

**JUDGE FORREST**

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

11 CIV 8163

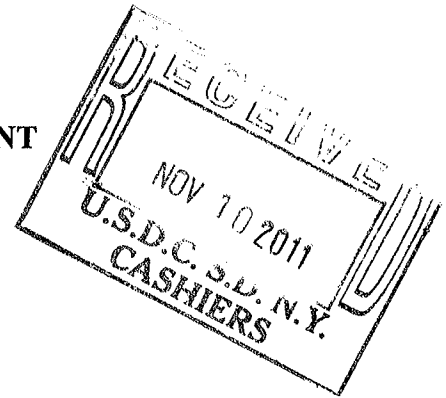
DAVID HESTER, an individual,  
Plaintiff,

vs.

TREMAINE NEVERSON, an individual, TREY  
SONGZ PRODUCTIONS, L.L.C.,  
Defendants.

CASE NO.:

COMPLAINT



**PRELIMINARY STATEMENT**

1. This action arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Trademark Act of July 5, 1946, as amended, commonly known as the Lanham Act, 15 U.S.C. § 1051 *et seq.* and 28 U.S.C. § 1367 as to claims subject to supplemental jurisdiction for tortious interference with contract and wrongful interference with prospective economic advantage.

2. Plaintiff seeks (a) a declaration that Plaintiff David Hester's ("Hester" or "Plaintiff") use of Hester's trademark **YUUUP!** in connection with his appearance on the nationally televised popular A&E Television Network program "Storage Wars" and brand name line of clothing and other merchandise prominently bearing the mark does not infringe any rights of Defendants Tremaine Neverson or Trey Songz Productions, L.L.C. (collectively "Defendants"), and (b) monetary damages for tortious interference with contract and interference with prospective economic advantage arising out of Defendants' cease and desist letter to the A&E Television Network which has caused the network to cease purchasing, marketing and

selling Plaintiff's merchandise prominently bearing Hester's mark, thereby repudiating the agreement between A&E Television Network and Hester.

3. Defendant Tremaine Neverson has asserted that Hester's use of Hester's trademark **YUUUP!** in connection with the A&E Television Network program "Storage Wars" and merchandise is likely to cause consumer confusion. As a result, a declaratory ruling is necessary to clarify Plaintiff Hester's rights in the **YUUUP!** trademark in connection with this television program and associated merchandising going forward.

### **THE PARTIES**

4. Plaintiff David Hester is a resident of Orange, California and a citizen of the State of California. Hester has been damaged by Defendants' wrongful claim that Hester's trademark **YUUUP!** infringes trademark rights of Defendants. Defendants' wrongful claim was communicated to third parties with whom Hester had and expected to have continuous contractual relationships. Defendants thus wrongfully interfered with Hester's prospective economic advantage and intentionally interfered with Hester's contractual relationship with A&E Television Network as further alleged below.

5. Defendant Tremaine Neverson, also known as "Trey Songz", is on information and belief a resident of the City of New York, N.Y. and a citizen of the State of New York and is the managing member of defendant Trey Songz Productions L.L.C.

6. Defendant Trey Songz Productions L.L.C. is a limited liability company organized and existing under the laws of the State of Florida. It's only known member is Tremaine Neverson, a resident of New York, N.Y. Therefore, Trey Songz Productions L.L.C. is a citizen of New York.

### **JURISDICTION**

7. This action arises and is brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Trademark Act of July 5, 1946, as amended, commonly known as the Lanham Act, 15 U.S.C. § 1051, *et seq.*

8. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 and 28

U.S.C. §§ 1331, 1338 and 2201-2202.

9. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. 1367(a).

10. This Court possesses personal jurisdiction over Defendant Tremaine Neverson because he is a resident in this district.

11. This Court possesses jurisdiction over Defendant Trey Songz Productions L.L.C. because its managing member is a resident in this district.

### VENUE

12. Venue is proper in this Court as to defendant Tremaine Neverson and Trey Songz Productions L.L.C. pursuant to 28 U.S.C. § 1391(b)(1) because all Defendants reside in this district.

