

STATE OF INDIANA) HAMILTON COUNTY SUPERIOR COURT
) ROOM NO. 1
 2008 JAN 13/SS:19:11
 COUNTY OF HAMILTON) CAUSE NUMBER: 29D01-0801-PL-045
 HEINEKEN USA, INC.)
)
 Plaintiff,)
)
 v.)
)
 BAPE CO., INC.)
)
 Defendant.)

COMPLAINT

For this Complaint against BAPE Co., Inc. ("BAPE"), Plaintiff, Heineken USA, Inc. ("HUSA") hereby alleges as follows:

SUBSTANCE OF THE ACTION

1. This case involves infringement upon the distinctive and world-famous Heineken trademarks used by HUSA in connection with the sale and promotion of its products in the United States. BAPE's infringement arises out of the unauthorized use of the Heineken trademarks on tennis shoes sold in the United States ("the infringing items").
2. BAPE's use of the Heineken marks on the infringing items violates HUSA's rights under federal trademark law, common law and Indiana state law. HUSA asserts claims for federal trademark infringement, federal trademark dilution, false designation of origin or sponsorship, false advertising, and trade dress infringement pursuant to the Lanham Act, as well as common law trademark infringement, unfair competition, conversion, forgery, counterfeiting, and deception. HUSA seeks a permanent injunction preventing BAPE from using the distinctive Heineken trademarks, along with an award of damages, treble

damages, profits, statutory damages, attorney's fees and costs.

THE PARTIES

3. HUSA is a corporation organized and existing under the laws of New York.
4. BAPE is a foreign business organized and existing under the laws of Japan. BAPE may be served through its President, Tomoaki Nagao, at his principal place of business, 5-5-8 Minami-Aoyama, Tokyo, Japan.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over this action pursuant to Ind. Code § 33-28-1-2 and Ind. Code § 33-33-29-7.
6. BAPE has submitted to this Court's jurisdiction by doing business in the state of Indiana.
7. The exercise of personal jurisdiction over BAPE by this Court is consistent with the federal Due Process Clause.
8. Venue properly lies in this Court because a substantial part of the events giving rise to the claims alleged herein arose in Hamilton County, Indiana.

GENERAL ALLEGATIONS AS TO HEINEKEN

Heineken's Trademark Rights

9. HUSA and Heineken Brouwerijen B.V. ("HBBV") are members of the Heineken Group and affiliated subsidiaries of the parent corporation, Heineken N.V. The Heineken Group ("Heineken") owns and manages one of the world's leading portfolios of beer brands. Relative to this business, HBBV has registered with the United States Patent and Trademark Office multiple word and image trademarks. These registrations are active and unrevoked, and constitute *prima facie* evidence of Heineken's ownership of the marks. These trademarks are collectively referred to herein as the "Heineken

trademarks” or the “Heineken marks.”

10. HUSA is the sole importer of Heineken products in the United States and bears the responsibility for all sales, marketing and promotional activities for Heineken in the United States. As the sole importer in the United States, HUSA is the exclusive licensee for use of the Heineken marks in this territory.
11. HBBV, as owner of the Heineken marks, has assigned to HUSA the right to enforce the Heineken marks within the United States, including the right to file actions related to infringement of the marks.
12. The Heineken trademarks are distinctive and famous.
13. HUSA maintains strict control over the quality and nature of its products and items bearing the Heineken trademarks in the United States.
14. HUSA has invested considerable time and money in advertising the Heineken trademarks throughout Indiana and the country. As a result of extensive worldwide advertising, the Heineken marks are immediately recognizable.
15. HUSA has acquired substantial goodwill among consumers in the United States.
16. As a result of such goodwill and immediate recognition, and as a result of extensive advertising, the Heineken trademarks have become highly valuable.

