which show confusion between the Plaintiff and the Defendants; and
- d. Emails received by the Plaintiff from people who mistook the Plaintiff for the Defendants.

D. *Liability under subsection 7(b) of the Trade-Marks Act*

[53] The Plaintiff has established a reputation for its trade-mark in Canada and has established a likelihood of confusion. The evidence also shows that damages will result from the Defendants' activities, in that such activities:

- a. Diminish the distinctiveness of the Plaintiff's KEYS PLEASE and THE DRIVING ALTERNATIVE trade-marks in Canada;
- b. Cause a likelihood of confusion in the Canadian market place and loss of control over the Plaintiff's registered trade-marks; and
- c. Undermine the Plaintiff's ability to franchise under its trade-marks now and in the future.

[54] I find that the Plaintiff has established its cause of action under subsection 7(b) of the Act.

E. *Liability under section 22 of the Trade-Marks Act*

[55] In addition to alleging trade-mark infringement and passing off, the Plaintiff alleges depreciation of goodwill under section 22 of the Act, which provides:

Depreciation of goodwill
22. (1) No person shall use a trade-mark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto.

Dépréciation de l'achalandage
22. (1) Nul ne peut employer une marque de commerce déposée par une autre personne d'une manière susceptible d'entraîner la diminution de la valeur de l'achalandage attaché à cette marque de commerce.

[56] The likelihood of confusion is not a factor under section 22. The Plaintiff need only show that the Defendants have used marks the same as or sufficiently similar to the registered trade-mark KEYS PLEASE or THE DRIVING ALTERNATIVE to evoke amongst the relevant universe of consumers a mental association of the two marks that is likely to depreciate the value of the goodwill attaching to the Plaintiff's registered trade-mark.

[57] The Defendants' use of the mark KEYZ PLEAZE is the same as KEYS PLEASE phonetically and in meaning, and almost identical in appearance. Both marks are associated with designated driving services. The Defendants purposely relied on this mental association or linkage in the minds of consumers when it used the term KEYZ PLEAZE in the KEYZ PLEAZE Statement from 2009 to 2012 on the Defendant's website, and in the London Free Press advertisement in 2009.

[58] I find that use by the Defendants of KEYZ PLEAZE, as above, contravenes section 22 of the Act.

[59] Likewise, use by the Defendants of the Plaintiff's trade-marks KEYS PLEAZE and THE DRIVING ALTERNATIVE, as set out above, contravenes section 22.

F. *Damages*

[60] The Plaintiff claims that if it franchised use of its registered trade-marks in London, it could have generated a franchise fee of \$35,000 and based on a conservative estimate, earned \$350,000 in royalties from 2005 to 2013. In support of this estimate, the Plaintiff relies on the local population and statements of royalties for its franchises in Prince George, Medicine Hat and Calgary. This estimate also includes an assumed 15% growth rate, an assumption which is drawn on the collective annual growth of its three franchises from 2005 to 2012.

[61] The Plaintiff also relies on a default judgment decided in its favour against an infringer in Oshawa, Ontario. In *The Driving Alternative Inc v Jarvis (cob Keyz Pleezz)*, 2012 FC 1430, Justice Michael Shore awarded damages in the amount of \$50,000 based on a period of infringement of approximately one year.

[62] Moreover, the Plaintiff points to the fact that Mr. Kilbourn paid \$200,000 to the corporate Defendant for the exclusive rights to use KEYZ THANKZ.

[63] Finally, the Plaintiff submits the Court should have little regard for the financial information produced by the Defendants, which was scant at best and lacks credibility.

[64] The Defendants argue that any award of damages should be mitigated by the fact that the Plaintiff failed to exercise its rights from 2005 to 2010, despite being aware of the activities of the Defendants. Furthermore, the Defendants note that the Plaintiff has not had any franchise in Ontario since 2005. I agree that these facts weigh against the amount of damages sought by the Plaintiff.

[65] I have carefully received the financial information provided by the Plaintiff in respect of its franchisees over the 2005 to 2013 period. It is difficult to assess what, if any, franchise fees the Plaintiff may have been able to make in London, but for the Defendants' infringing activities, or for that matter, anywhere in Ontario, given there has not been an Ontario franchisee at all in the relevant time frame.

[66] However, as the Plaintiff's counsel rightly pointed out, the Court must do its best to ascertain appropriate damages, no matter the difficulty in doing so. Moreover, the Defendants did not cross-examine any of the Plaintiff's affiants, nor did they file any rebuttal evidence, and therefore adverse inferences can be drawn against the Defendants (*Vuitton*, above, at para 99).

[67] I find that based on the facts before me, it is reasonable to estimate the Plaintiff's damages in the amount of \$25,000 for each of the years of infringement, for a total damage award of \$225,000.