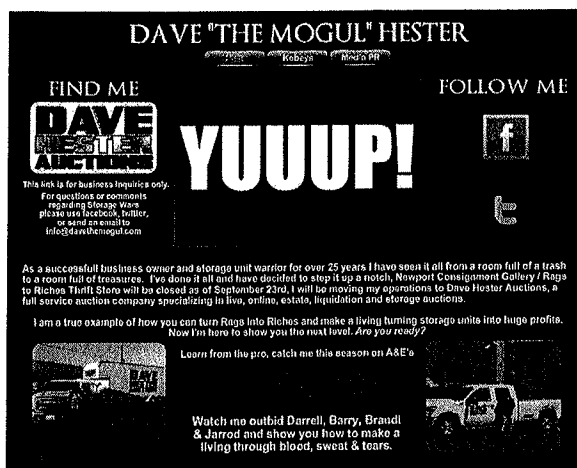
13. Venue is proper in this Court as to defendant Trey Songz Productions L.L.C. pursuant to 28 U.S.C 1391 (c) because it is subject to personal jurisdiction in this judicial district by virtue of its managing member, defendant Tremaine Neverson, being a resident of this judicial district.

14. Venue is proper in this district because the Defendants have communicated to A&E Television Network in this district in an effort to cause A&E Television Network to repudiate its contract with Plaintiff.

### GENERAL ALLEGATIONS

#### **Plaintiff Dave Hester's YUUUP! Trademark**

15. Plaintiff David "The Mogul" Hester is a well known television personality featured on the popular A&E Television Network program "Storage Wars" on which he wears clothing bearing his distinctive trademark, an invented word that he uses in his well known auction bidding on that show encountered by the public as follows:



16. Storage Wars is a reality television series which features an auctioneer and auction hunters, including Plaintiff David “The Mogul” Hester, the show’s recurring antagonist who frequently outbids others. When rent is not paid on a storage locker and the storage company has the right to take possession of the locker and its contents, the contents are commonly sold by an auctioneer as a single lot of items. The show follows professional buyers who purchase such locker contents after being given only a five-minute inspection and based only on what they can see from the locker door when it is opened. The goal of buyers is to turn a profit on the merchandise after guessing about the contents.

17. When Plaintiff David Hester bids he uses his trademark phrase “YUUUP!” while gesticulating to the auctioneer and wearing his trademarked clothes, including t-shirts and caps, which bear the distinctive trademark YUUUP! which is identified with David Hester.

18. The premiere episode of “Storage Wars” in 2010 drew 2.1 million viewers nationally and the show was A&E Television Network’s top-rated non-fiction show for 2010 with an average 2.4 million viewers.

19. “Storage Wars” has been renewed for a second season and is currently filming a twenty episode season with a third season scheduled on which David Hester will continue to appear as the shows’ recurring antagonist and “hunter” using his trademark bidding phrase “YUUUP!” and wearing clothes that bear his trademark, including t-shirts and caps.

20. The season two premiere consisted of back-to-back new episodes of the show; the second show drew 5.1 million total viewers nationally and provided the highest rating for an

episode in a series in A&E Television Network history. (The combined season premiere outperformed competing original episodes of NBC "Love in the Wild" and ABC's "Primetime Nightline".)

21. Plaintiff David Hester and his clothing have become associated with the use of the YUUUP! mark which is recognized by consumers as the source of his goods and services. Clothing products which bear his trademark YUUUP! are sold nationally and include upper and lower body wear such as sweaters, t-shirts, tank tops and head wear. Plaintiff David Hester has operated a consignment store in Newport Beach, California which attracted thousands of customers because of his celebrity status and association with the YUUUP! mark. Plaintiff operates an Auction Service Company at which he is currently selling merchandise using his trademark YUUUP!

