

IN THE CIRCUIT COURT OF LONOKE COUNTY, ARKANSAS

MICHAEL FLORENCE on behalf of
himself and all others similarly situated,

Plaintiffs,

v.

Case No.: 43CV-18-843

HORSEPOWER ENTERTAINMENT,
LLC, and THE MADISON
COMPANIES, LLC,

Defendants.

**** CORRECTED AND AMENDED ****

CLASS ACTION COMPLAINT

For his corrected and amended complaint, Plaintiff Michael Florence brings this action on behalf of himself and all others similarly situated, against Defendants The Madison Companies, LLC, and Horsepower Entertainment, LLC and alleges based upon his own personal knowledge and upon the information and belief following an investigation by his attorneys as follows:

1. Thunder on the Mountain was to be a weekend music festival at Mulberry Mountain near Ozark, Arkansas between June 26th through 28th, 2015. It was to include music from country stars such as Carrie Underwood, the Zac Brown Band, and Big & Rich (hereafter, "Thunder").

2. On June 15, 2015, just 11 days before Thunder was to begin, Defendants abruptly cancelled it, and Plaintiff and the Class he seeks to represent were left holding the bag.

3. This action is brought to provide a remedy to Plaintiff and the Class. The Class is defined as follows:

All persons who purchased day passes, children passes, VIP passes, camping passes, RV passes, hotel passes or packages, reserved seating, shower passes, passes of any other kind, or vendor booths to Thunder on the Mountain to be held on Mulberry Mountain, near Ozark, Arkansas between June 26th and 28th, 2015.

Excluded from the Class are the following:

- a) Any Class member that received a refund or charged back the amounts of their Thunder purchase on their credit or debit card;
- b) Any of the named Defendants, their directors, officers, employees, and/or agents;
- c) The judge presiding over this action and his/her immediate family members; and,
- d) Any person that timely and properly excludes himself/herself/itself pursuant to the orders of the Court.

JURISDICTION, PARTIES, AND VENUE

4. Plaintiff Michael Florence is a resident of Lonoke County, and a citizen of Arkansas. On or about November 26, and December 12, 2014, Plaintiff purchased four three-day passes, a reserved campsite, and four reserved seats to the Thunder on the Mountain music festival to be held near Ozark, Arkansas from June 26th through 28th, 2015 (“Thunder”). Plaintiff paid \$1,180.84 for these passes and reserve seats, \$450.00 for the reserved campsite and thus, his individual claim against Defendants is for his amount of

purchase, and no more than \$3,000.00 in total, inclusive on any potential recoverable interest or attorneys' fees.

5. Defendant The Madison Companies, LLC ("Madison") is a Delaware limited liability company that has its principal business in Greenwood Village, Colorado, and is a citizen of Delaware and Colorado. Madison is a venture capital firm. Madison was a partner in the creation, promotion, marketing, organization, and presentation of Thunder.

6. Defendant Horsepower Entertainment LLC ("Horsepower") is a Delaware limited liability company that is a wholly owned subsidiary of Madison, and has its principal business in Greenwood Village, Colorado, and is a citizen of Delaware and Colorado. Horsepower is a venture capital firm. Horsepower was a partner in the creation, promotion, marketing, organization, and presentation of Thunder.

7. This complaint refers to Madison and Horsepower, collectively, as "Horsepower."

8. Jurisdiction and venue are proper in this Court.

9. Federal jurisdiction is not implicated, and hereby disclaimed, because the total financial losses of the Class (as defined below) is about \$600,000.00. To the extent that any interest or attorneys' fees would be recoverable for the Class claims, such fees and interest would be no more than \$500,000.00, and therefore, the total amount in controversy in this action is \$1,100,000.00.

10. This amount in controversy amount has been verified from study of purchase information records obtained from the vendor responsible for the mechanism Class members used to purchase passes and other items for Thunder online, and the dollars charged back by consumers of Thunder on their credit and

debit cards at issue in other litigation involving Thunder. Defendants are also knowledgeable of these calculations and damages suffered by Class members as they received daily email summaries of Class member purchases from November of 2015 through at least June of 2015, and are also knowledgeable of the credit and debit card charge backs given litigation that they are involved in with the promoters of Thunder in federal court in Kansas.

FACTUAL ALLEGATIONS

11. In early 2014, Horsepower began negotiating an agreement to own and produce music festivals together with Brett Mosiman and his companies, which included Backwood Enterprises, LLC, and Pipeline Productions, Inc (collectively, Backwood).

12. By August of 2014, Horsepower and Backwood considered a partnership in the creation, promotion and presentation of Thunder for at least 2015, regardless of whether or not an offer to purchase Backwood by Horsepower ever materialized.

13. Indeed, in August and September of 2014, both oral and text message assurances were provided by Horsepower to Backwood that it would fund Thunder even if the contemplated purchase of Backwood did not occur. Thereafter, Backwood began organizing Thunder by booking artists to appear.

