

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

11-81026-Civ-Marra/Johnson

Case No. _____

Aqua Gear, Inc
A Florida Corporation,

Plaintiff,

vs.

Divegear, LLC
individually and dba
WayneWorks, LLC, Georgia LLCs,
aka "divegearusa.com",
aka "divegearusa.net",
aka "divegear.stores.yahoo.net"
aka "Divegear USA"
aka Wayne B. Brown

Defendants.

COMPLAINT

1. We, Aqua Gear Inc, Plaintiff, in the above styled cause, sue defendant Divegear, LLC individually and dba WayneWorks, LLC for Trademark infringement pursuant to the Lanham Act, Title 15 Chapter 22 of the U.S.C. as described hereinafter.

I. JURISDICTION AND VENUE

2. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. § 1331: Federal Question, as this case is pursuant to the Lanham Act, Title 15 Chapter 22 of the U.S.C. and Federal courts have exclusive jurisdiction to hear Federal Question cases.

3. Since several counts of infringement occurred on the World Wide Web, the infringement occurred in all states and countries with internet access equally and simultaneously. The Defendant is a corporation which engages in and solicits business, according to its website, in all states and internationally. As such, pursuant to Title 28 Chapter 87 U.S.C. §1391(c), a Federal Court in any state would be the appropriate jurisdiction, since the Defendant has substantial ties to all states such that Personal Jurisdiction may be found in them. Since the Plaintiff's discovery of infringement, the inciting incident leading to this action, occurred in Palm Beach County, this action is brought in the Southern District of Florida.

II. PLAINTIFF

4. At all times hereinafter mentioned, plaintiff was and is incorporated in the state of Florida, and does business in all 50 states as well as internationally. Plaintiff's address is 13297 Temple Blvd, Building B, West Palm Beach, FL 33412. Plaintiff's business phone number is 561-753-4636 and Plaintiff's business fax number is 561-753-4697. For completeness, Plaintiff was registered as an Illinois corporation prior to 1998 when it transferred its offices and corporate registration to Florida.
5. Plaintiff is an on-line retailer of Swimming Accessories, Water Exercise Equipment, and Aquatic Therapy Equipment which includes, but is not limited to, the sale of swimwear, wet suits, rash guards, goggles, nose clips, ear plugs, swim caps, water exercise belts, swim fins, water resistance equipment, floats and weights, water exercise clothing, recorded videos, swim suit care products, jewelry, snorkeling equipment, books, recorded music, waterproof music players, swim diapers, backpacks, equipment bags and water toys, and many other similar products, hereinafter collectively referred to as "Swimming Accessories".
6. Plaintiff is represented pro se by Nicholas ("Nick") Bullock, Vice President. In addition

to the company address, fax, and phone numbers provided in the paragraph 4, Nick can also be reached by email at nrahl@aqua-gear.com.

III. DEFENDANT

7. Defendant is Divegear LLC, a Georgia Limited Liability Company. The domain name under which at least one count of infringement occurs is registered to WayneWorks, LLC also a Georgia Limited Liability Company. Both LLCs have the same registered agent and are owned (to best of Plaintiff's knowledge) by the same person, one Wayne B. Brown and are hereby joined pursuant to FRCP 20(a)(2). Defendant may also be known as its websites "divegearusa.com", "divegear.stores.yahoo.net", "divegear.net" and/or by the name "Divegear USA", and/or by other names. To the best of Plaintiff's knowledge, all of the entities mentioned in this paragraph are a single party and are hereinafter referred to collectively as "Divegear USA" or as "Defendant".
8. To the best of Plaintiff's knowledge, based on domain name whois records and LLC records registered with the state of Georgia, Defendant's office is located at 209 Hudson Trace, Augusta, GA 30907, Defendant's phone number is 706-737-7687, Defendant's fax number is 706-737-7690, and Defendant's email address is support@wayneworks.com.
9. According to records available on Georgia's Secretary of State Website, the registered agent for both LLCs is Wayne B. Brown, who, in addition to the above mentioned business address, can be reached via email at wayne@wayneworks.com.
10. To the best of Plaintiff's knowledge, Defendant is a manufacturer, distributor, and online retailer of, among other things, rash guards, swimsuits, board shorts and t-shirts bearing the word "dive". Defendant's website defines their products as, "clothing, swim wear, rash guards and accessories".