BAPE's Infringement of HUSA's Rights

17. Subsequent to Heineken's development, use and the registration of the Heineken trademarks, BAPE began using the Heineken marks or confusingly similar variations of the marks.
18. Specifically, BAPE has manufactured, produced, advertised and/or sold tennis shoes bearing the Heineken trademarks. [See attached, Exhibit A]

19. BAPE has not received permission from HUSA, or anyone acting on Heineken's behalf, to manufacture, produce, advertise or sell any item bearing the Heineken trademarks.
20. By manufacturing, producing, advertising and/or selling items bearing the Heineken marks without permission, BAPE has attempted to profit from and capitalize on the trademark rights and substantial goodwill developed by Heineken and HUSA.
21. BAPE has willfully and intentionally manufactured, produced, advertised and/or sold products bearing the Heineken trademarks with knowledge that the Heineken marks are federally registered trademarks owned by Heineken.
22. BAPE manufactured, produced, advertised and/or sold items bearing the Heineken marks with knowledge that BAPE's use of the Heineken trademarks was unauthorized.
23. The manufacture, production, advertisement, and/or sale of items bearing the Heineken trademarks created a likelihood of consumer confusion.
24. BAPE used the Heineken marks with the intent to confuse and/or deceive consumers.

COUNT I
FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114

25. HUSA incorporates herein by reference the allegations contained in all previous paragraphs of this Complaint.
26. BAPE has used in commerce, and in connection with the sale of goods, a reproduction, counterfeit, copy or colorable imitation of the Heineken trademarks.
27. BAPE has reproduced, counterfeited, copied or imitated the Heineken marks and applied the marks to labels, signs, prints, packages, receptacles or advertisements intended to be used in commerce.
28. BAPE's use of the Heineken trademarks creates the likelihood of confusion, mistake and/or deception among consumers.

29. BAPE willfully infringed upon the rights of HUSA. BAPE intended to confuse, mistake or deceive consumers.
30. BAPE used the reproductions of the Heineken trademarks with knowledge that the marks were copies and/or counterfeits.
31. Consumers were initially interested and lured to the infringing items by the similarity to the Heineken marks.
32. As a result of BAPE's infringement, HUSA has suffered irreparable harm to valuable Heineken trademarks. Unless BAPE is permanently enjoined from further infringement, HUSA will continue to suffer irreparable harm.
33. A permanent injunction is necessary to prevent BAPE from further interference with HUSA's rights.
34. As a result of BAPE's infringement under 15 U.S.C. § 1114, HUSA has been injured and is entitled to damages, including but not limited to, BAPE's profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT II
TRADEMARK DILUTION UNDER 15 U.S.C. § 1125(c)

35. HUSA incorporates by reference the allegations contained in all previous paragraphs of this Complaint.
36. The Heineken trademarks are the product of creativity and imagination.
37. The Heineken trademarks are distinctive and famous.
38. BAPE adopted the Heineken trademarks after the marks became famous.
39. BAPE's use of the Heineken trademarks caused dilution of the marks.
40. BAPE's use of the Heineken trademarks is commercial and in commerce.

41. BAPE's use of the Heineken trademarks has weakened the unique association of the marks with Heineken, as owner of the marks.
42. As a result of BAPE's dilution under 15 U.S.C. § 1125(c), HUSA has suffered irreparable harm to valuable Heineken trademarks. Unless BAPE is permanently enjoined from further dilution, HUSA will continue to suffer irreparable harm.
43. A permanent injunction is necessary to prevent BAPE from further interference with HUSA's rights.
44. BAPE's dilution of the Heineken marks has caused HUSA damages, including, but not limited to, BAPE's profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT III
FALSE DESIGNATION OF ORIGIN OR SPONSORSHIP,
FALSE ADVERTISING AND
TRADE DRESS INFRINGEMENT UNDER 15 U.S.C. § 1125(a)

45. HUSA incorporates by reference the allegations contained in all previous paragraphs of this Complaint.
46. BAPE used the Heineken trademarks in commerce and in connection with the sale of goods or services.
47. BAPE's use of the Heineken marks is likely to cause confusion or mistake and/or is likely to deceive consumers as to the affiliation, connection or association of BAPE with HUSA; or as to the origin, sponsorship, or approval of BAPE's goods by HUSA.
48. BAPE's conduct constitutes false or misleading descriptions, false advertising, and false designations of the origin and/or sponsorship of BAPE's goods and constitutes trade dress infringement in violation of § 43(a) of the Lanham Act, as amended, 15 U.S.C. § 1125(a).

49. As a result of BAPE's conduct, HUSA has suffered irreparable harm to valuable Heineken trademarks. Unless BAPE is permanently enjoined from further false designations, false advertisement and trade dress infringement, HUSA will continue to suffer irreparable harm.

