

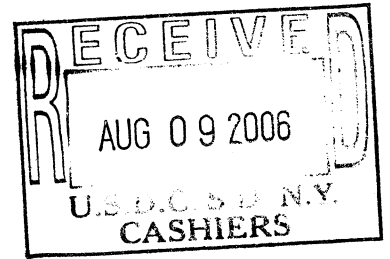
**Judge Hellerstein**

**06 CV 6054**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**THE "OXES", MARC MILLER,  
CHRISTOPHER FREELAND, NATHANIEL  
FOWLER and MONITOR RECORDS,**



**COMPLAINT**

**Civ. No.**

**PLAINTIFFS DEMAND  
TRIAL BY JURY**

**Plaintiffs,**

**- against -**

**OLD NAVY, INC., XYZ  
and ABC CORPORATIONS,**

**Defendants.**

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Plaintiffs, by their attorney, CARMEN S. GIORDANO, complaining of Defendants,  
respectfully allege:

**PRELIMINARY STATEMENT**

1. This is a trademark infringement action for preliminary and permanent injunctive relief and monetary damages. Plaintiffs seek relief against Defendants under §43(a) of the Trademark Act of 1946 (Lanham Act), New York statutory law, and unfair competition under federal and New York statutory and common law.

2. Plaintiff the "OXES" is an internationally known rock group with three full-length albums released between 2000 and 2005 and distributed by their record label Plaintiff, MONITOR RECORDS. Plaintiff the OXES have used and continue to use their inherently distinctive mark "OXES" to distinguish and brand their unique image and sound, and have used the mark on their albums, t-shirts, posters, and flyers produced, distributed and sold over the Internet and at live concerts by Plaintiff MONITOR RECORDS since 2000. Plaintiff the OXES

have made continuous use of the trademark “OXES” since 1999, and the mark is the group’s signature slogan.

3. On or about April 2006, Plaintiffs were informed that without prior agreement or authorization from Plaintiffs, Defendant OLD NAVY, INC. began selling t-shirts in its nationwide and Canadian retail stores bearing the “OXES” trademark below the caption, “Rock Action Presents: Live at the Social” (**Exhibit “A”**). The term “Rock Action” is an apparent allusion to the Scottish company “Rock Action Records”, from whom Plaintiff MONITOR RECORDS licensed two record albums in 2004 and 2005. Also, on December 8, 2001, the OXES performed a live concert at the Orlando, Florida concert hall called, “The Social.” The combination of the “OXES” trademark along with the related phrases “Rock Action” and “Live at the Social” establishes the intentional, flagrant and completely unjustifiable misappropriation of Plaintiffs’ trademark.

4. At all relevant times, Defendants’ t-shirts have been and are prominently on display and for sale in many if not all OLD NAVY, INC., retail stores, including those located throughout the Southern District of New York and are also for sale on Defendant OLD NAVY, INC.’s official Internet website, which markets directly into the Southern District of New York. Plaintiffs have not given Defendants permission to use their mark “OXES” on Defendants’ merchandise or to use any other artwork that would convey the incorrect message that Plaintiffs the OXES have endorsed, sponsored, or are affiliated with Defendants’ merchandise.

5. Defendant OLD NAVY, INC.’s t-shirts improperly display the “OXES” trademark and also refer to the group’s tour, label, and performance history. Defendants,

without permission or authority to do so, have deliberately and wilfully exploited the “OXES” mark, confused the public as to the origin of the t-shirts, and accordingly has capitalized on the OXES name and reputation and illegally boosted it’s own merchandise sales. This behavior constitutes willful trademark infringement in violation of the Lanham Act as well as unfair competition under the Lanham Act and New York common law.

6. The resultant likelihood of and actual confusion has caused Plaintiffs to suffer irreparable harm as a result of Defendants OLD NAVY, INC.’s and XYZ and ABC CORPORATIONS’ willful and deliberate trademark infringement and has further damaged Plaintiffs as described herein.