IV. FACTS

11. Plaintiff, Aqua Gear, Inc, holds a Federally registered Service Mark for the Standard Character Mark “AquaGear” on the Principal Register, with a first use in commerce date of 1994. The registration number is 3,814,395.
12. Plaintiff has used, and has proof of use of, the marks “Aqua Gear”, “Aqua-Gear”, “AquaGear” and similar variations in common law since 1992. Plaintiff is, was at the time of discovery of infringement, and for almost 19 years prior to the time of discovery of infringement, known as all of the above marks. Plaintiff operates, and has operated since 1999, a website at “AQUA-GEAR.COM”, and plaintiff has had a website online since 1995.
13. On November 11th, 2010, Plaintiff discovered a page on Defendant's website which infringes on Plaintiff's Trademark rights. The URL is <http://www.divegearusa.com/swimwear.html>, a screen-shot of which is included. The page in question contains products which are generically known as “swimwear”, “board shorts” and rash guards”. The page was titled “AquaGear”, and had links to it from all other pages on Defendant's website, with the words “AquaGear” as the anchor text. The combination of a meta title “AquaGear” with links on every other page of Defendant's website linking to the page in question caused Google and other search engines to rank this particular page highly in search engine results for the search phrase “AquaGear” and “Aqua Gear”, typically between positions 3 and 7, not far after Plaintiff's own site.
14. The page mentioned in the preceding paragraph shows up in Google and other search engine results as “Aqua Gear”, and confuses and deceives users who are attempting to reach Plaintiff's site into visiting Defendant's swimwear page, which they would not have otherwise visited or found.
15. On November 11th, 2010, the date the infringement was discovered, Plaintiff sent an email to Respondent asserting it's Trademark rights, and requested that Defendant rename

it's page so as not to cause confusion. Defendant did not reply to Plaintiff's email, but did, at some point in time after receiving notice, change the title of the page and links pointing to it from "AquaGear" to "Aqua Gear", by adding a single space between the words "aqua" and "gear". Despite this minor change, the Defendant's page continues to rank highly in Google and other search engines for both "Aqua Gear" and "AquaGear", as stated in the previous section, and continues to deceive Plaintiff's customers and Plaintiff's would be customers into visiting Defendant's swimwear page, which undoubtedly results in a commercial gain for the Defendant.

16. On August 28th, 2011, Plaintiff sent a follow-up email to Defendant acknowledging the addition of a space between the words "aqua" and "gear", and informing Defendant that, despite the addition of a space, "Aqua Gear" was identical in sound and meaning to Plaintiff's Registered Mark "AquaGear", and nearly identical in written form, and thus was still confusingly similar. Plaintiff recommended that Defendant rename the page to something more appropriate, and suggested the generic phrase "swimwear". Plaintiff advised defendant that Plaintiff did not wish to pursue litigation if it could be avoided, but as a Trademark holder was obligated to defend its rights, and would pursue litigation if Defendant continued to use the "AquaGear" or any similar Mark without authorization.
17. On September 2nd, 2011, Defendant replied to Plaintiff via email informing Plaintiff that Defendant intended to continue to use the Plaintiff's "Aqua Gear" Mark in connection with Defendant's products.
18. On September 10th, 2011, Plaintiff's officers attended an industry trade show, the "Surf and Sun Expo" at the Orange County Convention Center in Orlando, Florida. Defendant was an exhibitor at that show. A large placard bearing the words 'Aqua Gear' was affixed to Defendant's exhibit booth. Plaintiff has not yet had the opportunity to investigate Defendant's use of the 'Aqua Gear' Mark further, but believes that upon such an investigation, Plaintiff would likely find more instances of the Defendant's unauthorized use of of Plaintiff's "Aqua Gear" and/or "AquaGear" Marks in connection with the products Defendant sells, and in related marketing and promotional materials related to

the sale and promotion of those products.

V. COUNTS

19. **Count 1:** The use of Plaintiff's Mark by Defendant on Defendant's website as the page's meta title as described above creates an initial interest confusion in the Search Engine Results Pages (SERPs). This unauthorized misuse of Plaintiff's Mark causes Plaintiff's existing and would be customers to mistakenly visit Defendant's site, since it is not readily obvious to internet users that Defendant is not Plaintiff, since the SERP caption is only 'Aqua Gear', without further qualification. This misuse is likely to cause confusion and/or mistake, and deceives consumers. This is a violation of the Lanham act, U.S.C. Title 15 Chapter 22, specifically but without limitation, §1114 and §1125.

