

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

G.I. SPORTZ INC.	)	
GI SPORTZ DIRECT LLC;	)	
	)	
<i>Plaintiffs,</i>	)	
v.	)	Civil Action No. _____
	)	
VALKEN INC.,	)	JURY TRIAL DEMANDED
	)	
<i>Defendant.</i>	)	<b><u>COMPLAINT</u></b>
	)	

**COMPLAINT**

Plaintiffs G.I. Sportz Inc. and GI Sportz Direct LLC (collectively “GI”) by and through their undersigned counsel, file this Complaint against Defendant Valken Inc. (“Valken”), and allege as follows:

**NATURE OF THE ACTION**

1. This is an action for [i] breach of contract, [ii] infringement of GI’s trade dress rights in its federally-registered Marballizer trade dress in violation of 15 U.S.C. §1114, [iii] federal unfair competition in violation of 15 U.S.C. §1125(a), [iv] common law trademark infringement, and [v] violation of New Jersey’s Fair Trade Act, N.J.S.A. 56:4-1.

**THE PARTIES**

2. G.I. Sportz Inc. is a Canadian corporation with a principal place of business at 6000 Kieran, Ville St Laurent, Quebec H4S 2B5, CANADA.

3. GI Sportz Direct LLC is a Delaware limited liability company with a principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080. GI Sportz Direct LLC is a wholly-owned subsidiary of G.I. Sportz, Inc, and is the survivor of, and the predecessor-in-interest of all rights in and to, both KEE Action Sports, LLC and KEE Action Sports II, LLC

(collectively, “KEE Action”), each of which previously resided at and operated out of GI Sportz Direct LLC’s current New Jersey address.

4. Upon information and belief, Valken is a New Jersey corporation with its principal place of business at 1 Hawk Court, Swedesboro, New Jersey 08085.

#### **JURISDICTION AND VENUE**

5. This is an action for trade dress infringement that arises under the Lanham Act, Title 15, United States Code § 1051, et seq. Accordingly, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338, and jurisdiction over the related ancillary claims under §1367.

6. This Court has personal jurisdiction over Valken, and venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), (c) and § 1400(b), in that, upon information and belief, Valken resides in this district, Valken has committed acts of infringement in this district that give rise to the claims alleged herein, and Valken has a regular and established practice of business in this district.

7. This Court also has express jurisdiction pursuant to Section 10.01 of the Litigation Settlement Agreement entered into between Valken and KEE Action on May 20, 2014 (“the Agreement”)—an agreement that Valken has breached, as detailed herein. A copy of the Agreement is attached hereto as **Exhibit A**.

#### **GI’S MARBALLIZER TRADE DRESS**

8. GI is the world’s leading provider of equipment and supplies to the paintball industry. In 2015, GI acquired KEE Action, including all of KEE Action’s assets, liabilities, rights and privileges.

9. In 1994, R.P. Sherer Technologies, Inc. (“RPS”) began selling a line of paintballs that introduced a second color into the machine used to manufacture the balls. When done in a

certain manner, each resulting paintball had a random, blended design that swirled the colors together, resembling a marble. RPS branded these paintballs “Marballizer,” and obtained U.S. Reg. No. 2,435,370 covering that name. Soon, the name “Marballizer,” and the randomly swirled, multi-color design used on the paintball exterior, became synonymous with the high quality, consistent paintballs.

10. In 2003, RPS sold its paintball division, along with all rights in the Marballizer name and its associated trade dress, to Pursuit Marketing, Inc. (“PMI”), which was one of the nation’s largest paintball manufacturer’s at the time. KEE Action was later formed out of a merger between PMI and another paintball manufacturer, resulting in all rights in the Marballizer trade dress passing to KEE Action.