14. By November 2014, Horsepower and Backwood were diligently working together to fund, organize and promote Thunder on the Mountain. Such organization included negotiations with entertainers, making deposits with the selected performers, and the marketing of Thunder and selling of tickets, parking passes, and camping passes to the festival.

15. Pursuant to their agreement, Horsepower was to receive a 51% ownership in Thunder by providing a payment of \$750,000 for same, then fund \$500,000 of the operating capital for Thunder, and pay Backwood \$80,000 to produce and operate Thunder.

16. As part of the joint venture, Horsepower spent hundreds of thousands of dollars to organize the festival, and provided the scheduled entertainers (including Carrie Underwood and Zac Brown) their required deposits. Horsepower also directed and managed Backwood, and had final approval of every detail related to Thunder.

17. Backwood provided most of the labor in organizing the festival, and took direction from Horsepower regarding the same. Backwood scheduled the entertainment, negotiated with vendors, and others, and directly handled the administrative details of putting on a music festival. Backwood also negotiated and organized the mechanisms to sell tickets, camping and parking passes, and vendor booths.

18. In the winter months of 2014 and 2015, considerable tension developed between the Defendants related to need for more money, and that the festival appeared to be destined to suffer a financial loss.

19. From at least December of 2014, Horsepower hid from Plaintiffs and the Class the considerable tension between it and Backwood, and that the festival was on very shaky ground. However, attendance passes, camping and parking passes, and vendor booths continued to be sold to Plaintiffs and members of the Class.

20. Rather than reveal these material issues, Horsepower continued to approve the promotion and sales to Thunder and even though Horsepower knew it was very likely that the companies would breach their agreement with Backwood.

21. Due to the material omissions by Horsepower, Plaintiffs and the Class continued to make various purchases related to Thunder, and continued to be misled that they would attend Thunder in June of 2015 and see entertainers Carrie Underwood, Big & Rich, the Zac Brown Band, and others.

22. On April 15, 2015, two months before the festival, Horsepower sued Backwood in Delaware Chancery Court. The complaint alleged Backwood were attempting to force them into a formal joint venture agreement they did not wish to enter into, but admitted that Horsepower helped organize Thunder on the Mountain, and further, had contributed hundreds of thousands of dollars to promote and arrange for the festival. This lawsuit was not disclosed to Plaintiff nor the Class, and indeed, sales and marketing of attendance passes, parking passes, and camping passes continued even after Horsepower's lawsuit was filed.

23. Even after filing this lawsuit against Backwood, Horsepower knew, having received and continuing to receive daily ticket sales reports for Thunder, that Class members were still purchasing Thunder based upon the continued advertising for Thunder.

24. On May 14, 2015, Backwood and Pipeline removed the Delaware Chancery Court case against them to federal court in Delaware. Sales for Thunder continued, and Backwood and Horsepower continued to receive emails with daily ticket sales reports.

25. On May 21, 2015, Backwood sued Horsepower in federal court in Kansas over the failed Thunder. Backwood's original complaint alleged a joint venture existed between the parties, and that Horsepower breached the agreement and breached the fiduciary duty they owed to Backwood.

26. Horsepower also failed to reveal this lawsuit to Plaintiff and the Class, and even continued to promote and to sell the various passes to Class members.

27. On June 15, 2015, just about two weeks before the music festival was to begin, Thunder was cancelled without any public explanation.

28. On the same day, vendors were notified by email of the event's cancellation, but again, not told why.

29. Plaintiffs and members of the Class all expended sums of money for Thunder, and Horsepower accepted these payments to their benefit. Additionally, due to Horsepower's wrongdoing, Plaintiff suffered actual financial losses.

CLASS ALLEGATIONS

30. Plaintiff incorporates all allegations and facts asserted in this Complaint.

31. Plaintiff bring this class action under Rule 23 of the Arkansas Rules of Civil Procedure, individually and for all members of the following Class:

All persons who purchased day passes, children passes, VIP passes, camping passes, RV passes, hotel passes or packages, reserved seating, shower passes, passes of any other kind, or vendor booths to Thunder on the Mountain to be held on Mulberry Mountain, near Ozark, Arkansas between June 26th and 28th, 2015.

Excluded from the Class are the following:

- e) Any Class member that received a refund or charged back the amounts of their Thunder purchase on their credit or debit card;
- f) Any of the named Defendants, their directors, officers, employees, and/or agents;
- g) The judge presiding over this action and his/her immediate family members; and,
- h) Any person that timely and properly excludes himself/herself/itself pursuant to the orders of the Court.

A. Typicality

32. Plaintiff's claims are typical of the claims of Class, because they all purchased passes and vendor booths for Thunder, and the claims all arise from the same wrongdoing committed by Horsepower. Plaintiff's claims are based upon the same set of facts and assert the same legal theories as the Class and they are typical on one another.