[68] I have also considered the Plaintiff's arguments for punitive and exemplary damages, and I am not persuaded they are appropriate. The Defendants' activities do not amount to the

threshold test set out in either *Whiten v Pilot Insurance*, [2002] 1 SCR 595 [*Whiten*] in the Supreme Court of Canada, or the *Vuitton* case, above, to award punitive and exemplary damages. The Defendants' failure to comply with the Court's Orders and process, as well as failure to be forthcoming on discovery, are matters properly dealt with in costs.

G. *Costs*

[69] The fact that the Defendants dismissed counsel, allegedly due to impecuniosity, and chose to be self-represented, does not excuse them from failing to comply with multiple orders of this Court during this summary trial proceeding, nor does it excuse their lack of compliance with discovery obligations. This includes repeated failures to produce relevant documents and to file a motion pursuant to Rule 120 to allow Mr. Kilbourn to represent the corporate Defendant, even though I allowed him to proceed to do so at the hearing.

[70] Their lack of regard for this Court's process has unduly lengthened proceedings and increased the Plaintiff's costs unnecessarily. The Defendants' willful blindness to their ongoing infringement, even if through ignorance of the law, is no excuse for doing so.

[71] I find therefore that an award of solicitor and client costs is appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Plaintiff THE DRIVING ALTERNATIVE INC is the owner of the trade-marks KEYS PLEASE and THE DRIVING ALTERNATIVE and trade-mark registrations TMA 570,390 and TMA 542, 824, in-respect thereof [the Plaintiff's trade-marks]; said registrations are valid and have been infringed by each of the Defendants KEYZ THANKZ INC and Brent Kilbourn, contrary to sections 19 and 20 of the *Trade-marks Act*;
2. Each of the Defendants KEYZ THANKZ INC and Brent Kilbourn have directed public attention to their services in such a way as to cause or to be likely to cause confusion in Canada between their services and business and the services and business of the Plaintiff, contrary to subsection 7(b) of the *Trade-marks Act*;
3. Each of the Defendants KEYZ THANKZ INC and Brent Kilbourn have used the trade-marks KEYZ PLEAZE, KEYS PLEASE and THE DRIVING ALTERNATIVE, in a manner likely to have the effect of depreciating the value of the goodwill associated with the Plaintiff's trade-marks;
4. The Defendant KEYZ THANKZ INC, by itself, its servants, workmen, agents and employees, and the Defendant Brent Kilbourn, are permanently restrained and enjoined from, directly or indirectly:
 - a. Further infringing the Plaintiff's trade-marks;
 - b. Using the trade-marks, KEYZ PLEAZE, KEYZ THANKZ, THE DRIVING ALTERNATIVE or any other words, or combination of words, likely to be confusing with the Plaintiff's trade-marks, as in a trade-mark or trade name, or for any other purpose;

- c. depreciating the value of the goodwill attaching to the Plaintiff's trade-marks; and
 - d. directing public attention to any of the Defendants, KEYZ THANKZ INC's or Brent Kilbourn's services in such a way as to cause or to be likely to cause confusion between the services and business of said Defendants and the services and business of the Plaintiff;
5. Each of the Defendants, KEYZ THANKZ Inc and Brent Kilbourn shall deliver up or destroy under oath any signage, labeling, documents, advertising, or any other matter in the possession or control of either Defendant, which would offend the terms of this injunction so ordered, within 60 days of this Judgment;
6. The Defendants KEYZ THANKZ INC and Brent Kilbourn shall pay damages in the amount of \$225,000 CDN plus interest thereon at a rate of 3%;
7. The Defendants KEYZ THANKZ INC and Brent Kilbourn shall pay to the Plaintiff its solicitor and client costs of the proceedings, in an amount to be assessed.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-779-11

STYLE OF CAUSE: THE DRIVING ALTERNATIVE INC v KEYZ THANKZ
INC, BRENT KILBOURN AND TRACY WILKINS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 2, 2014

JUDGMENT AND REASONS: MANSON J.

DATED: JUNE 12, 2014

APPEARANCES:

Mr. Ahmed Bulbulia FOR THE PLAINTIFF,
THE DRIVING ALTERNATIVE INC

Mr. Brent Kilbourn FOR THE DEFENDANTS,
BRENT KILBOURN AND KEYZ THANKZ INC

Ms. Tracy Wilkins FOR THE DEFENDANT,
TRACY WILKINS, ON HER OWN BEHALF

SOLICITORS OF RECORD:

MACERA & JARZYNA/MOFFAT & CO FOR THE PLAINTIFF,
Barrister and Solicitor THE DRIVING ALTERNATIVE INC
Ottawa, ON

Brent Kilbourn FOR THE DEFENDANTS,
BRENT KILBOURN AND KEYZ THANKZ
INC

Tracy Wilkins FOR THE DEFENDANT,
TRACY WILKINS, ON HER OWN
BEHALF