11. Thus, since 1994, and through the acquisitions and mergers described above, Marballizer brand paintballs, together with their unique, randomly blended, multi-color trade dress, have been continuously offered under the control of a single source. Over the years, paintballs having a random, swirled “marble” appearance have become associated with the Marballizer brand just as much as the brand has become associated with the unique paintball design. It is this distinctive design that constitutes the “Marballizer Trade Dress.”

12. In order to protect its valuable trade dress, Plaintiff, G.I. Sportz Direct LLC, owns and maintains a federal trademark registration, U.S. Reg. No. 3,049,101 (“the Registration”), which covers the Marballizer Trade Dress. The Registration describes the Marballizer Trade Dress as consisting of “contrasting colors blended randomly together to form the appearance of a fanciful design on the surface of a paintball.” A true and correct copy of the Registration is attached as **Exhibit B**.

13. The Marballizer Trade Dress covered by the Registration has been in continuous use by GI and its predecessors-in-interest for over twenty years and, in addition to being inherently distinctive, has achieved significant secondary meaning among dealers and consumers of paintballs. As a result of its longevity on the Principal Registry, the Registration is now incontestable under 15 U.S.C. § 1065.

#### **THE 2012 LAWSUIT**

14. In 2012, KEE Action became aware that Valken was infringing the Marballizer Trade Dress, at least with its “Redemption” brand paintballs. KEE Action put Valken on actual notice of its infringement via letter on January 30, 2012. A copy of the letter is attached as **Exhibit C**.

15. Valken initially refused to cease infringement. After subsequent investigation was conducted, KEE Action filed the 2012 Lawsuit asserting that Valken’s Redemption and Graffiti brand paintballs infringed the Marballizer Trade Dress. KEE Action also alleged infringement of several patents covering certain paintball markers and loaders. A copy of the Complaint filed in the 2012 Lawsuit is attached as **Exhibit D**.

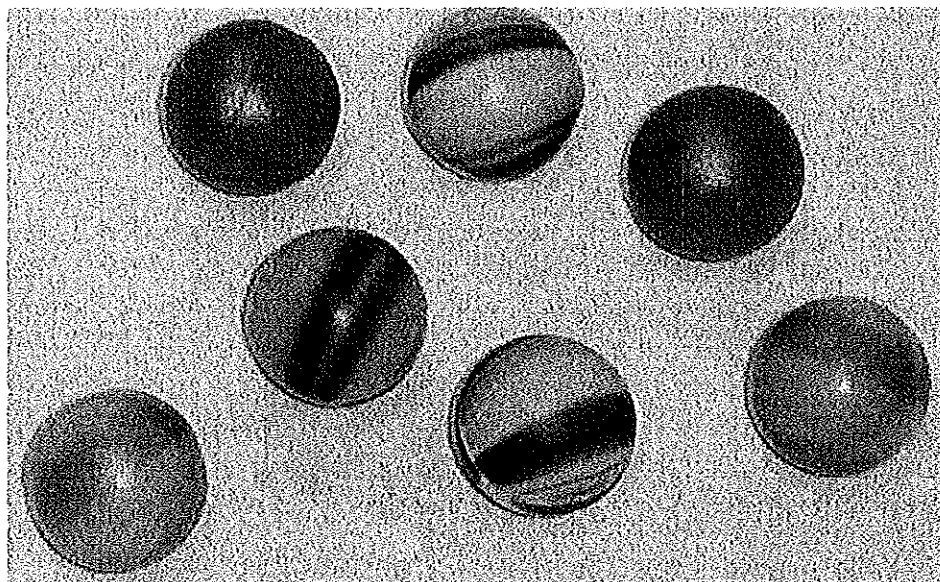
16. Valken eventually filed a Motion to Dismiss the trade dress infringement claim on the basis that, in asserting the Registration, KEE Action had allegedly not sufficiently identified its asserted trade dress. On December 17, 2013, this Court denied Valken’s Motion on the basis that KEE Action’s trade dress was associated with a specific product (i.e., Marballizer brand paintballs) rather than a series or line of products, thereby distinguishing the law upon which Valken had relied to support its motion. A copy of the Court’s Order denying Valken’s Motion to Dismiss is attached as **Exhibit E**.

