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# Arbitration Agreements in the Employment Context

It's rare when one of the most well-known coffee companies in the world gets into a trademark battle. But that is what happened last year when Starbucks, Inc., released a unicorn-themed Frappuccino® drink in an attempt to capitalize on the “unicorn craze.” As with most things

Starbucks does, the drink received wide publicity. The public's reaction to the drink was mixed – some were enthused by the drink's bright colors and fanciful flavoring; while others, including some famous actresses and artists, expressed their “complete disgust” with the drink.

One small café in New York was particularly distraught about Starbucks' new offering. The End, which is owned by the Montauk Juice Company, sells healthy organic drinks and juices at its store in Brooklyn. The End had recently created a drink called the Unicorn Latte® which featured a mix of colorful “superfood” ingredients, such as cold-pressed ginger, lemon juice, dates, cashews, maca root, blue-green algae and vanilla bean. The End's product also featured no cow's milk, so the use of the term “latte” appeared to be a spoof of an actual latte.

The End's Unicorn Latte received increasing publicity for its unique colors and health benefits, being featured in various local and national news outlets, including *The New York Times*. After initial fanfare in late 2016 and early 2017, The End's owners decided to register the mark “UNICORN LATTE” with the U.S. Patent and Trademark Office (Serial No. 87308906).

A few months later, Starbucks released its unicorn-themed drink. This limited Frappuccino release had a distinct blue and pink color scheme with a sparkle top, similar to the Unicorn Latte. However, the Unicorn Frappuccino was cream-based and contained mango syrup, sugar and classic syrup. The drink was then topped with whipped cream and “dusted” with a

blue and pink unicorn dust. A side-by-side comparison shows some of the similarities:



The End's Unicorn Latte®

Starbucks' Unicorn Frappuccino®

On April 24, 2017, with their recently registered mark in hand, The End issued a cease and desist letter to Starbucks for its allegedly infringing use of the term “unicorn” to describe its Frappuccino drink. Although the products were different, the complaint alleged that “the size of and scope of Starbucks' product launch was designed so that the Unicorn Frappuccino would eclipse the Unicorn Latte in the market, thereby harming plaintiffs and confusing their customers.” The complaint also noted that customers started to ask The End to create Unicorn Frappuccinos for them, while online publications and customers furthered ongoing confusion by referring to Starbucks' product as a Unicorn Latte.

Starbucks failed to comply with the cease and desist letter. So, The End filed a lawsuit in the U.S. District Court for the Eastern District of New York on May 3, 2017.<sup>1</sup> The End's theories of liability were broad and well-crafted. The complaint sought relief not only for trademark infringement, dilution and false designation of origin under the Lanham Act, but also brought claims of unfair business practices, as well as common law trademark and state law claims. The End cited to its registered mark, and also to Starbucks' failure to mitigate the confusion through its marketing.



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It claimed that by creating and marketing such a similar product, Starbucks ought to be “held accountable for infringing, diluting and otherwise diminishing” The End’s intellectual property.

The End sought a permanent injunction against Starbucks’ use of the “UNICORN LATTE” or “UNICORN FRAPPUCCINO” mark, as well as damages in the form of Starbucks’ profits from the drink and any losses that The End incurred. Some sources claim the demand totaled \$10 million.<sup>2</sup>

In September 2017, before the litigation was resolved, the parties settled for an undisclosed sum. Even though the court documents do not specify the amount, the record shows that each party will pay their own costs and also noted prejudice against Starbucks.<sup>3</sup>

Although we will likely never know the actual cost of Starbucks’ alleged infringement, the lawsuit highlights how well-maintained intellectual property and a skillfully drafted complaint can lead to quick and successful litigation, even against one of the largest brands in the world. If The End had not registered its mark with the Patent and Trademark Office, it would have diminished its ability to bring suit for nationwide damages since it had only one location in New York. In addition, the registration put Starbucks on constructive notice that its product would potentially infringe on The End’s mark. But the registration wasn’t the only component that led to The End’s ultimate success.

The complaint’s inclusion of state law and common law claims also forced Starbucks to defend its general business tactics in failing to take steps to clarify that its product was distinct from The End’s latte. The unfair business practices claims and common law claims would have likely prevented Starbucks from arguing that it had no control over its customers’ use (or misuse) of the Unicorn Latte mark to refer to its Frappuccino once the product was released.

However, it also should be noted that Starbucks might have identified the Unicorn Latte mark in advance, but determined that the risk of infringement was not likely

or that the money it would make off of the product was worth the risk.

This Unicorn Latte example also serves as a reminder to protect any new brands at an early stage – even small ones. The small brand owner should collect evidence of confusion and call upon an attorney early to draft a comprehensive complaint under common law, state law and federal law. Doing so can prevent large brands from co-opting unique intellectual property, especially during a fast-moving social trend, such as the unicorn movement, making this prudent protection process potentially worth its weight in gold. **P**

- 1 Complaint, Montauk Juice Factory Inc., The End Brooklyn v. Starbucks Corporation d/b/a Starbucks Coffee Company, WL 1747128 (E.D.N.Y. 2017). (No. 1:17-cv-02678).
- 2 Corinne Ramey, Starbucks and Brooklyn Cafe Settle Unicorn-Drink Lawsuit, Fox Business (Sept. 5, 2017), [foxbusiness.com/features/2017/09/05/starbucks-and-brooklyn-cafe-settle-unicorn-drink-lawsuit.html](https://www.foxbusiness.com/features/2017/09/05/starbucks-and-brooklyn-cafe-settle-unicorn-drink-lawsuit.html); Dave Simpson, Starbucks, NY Cafe Settle ‘Unicorn Frappuccino’ TM Row, Law360 (Sept. 5, 2017, 10:04 PM), <https://www.law360.com/articles/960858/starbucks-ny-cafe-settle-unicorn-frappuccino-tm-row>.
- 3 Stipulation of Voluntary Dismissal with Prejudice Pursuant to F.R.C.P. 41(a)(1)(A)(ii), Montauk Juice Factory Inc., The End Brooklyn v. Starbucks Corporation d/b/a Starbucks Coffee Company, No. 1:17-cv-02678 (E.D.N.Y. Sept. 5, 2017).