22. Plaintiff has applied to register his mark with the United States Patent and Trademark Office which has assigned his application Serial Number 85-311,656, and described his mark as a standard character mark, YUUUP!, in connection with entertainment services, bumper stickers, stickers, posters, and clothing. The mark was published in the Trademark Official Gazette on September 27, 2011 to which, Plaintiff is informed and believes, no opposition or request to extend the deadline to oppose has been filed.

23. On information and belief Plaintiff expects his mark will be issued and approved by the USPTO.

#### **Tremaine Neverson's Claims**

24. Upon information and belief, Defendant Tremaine "Trey" Aldon Neverson, better known by his stage name Trey Songz, is an American singer-songwriter, rapper, record producer, and performer.

25. Defendant's discography includes four studio albums, "I Gotta Make It" (2005), "Trey Day" (2007), "Ready" (2009), and "Passion, Pain & Pleasure" (2010). He has been nominated for numerous BET (Black Entertainment Television) awards, including winning the BET Award for Best Male R&B Artist in 2009.

26. Defendant claims a “signature” sound which when phonetically spelled has been variously reduced to writing on Defendant’s promotional materials and the media as “yeeeeuuuuuppp”, “yuuuuuup” and other iterations, including “Yuuup”.

27. On one record album entitled “Best of Songz”, Volume 1, which features a second artist, DJ F.A.T.E. a title appears in print presented to the public as “I be like YUUUP!”

28. Upon information and belief Defendant has recorded this vocal sound for downloading from the Internet as Defendant’s “signature” sound, on such websites as [www.djdownloadz.com/trey-songz-dj-fate-i-be-like-yuuup-mixtape](http://www.djdownloadz.com/trey-songz-dj-fate-i-be-like-yuuup-mixtape).

29. Upon information and belief Defendant’s “signature” downloadable sound resembles an animal-like or non-human squeal which begins with a distinct “yeeee” sound before finishing with a squeal-like “uuuup” sound, and is distinct and different from Hester’s more monosyllabic sounding guttural auction bidding phrase when used on “Storage Wars” which is meant to convey the meaning of “yes” or an affirmative expression of agreement to a higher bid suggested by an auctioneer.

30. Upon information and belief Neverson uses his “signature” non-human-like squeal in the course of performances as a rapper and R&B Artist. Hester is not a rapper or R&B artist or musician or otherwise eligible for a BET award nor has Hester ever released any studio albums of music of any kind.

31. Neverson has not identified and cannot identify any individual who was actually confused and believed that Hester’s mark for clothing originated from or was some how affiliated or associated with Neverson.

32. If Neverson has any protectable rights in his sound or alleged mark, there is no evidence of any likelihood of confusion caused by Hester’s use of the YUUUP! mark because, among other reasons: Neverson’s sound or alleged mark is not protectable by trademark law because it is a lyric and musical/rap composition that is protectable only by copyright, if at all; Neverson’s alleged mark appears in print displayed to the public in a manner dissimilar from Plaintiff’s mark because Neverson uses various spellings and small and capital letters which are

dissimilar from Plaintiff's mark which has only one spelling and only uses all capital letters; Neverson's alleged mark is not in competitive proximity to Hester's mark because the products which display Hester's mark and Neverson's alleged mark do not appeal to the same consumer nor are they marketed in a similar fashion or in the same channels of trade.

33. On September 2, 2011, a lawyer for Neverson sent a cease and desist letter to Plaintiff David Hester and A&E Television Network claiming to represent Defendant "recording artist and performer Tremaine Neverson p/k/a 'Trey Songz', as well as Trey Songz Productions, LLC." The lawyer asserted Neverson "has used the mark YUUUP! continuously since at least as early as July 2009 ... in connection with both live and recorded performances, appearances, in entertainment services, and on merchandise, as well as displaying the mark on promotional materials and Trey Songz's website."

34. Defendants' lawyer further asserted that Defendants considered "any use of the YUUUP! trademark as a violation of his valuable state and federal rights" and intended to oppose Hester's trademark application.