#### **JURISDICTION AND VENUE**

7. This Court has federal question jurisdiction pursuant to 28 U.S.C. §1331 in that this action arises under §43(a) of the Lanham Act. This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. §1367 and the doctrine of pendent jurisdiction, since the state claims arise from the same operative facts and are part of the same case or controversy.

8. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. §1391(b) and (c) because Defendant OLD NAVY, INC., markets, distributes and sells the unauthorized t-shirts within this District. Defendant OLD NAVY, INC.’s two out of six flagship stores are located within the Southern District of New York. Furthermore, Plaintiffs transact business within the Southern District of New York and maintain continuous business ties within this District.

9. This action was commenced within three years after the cause of action herein accrued.

### **THE PARTIES**

10. Plaintiff, the OXES is a contemporary rock and roll musical group comprised of Plaintiffs Marc Miller, Christopher Freeland and Nathaniel Fowler originating from Baltimore, Maryland (“OXES”).

11. MONITOR RECORDS is a limited liability company organized and existing under the laws of the State of Maryland. MONITOR RECORDS’ principal place of business is located in Baltimore, Maryland with it’s principal radio promotion facilities located in New York, NY (“MONITOR”). Plaintiffs OXES and MONITOR are sometimes referred to herein as “Plaintiffs.”

12. Upon information and belief, Defendant OLD NAVY, INC. is a foreign corporation organized and existing under the laws of the State of Delaware. OLD NAVY, INC.’s principal place of business within the United States is located at Two Folsom Street, San Francisco, CA 94105, with stores located within the Southern District of New York. OLD NAVY, INC., (“OLD NAVY”) transacts and does business within this District.

13. Defendants XYZ and ABC CORPORATIONS are engaged in business with OLD NAVY and have manufactured and/or sold and/or imported into the United States the complained of merchandise.

**AS AND FOR A FIRST CLAIM FOR TRADEMARK INFRINGEMENT  
PURSUANT TO LANHAM ACT §43(a) BY PLAINTIFFS OXES AND  
MONITOR RECORDS AGAINST ALL DEFENDANTS**

14. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

15. The trademark “OXES” is a valid mark entitled to the highest of protection because it is an inherently distinctive or “arbitrary” mark. Plaintiffs’ ownership and use of the mark began in 1999 from their actual use in the marketplace with respect to three released full-length albums, continual live performances, interstate record sales, and interstate merchandise sales, including sales of MONITOR RECORDS’ OXES t-shirts. Attached as **Exhibit “B”** are exemplars of the CD covers of the aforementioned OXES albums.

16. Plaintiffs have since 1999 continuously used the “OXES” and “MONITOR RECORDS” trademarks in interstate commerce.

17. Defendants’ unauthorized use of the “OXES” trademark on its merchandise is likely to cause and has caused confusion among the public in general and OXES’ fans in particular in that they are likely to believe Plaintiffs have authorized or endorsed the OLD NAVY merchandise, or are somehow affiliated with or endorsing products of OLD NAVY. Defendants’ use of the “OXES” mark along with the slogans, “Rock Action Presents” and “Live at the Social” add to the likelihood of confusion and gives the false impression that the OXES are somehow associated with, have endorsed or “sold out” to OLD NAVY.

18. Upon information and belief, Defendants have intended such confusion in order to capitalize on the OXES’ name and reputation and to to sell its unauthorized merchandise.

19. Defendants' unauthorized use of the "OXES" trademark infringes upon Plaintiffs' rights under §43(a) of the Lanham Act.

20. As a result, Plaintiffs have suffered and continue to suffer irreparable harm.

21. Plaintiffs are, therefore, entitled to preliminary and permanent injunctive relief, money damages, including disgorgement of all profits from the sale of said merchandise, attorneys' fees, costs and disbursements for this action.

**AS AND FOR A SECOND CLAIM FOR TRADEMARK INFRINGEMENT PURSUANT  
TO NEW YORK G.B.L. § 133 BY BY PLAINTIFFS OXES  
AND MONITOR RECORDS AGAINST ALL DEFENDANTS**

22. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

23. Defendants' unauthorized use of the "OXES" trademark infringes upon Plaintiffs' trademark rights under New York G.B.L. § 133.