50. A permanent injunction is necessary to prevent BAPE from further interference with HUSA's rights.

51. BAPE's violations of 15 U.S.C. §1125(a) have caused HUSA to incur damages, including, but not limited to, BAPE's profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT IV
COMMON LAW TRADEMARK INFRINGEMENT

52. HUSA incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

53. Heineken was the first to use the Heineken trademarks or any marks similar thereto in association with the sale of any product or service. As a result of the continued sale by Heineken, the marks have become internationally known and Heineken has become identified in the public mind as the manufacturer and/or licensor of the products and services to which the Heineken trademarks are applied.

54. Heineken has acquired a reputation among consumers in the United States for quality and excellence, and the Heineken trademarks have come to symbolize that reputation.

55. BAPE, with knowledge of and with intentional disregard for the rights of Heineken and HUSA, manufactured, produced, advertised and/or sold items using the Heineken marks or confusingly similar imitations thereof.

56. BAPE's use of the Heineken marks has created the likelihood of confusion among

consumers.

57. BAPE's acts constitute trademark infringement and willful infringement under the common law.

58. As a result of BAPE's conduct, HUSA has suffered irreparable harm to valuable Heineken trademarks. Unless BAPE is permanently enjoined from further infringement, HUSA will continue to suffer irreparable harm.

59. A permanent injunction is necessary to prevent BAPE from further interference with HUSA's rights.

60. As a result of BAPE's infringement, HUSA has suffered damages, including, but not limited to, BAPE's profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

COUNT V
UNFAIR COMPETITION

61. HUSA incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

62. BAPE's unlawful and unauthorized use of the Heineken trademarks constitutes unfair competition with HUSA.

63. BAPE's conduct creates consumer confusion as to the source and/or origin of the infringing items.

64. BAPE's use of the Heineken trademarks is an attempt to interfere with HUSA's business relationship with its consumers and to trade on HUSA's goodwill.

65. As a result of BAPE's conduct, HUSA has suffered irreparable harm to valuable Heineken trademarks. Unless BAPE is permanently enjoined from further unfair competition, HUSA will continue to suffer irreparable harm.

66. A permanent injunction is necessary to prevent BAPE from further interference with HUSA's rights.

67. BAPE's unfair competition has caused HUSA to incur damages, including but not limited to, BAPE's profits from the sale of the infringing products, actual damages, costs of suit and attorney's fees.

COUNT VI
CONVERSION UNDER IND. CODE § 35-43-4-3

68. HUSA incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

69. BAPE knowingly or intentionally exerted unauthorized control over the property of Heineken.

70. BAPE sold items bearing Heineken intellectual property without HUSA's consent and in a manner or to an extent other than that to which HUSA had consented.

71. BAPE knowingly or intentionally exerted unauthorized control over the goodwill developed by HUSA.

72. As a result of BAPE's conversion, HUSA was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

COUNT VII
FORGERY UNDER IND. CODE § 35-43-5-2(b)

73. HUSA incorporates by reference the allegations contained in the previous paragraphs of this Complaint.

74. BAPE, with the intent to defraud, made, uttered, and/or possessed a written instrument in such a manner that it purports to have been made by HUSA.

75. HUSA did not give BAPE the authority to make or possess the infringing items.
76. As a result of BAPE's forgery, HUSA was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

COUNT VIII
COUNTERFEITING UNDER IND. CODE § 35-43-5-2(a)

77. HUSA incorporates herein by reference the allegations contained in all previous paragraphs of this Complaint.
78. BAPE knowingly or intentionally made and/or uttered a written instrument in such a manner that it purports to have been made by HUSA.
79. HUSA did not give BAPE the authority to make or utter the infringing items.
80. As a result of BAPE's counterfeiting, HUSA was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

COUNT IX
DECEPTION UNDER IND. CODE § 35-43-5-3

81. HUSA incorporates herein by reference the allegations contained in all previous paragraphs of this Complaint.
82. BAPE knowingly or intentionally made a false or misleading written statement with the intent to obtain property.
83. BAPE, with the intent to defraud, misrepresented the identity or quality of property.
84. As a result of BAPE's deception, HUSA was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

COUNT X
CLAIM FOR CORRECTIVE ADVERTISING DAMAGES

85. HUSA incorporates herein by reference the allegations contained in all previous paragraphs of this Complaint.
86. BAPE has damaged HUSA, through its advertising, HUSA's goodwill and reputation, or has otherwise caused misinformation in the marketplace as to the origin, source or sponsorship of BAPE's products.
87. HUSA seeks those damages arising from this advertising injury, including but not necessarily limited to monies sufficient to compensate for the damage to HUSA's goodwill and/or the cost for correcting the misinformation in the marketplace.