35. Defendants' lawyer further demanded in the cease and desist letter that Hester cease and desist any manufacturing, licensing, distributing, and/or commercial exploitation of any merchandise bearing the YUUUP! trademark, refrain from using the YUUUP! trademark in any manner, abandon any ownership rights to the YUUUP! trademark and provide an itemized statement of account for all compensation received earned by or due to Plaintiff or A&E Television Network in relation to merchandise sold by Plaintiff and/or A&E Television Network.

36. After receipt of the cease and desist letter, exchanges between representatives of Plaintiff and Defendants occurred during which the dispute reflected by the cease and desist letter was addressed but remains unresolved.

37. Under the circumstances a controversy of sufficient immediacy and reality exists with respect to Plaintiff's use of his YUUUP! trademark to warrant the issuance of a declaratory judgment.

38. Therefore, there exists an actual and justiciable controversy between Hester, on

the one hand, and Neverson and Trey Songz Productions, L.L.C., on the other hand, regarding whether Plaintiff is infringing the alleged trademark rights owned by Neverson and/or Trey Songz Productions, L.L.C., if any.

39. Plaintiff has made a substantial effort and investment in developing, promoting and licensing his mark, including entering various agreements with A&E Television Network pursuant to which A&E Television Network purchases merchandise manufactured for Plaintiff which prominently displays Plaintiff's mark and A&E Television Network then markets and sells such product in conjunction with the reality television show "Storage Wars" in which Plaintiff, the principal recurring antagonist, wears and displays such products. This substantial investment has developed significant goodwill in Hester's YUUUP! trademark.

40. Hester's right to use his trademark is now clouded as a result of Defendants' actions. Defendants' actions will continue to impede and interfere with Plaintiff's legitimate business interests and objectives, including Hester's agreement with A&E Television Network, and Hester's prospective economic advantage derived from further commercial exploitation of the mark, thereby constituting actual harm and injury to Plaintiff.

**FIRST CLAIM FOR RELIEF**  
**Declaratory Judgment of Non-Infringement**

41. Plaintiff incorporates each and every allegation set forth in the above paragraphs as though fully alleged herein.

42. An actual *bona fide* controversy exists between Plaintiff, on the one hand, and Defendants, on the other hand, as to whether Plaintiff's use of his trademark YUUUP! infringes any existing and valid trademark right of Defendants under the Lanham Act.

43. Plaintiff seeks a judicial declaration that Plaintiff's use of its mark YUUUP! does not infringe any existing and valid trademark right of Defendants under federal or state law.

**SECOND CLAIM FOR RELIEF**  
**Tortious Interference with Contract**

44. Plaintiff incorporates each and every allegation set forth in the above paragraphs



as though fully alleged herein.

45. On and before September 2, 2011 there were valid contracts in existence between Plaintiff and a third party, namely A&E Television Network, pursuant to which Plaintiff permitted and licensed A&E Television Network to prominently display Plaintiff's mark **YUUUP!** on the reality television series "Storage Wars," to use his audible **YUUUP!** on the series, and also market and sell Plaintiff's merchandise bearing Plaintiff's mark **YUUUP!**

46. The agreements between Plaintiff and A&E Television Network were successful as A&E Television Network's marketing and sale of Plaintiff's clothes both effectively advertised the reality television show "Storage Wars" and also garnered substantial profits for both Plaintiff, and A&E Television Network, derived from "merchandising" the popularity of the "Storage Wars" television series. In this manner A&E Television Network and Plaintiff "cross-marketed" their products.

47. At all relevant times, Defendants and each of them, had knowledge of the aforesaid agreements between Plaintiff and A&E television network for the use and display of Plaintiff mark **YUUUP!** on the reality television series "Storage Wars" and Hester's marketing and A&E Television Network's marketing and sale of Plaintiff's merchandise bearing Hester's mark **YUUUP!**

48. Defendants improperly and intentionally interfered with the performance of those agreements and contracts by issuing a cease and desist letter to "A&E Television Networks, LLC" to the attention of "Business & Legal Affairs" in New York, N.Y., which letter bore the subject in bold, capital letters "**CEASE AND DESIST REGARDING THE UNAUTHORIZED USE OF A TRADEMARK**" and further demanding that A&E Television Network cease distribution or commercial exploitation of any merchandise bearing the **YUUUP!** trademark including, among other things, refraining from using the **YUUUP!** trademark in any manner.