24. As a result, Plaintiffs are suffering irreparable harm.

25. Plaintiffs are, therefore, entitled to preliminary and permanent injunctive relief, money damages, attorneys' fees, costs and disbursements for this action.

**AS AND FOR A THIRD CLAIM FOR COMMON LAW UNFAIR COMPETITION  
BY PLAINTIFFS OXES AND MONITOR RECORDS AGAINST ALL DEFENDANTS**

26. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs as if fully set forth herein.

27. Defendants' use of the "OXES" trademark is likely to cause confusion among the public about whether the OXES have authorized or endorsed the merchandise, or whether Plaintiffs are somehow affiliated with OLD NAVY.

28. Defendants' unauthorized use of the trademark constitutes common law unfair competition.

29. As a result, Plaintiffs are suffering irreparable harm.

30. Plaintiffs are, therefore, entitled to preliminary and permanent injunctive relief and money damages.

**WHEREFORE**, Plaintiffs respectfully pray that this Court grant the following relief:

1. Orders for preliminary and permanent injunctions enjoining Defendants and their agents, servants, employees, affiliates, parents, subsidiaries, directors, officers, and attorneys and those persons in active concert or participation with them:

a. From using the mark or phrase "OXES" independently or in conjunction with the phrases "Rock Action" and/or "Live at the Social" in connection with the sale of any goods or provision with any services;

b. From using any logo, trade name, or trademark which may be calculated to falsely represent, or which has the effect of falsely representing, that the services or products of Defendants are sponsored by, authorized by, or in any way associated with Plaintiffs;

c. From further infringing the OXES' name;

- d. From otherwise unfairly competing with Plaintiffs;
2. An order awarding Plaintiffs compensatory damages, including disgorgement of all Defendants' profits relating to the sale of unauthorized merchandise in an amount to be determined, and other consequential damages, including damages to Plaintiffs' reputation;
3. An order awarding Plaintiffs punitive damages in an amount to be determined;
4. An order awarding Plaintiffs reasonable attorneys' fees and all costs and expenditures associated with this action; and,
5. Such other and further relief as this Court deems just and proper.

Dated: New York, New York  
August 7, 2006

Law Office of Carmen S. Giordano  
***Attorney for Plaintiffs***

By: 

Carmen S. Giordano (CSG-3927)  
225 Broadway, 40<sup>th</sup> Floor  
New York, NY 10007  
(212) 406-9466



**EXHIBIT “A”**

Mark Helton Presents  
**LIVE AT THE SOCIAL**



**SEPT 23RD 9PM OVER 18'S ONLY**

**EXHIBIT “B”**

# OXES

banned xxx Ip

"This is amazing - make no mistake!  
Truly amazing...their music is so  
wrong it HAS to be right..." - BBC

"Eardrum-shattering, technically  
awesome math rock; listen and  
become the coolest outcast at your  
school." - Alternative Press

JUPITER  
NO OXES  
QUTV!  
suck  
COXES



YES!



# OXES

s/t debut album

"...these Charm City ruffians have coughed up the most thoroughly enjoyable rock of recent memory."

- Pitchfork

"...these twisted, off-kilter tunes are resolutely non-conformist and rock big style!" - KKKK Kerrang!

**OXES**  
oxes ep



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ITALIA



## SUMMONS and COMPLAINT

Sir :

Please take notice that the within is a certified true copy of a SUMMONS and COMPLAINT duly entered in the within named court.

Dated,

August 7, 2006

*Yours, etc.*

**CARMEN S. GIORDANO, ESQ.**

*Attorneys for Defendants*

To:

*Defendants*

**OLD NAVY, INC.**

Two Folsom Street

San Francisco, CA 94105

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**- against -**

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**Defendants.**

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**CARMEN S. GIORDANO, ESQ.**

*Attorneys for Plaintiff*

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