PRAYER FOR RELIEF

WHEREFORE, HUSA prays for relief against the BAPE as follows:

- a. That BAPE, its officers, partners, agents, servants, affiliates, employees, attorneys, and representatives, and all those in privity or acting in consent or participation with BAPE, and each and all of them, be permanently enjoined from:
- (i) Imitating, copying, reproducing, or using, in any manner, the Heineken trademarks, or any other mark confusingly similar to the Heineken trademarks;
 - (ii) Committing any act that dilutes or is likely to dilute the distinctiveness of the Heineken trademarks;
 - (iii) Committing any act that is likely to create the impression that BAPE's business or products are in any way sponsored by, approved of or

otherwise affiliated or connected with HUSA;

- (iv) Importing, manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product or service using any simulation, reproduction, counterfeit, copy or imitation of any Heineken trademark or trade dress; and
- (v) instructing, assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs (i) through (iv) above.

b. That BAPE be required to:

- (i) Deliver to HUSA for destruction all goods and materials bearing Heineken trademarks which BAPE has in its possession;
- (ii) Recall and deliver to HUSA for destruction all goods and materials bearing the Heineken trademarks that have been previously distributed or sold;
- (iii) Pay compensatory damages to HUSA in an amount to be determined at trial for the injuries Heineken has sustained as a consequence of the acts complained of;
- (iv) Pay HUSA treble damages, or alternatively, BAPE's profits trebled, whichever is greater;
- (v) Pay all of HUSA's litigation expenses, including reasonable attorneys' fees and costs of this action;
- (vi) Pay interest to HUSA, including pre-judgment interest on the foregoing sums; and

(vii) File with this Court and serve on HUSA an affidavit setting forth in detail the manner and form of BAPE's compliance with the terms of this Court's orders.

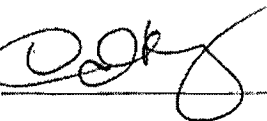
c. That HUSA be awarded such other and further relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

HUSA hereby respectfully requests a trial by jury in this cause, and for all other relief just and proper in the premises.

Respectfully submitted,

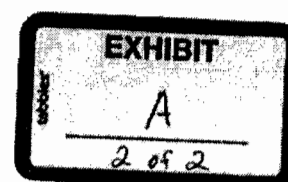
Darlene R. Seymour
Attorney # 23133-49

By:  _____

1292 E. 91st Street
Indianapolis, IN 46240



EXHIBIT
A
1 of 2



STATE OF INDIANA) HAMILTON COUNTY SUPERIOR COURT
) ROOM NO. 1
) SS:
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APPEARANCE BY ATTORNEY IN CIVIL CASE

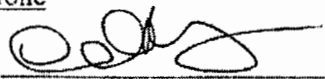
COMES NOW, Darlene R. Seymour, attorney for Plaintiff, and files her appearance in this matter.

Party Classification: Initiating ☒ Responding ☐ Intervening ☐

1. The undersigned attorney and all attorneys listed on this form now appear in this case for the following party member(s): Heineken USA, Inc.
2. Applicable attorney information for service as required by Trial Rule 5(B)(2) and for case information as required by Trial Rules 3.1 and 77(B) is as follows:

Name: Darlene R. Seymour Attorney Number: 23133-49
Address: 1292 E. 91st Street Phone: 317-818-0523
Indianapolis, IN 46240 FAX: 317-566-2453

3. There are other party members: Yes ☐ No ☒
4. *If first initiating party filing this case*, the Clerk is requested to assign this case the following Case Type Under Administrative Rule 8(b)(3): PL as listed above per clerk.
5. I will accept service by FAX at the above noted number: Yes ☒ No ☐
6. This case involves support issues. Yes ☐ No ☒
7. There are related cases: Yes ☐ No ☒
8. This form has been served on all other parties. Certificate of Service is attached: Yes ☐ No ☒
9. Additional information required by local rule: None



Darlene R. Seymour
Atty. No. 23133-49
Attorney for Plaintiff