20. **Count 2:** Plaintiff's Mark is the name of Plaintiff's well known online retail store. Plaintiff's online store features, among many other related products, swimwear, rash guards and wet suits. Defendant is using the words 'Aqua Gear' in connection with its own online store, in connection with a line of swimwear, rash guards and board shorts. Due to the fact that both Plaintiff's and Defendant's websites are online stores, and due to the similarity between goods offered at both of these online stores, Defendant's unauthorized use of Plaintiff's Mark in connection with its online retail store is extremely likely to cause confusion with Plaintiff's Trademark. This is a violation of the Lanham act, U.S.C. Title 15 Chapter 22, specifically but without limitation, §1114 and §1125.

21. **Count 3:** Defendant's unauthorized use of Plaintiff's Mark at trade shows, on its website, and in marketing and/or promotional materials, and/or in any other way, is likely to cause confusion, or to cause mistake, or to deceive consumers as to the source and/or origin of the products in question in violation of the Lanham act, U.S.C. Title 15 Chapter 22, specifically but without limitation, §1114 and §1125.

22. **Count 4:** Defendant's unauthorized use of Plaintiff's Mark is a deliberate and bad faith

attempt to profit from the goodwill and acclaim of Plaintiff's Mark. Defendant knew or should have known of Plaintiff and Plaintiff's rights in the 'AquaGear' Mark prior to using said Mark. Plaintiff's Trademark registration with the USPTO serves as constructive notice of rights to the 'AquaGear' Mark, pursuant to U.S.C. Title 15 Chapter 22 §1072. Defendant was notified of Plaintiff's rights, and deliberately continued to use the infringing Mark. Defendant was notified of Plaintiff's rights again, and Defendant responded, stating that Defendant had no intention of discontinuing its infringing use.

VI. PRAYER

23. Having made a good faith effort to resolve the infringement without litigation, Plaintiff now seeks legal recourse for Defendant's actions and sues defendant under the Lanham Act, Title 15 Chapter 22 of the U.S.C.
24. WHEREFORE, Plaintiff demands permanent injunction against the Defendant from any and all future use of the "AquaGear" Trademark, including but not limited to nearly identical and confusingly similar marks, such as, but not limited to, "Aqua Gear".
25. Plaintiff additionally demands reimbursement of costs of the action and other costs directly and/or indirectly related to the filing of this case, such as but not limited to, filing fees and cost of service as applicable, as well as reasonable compensation for time and travel expenses related to this action.
26. As this is a case of willful and deliberate infringement, pursuant to U.S.C. Title 15 Chapter 22 §1117, Plaintiff also seeks Defendant's profits in connection with its use of the infringing Mark and/or an award of statutory damages to the full extent permissible by law and/or as deemed appropriate by the Court, as well as any further relief which the Court may deem appropriate to deter Defendant from infringing on the Trademark rights of Plaintiff or other Mark holders in the future.

Dated: September 12th, 2011

Respectfully submitted,



Nicholas Bullock, Vice President

Aqua Gear, Inc

nrahl@aqua-gear.com

13297 Temple Blvd

West Palm Beach, FL 33412

Telephone: 561-753-4636

Facsimile: 561-753-4697

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS
Aqua Gear, Inc, A Florida Corporation
(b) County of Residence of First Listed Plaintiff Palm Beach County
(c) Attorney's (Firm Name, Address, and Telephone Number)
Nicholas Bullock, pro se
13297 Temple Blvd
West Palm Beach, FL 33412
561-753-4636

DEFENDANTS
Divegear, LLC individually and dba WayneWorks, LLC, Georgia LLCs, aka "divegearusa.com", aka "divegearusa.net", aka
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.
Attorneys (if known)

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)
Handwritten: 11CV81026 TAM/LRS

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 1
Citizen of Another State 2 2
Citizen or Subject of a Foreign Country 3 3
Incorporated or Principal Place of Business In This State 4 4
Incorporated and Principal Place of Business In Another State 5 5
Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)
Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Re-filed (see VI below)
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S).
a) Re-filed Case YES NO
b) Related Cases YES NO
JUDGE DOCKET NUMBER

VII. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):
Trademark infringement, Title 15 Chapter 22 of the U.S.C.
LENGTH OF TRIAL via 1 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE
SIGNATURE OF ATTORNEY OF RECORD DATE
September 12, 2011

FOR OFFICE USE ONLY
AMOUNT 350 RECEIPT # FLS9-1053