B. Commonality

33. There are questions of law and/or fact common to the Plaintiff and the Class, which predominate over questions that may affect particular Class members. The common and predominate question is whether Horsepower was unjustly enriched and/or violated the Arkansas Deceptive Trade Practices Act ("ADTPA") by promoting and selling the passes and vendor booths for Thunder, and accepting money from the Class and using such funds for Horsepower's benefit, but then cancelling Thunder and maintaining the benefits of the ill-gotten proceeds.

C. Numerosity

34. The Arkansas Supreme Court has noted that classes of only 40 members may be proper for class certification, because of the difficulty inherent in joining as few as 40 class members. The Arkansas Supreme Court has certified a class as few as 77 members. Passes and vendor booths to Thunder were sold regionally, and to at least to citizens in Arkansas, Kansas, Missouri, Oklahoma, Texas, Louisiana, and Kansas, and to more than 77 people.

35. Thus, the members of the Classes are so numerous that joinder of all members is impracticable.

D. Superiority

36. A class action is superior to other methods for the fair and efficient adjudication of the controversy because:

- a. The prosecution of separate actions by individual members of the Class creates a risk of inconsistent and varying adjudications regarding members of the Class and would establish incompatible standards of conduct for Defendants; and
- b. Questions of law and fact common to the members of the Class predominate over questions affecting only individual members and prosecutions as a class action will eliminate the possibility of duplicate litigation.

E. Adequacy

37. Plaintiffs will fairly and adequately represent the interests of the Class because Plaintiff's interests do not conflict with the interests of the other Class members he seeks to represent. Plaintiff has also retained competent counsel experienced in class action litigation. Plaintiff's counsel will fairly and adequately protect the interests of the Class.

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CAUSES OF ACTION

COUNT I

Unjust Enrichment

38. Plaintiff and the Class incorporate all allegations asserted above.

39. Plaintiff and the Class provided money to the Horsepower in the form of purchases of attendance passes, camping, shower, and parking passes, and vendor booths for the Thunder.

40. Horsepower received benefits from Plaintiff and the Class in the form of purchases, which were then used to pay costs associated with the festival, including costs related to various entertainers.

41. Horsepower acted purposely to conceal their animosity toward Backwood, and their knowledge as early as December of 2014 that the festival was in grave peril – yet promotion of Thunder and sales continued to Plaintiff and the Classes.

42. It would be unjust to allow Horsepower to continue to retain Plaintiff's and the Class members' money under these circumstances, and thus, Defendants should be required to restore and provide restitution to the Plaintiffs and the Classes.

COUNT II

Violations of The Arkansas Deceptive Trade Practices Act

43. Plaintiff and the Class incorporate all of the paragraphs above.

44. Horsepower's wrongdoing, as alleged above, violated the ADTPA.

45. Plaintiff and the Class members are consumers.

46. The activities at issue are consumer-oriented practices.

47. Horsepower violated A.C.A. §4-88-107 (a)(1) by engaging in an unconscionable, false or deceptive act or practice in business, commerce or trade. As alleged throughout this pleading, Horsepower's actions were unconscionable, false, and deceptive in that it marketed Thunder at times it knew the music festival was in great peril, and at times it was very likely not to occur, but Horsepower continued to sell passes and vendor booths to Thunder and collect money from Plaintiff and the Class.

48. By the allegations and wrongdoing alleged in this pleading, Horsepower also violated A.C.A. §4-88-108 (1) and (2) by promoting Thunder to the Plaintiff and the Class with deception, and specifically by continuing to market Thunder at times Horsepower knew the music festival was in great peril, and at times it was very likely not to occur. Horsepower omitted material facts from Plaintiff and the Class in the form of choosing not to reveal the problems it had with Backwood in the fall of 2014, and which continued and became even more problematic in 2015.

49. Due to Horsepower's violations of the ADTPA, Plaintiff and the Class purchased various passes, reserved seats, and vendor booths, and thus, suffered actual financial losses with Thunder's cancellation.

50. Plaintiff and the Class commonly relied in that they each paid sums of money for various passes, seats, and vendor booths to Thunder.

51. A.C.A. §4-88-113(f)(1)(B) is unconstitutional in that the General Assembly amended the Arkansas Rules of Civil Procedure, which may only be amended by the Arkansas Supreme Court.

JURY DEMAND

Plaintiffs and the Classes demand a trial by jury regarding all issues.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the Classes pray for judgment against all Defendants, and that the Court to grant them:

- a. An Order certifying the Class and appointing Plaintiff and this counsel to represent the Class;
- b. An award to Plaintiff and the Class against Defendants for their financial losses and for restitution of \$600,000.00; and,
- c. An award attorneys' fees and costs not to exceed \$480,000.00;

DATED: September 5, 2018

Respectfully submitted,

STEEL, WRIGHT, GRAY, PLLC



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