49. As a result of Defendants' cease and desist letter, A&E Television Network stopped selling Hester's merchandise causing Hester substantial damages.

50. Defendants' improper and intentional interference with the performance of the contract between A&E television network and Hester caused Hester damages in an amount to be determined at trial.

**THIRD CLAIM FOR RELIEF**  
**Interference with Prospective Economic Advantage**

51. Plaintiff incorporates each and every allegation set forth in the above paragraphs as though fully alleged herein.

52. On and before September 2, 2011 there were valid contracts in existence between Plaintiff and a third party, namely, A&E Television Network pursuant to which A&E Television Network permitted Plaintiff to prominently display Plaintiff's mark **YUUUP!** on the reality television series "Storage Wars". Additionally, A&E Television Network marketed and sold Plaintiff's line of clothes bearing Plaintiff's mark **YUUUP!**

53. The agreements between Plaintiff and A&E Television Network were successful as A&E Television Network's marketing and sale of Plaintiff's clothes both effectively advertised the reality television show "Storage Wars" and also garnered substantial profits for both Plaintiff, and A&E Television Network, derived from "merchandising" the popularity of the "Storage Wars" television series. In this manner A&E Television Network and Plaintiff "cross-marketed" their products.

54. The reality series "Storage Wars" from its inception to the present time proved to be increasingly successful providing increased opportunities for Plaintiff to continue to enter further contracts with A&E Television Network to continue to use Plaintiff's mark **YUUUP!** for prominent display during the show and also marketing and selling merchandise prominently displaying Plaintiff's mark.

55. Defendants improperly, intentionally and wrongfully interfered with Plaintiff's opportunity to continue to renew those agreements and contracts by issuing a cease and desist letter to "A&E Television Networks, LLC" to the attention of "Business & Legal Affairs" in this district which letter bore the subject in bold, capital letters **"CEASE AND DESIST**

**REGARDING THE UNAUTHORIZED USE OF A TRADEMARK”** and further demanding that A&E Television Network cease distribution or commercial exploitation of any merchandise bearing the **YUUUP!** trademark including, among other things, refraining from using the **YUUUP!** trademark in any manner.

56. But for Defendants’ wrongful conduct, Plaintiff would have continued to enter extensions of those agreements and contracts to license Plaintiff mark **YUUUP!** for prominent display during the show and also marketing and selling merchandise prominently displaying Plaintiff’s mark.

57. Defendants improper and intentional interference with the aforesaid prospective contracts between A&E television network and Plaintiff caused Plaintiff damage in an amount to be determined at trial.

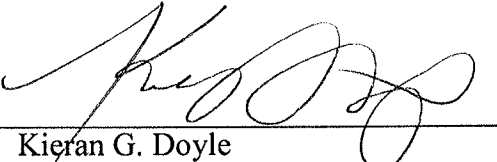
#### **PRAYER FOR RELIEF**

**WHEREFORE,** Plaintiff David Hester prays for a judgment in its favor and against Defendants as follows:

1. That the Court declare that Hester’s use of his trademark **YUUUP!** does not infringe any existing and valid trademark right of Defendants under the Lanham Act.
2. That the Court order that Defendants, their employees, servants, attorneys, agents, representatives, distributors, licenses, and all persons in active concert or participation with Defendants, be enjoined and restrained permanently from interfering with Plaintiff’s use and registration of the trademark **YUUUP!** and from opposing, seeking to cancel, or otherwise objecting to any federal registration applications to the **YUUUP!** trademark.
3. That Hester be awarded compensatory damages.
4. That Hester be awarded his reasonable attorneys’ fees and costs.
5. Awarding such other and further relief as the Court may deem just and proper.

Dated: November 10, 2011

**COWAN LIEBOWITZ & LATMAN, P.C.**

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