17. Shortly thereafter, Valken entered into the Agreement with KEE Action, resulting in settlement of the 2012 Lawsuit. The Agreement defines the Marballizer Trade Dress as “trade dress consisting of paintballs having contrasting colors blended randomly together to form the appearance of a fanciful design on the surface of the paintball.”

18. Pursuant to Section 3.01 (iii) of the Agreement, Valken agreed:

*that on and after [May 20, 2014] it will not within the United States, and other territories where KEE has rights in the Marballizer Trade Dress, manufacture, cause to be manufactured, sell, market or distribute alone or in conjunction with others, the Subject Paintballs.*

19. The Agreement defines “Subject Paintballs” as those having “the appearance of, or similar to, the KEE paintball, as exemplified by Exhibit C.” The referenced exhibit is attached as part of the Agreement, and is re-produced in relevant part below.



20. Section 15 of the Agreement covers termination in the event of breach. Pursuant to Section 15, and in the event of termination as a result of breach, Valken expressly waived any defenses “based solely on the passage of time, including but not limited to, any applicable statute of limitations and the defense of laches.” In such instances, the Section also expressly

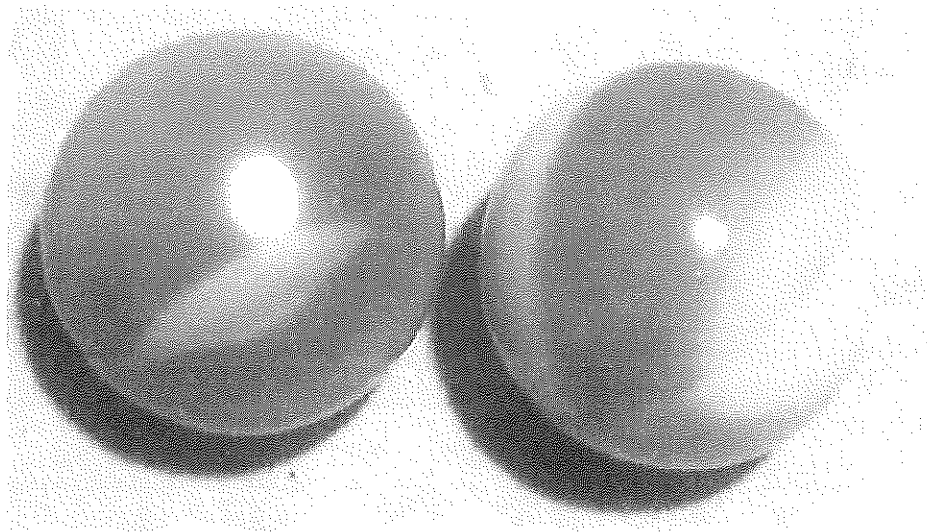
states that KEE Action (now GI) “shall not be barred from claiming the trade dress damages it would have sought in [the 2012 Lawsuit].”

### VALKEN’S INFRINGING ACTS

21. Upon information and belief, Valken initially complied with the Agreement, and stopped the sale of infringing paintballs having the Marballizer Trade Dress. However, GI recently learned that Valken has reinitiated sales of Redemption and Graffiti brand paintballs that incorporate and copy GI’s Marballizer Trade Dress. This was recently confirmed through a third party paintball manufacturer that identified Valken as having recently manufactured paintballs with a multi-color swirl design like that identified in GI’s Registration.

22. On August 23, 2016, GI sent Valken a Notice of Breach, pursuant to Section 15 of the Agreement. A copy of the Notice is attached as **Exhibit F**.

23. After waiting the thirty (30) days required by the Agreement to see if Valken would request mediation, GI performed a test buy to confirm that Valken was still infringing. An order for Valken Redemption paintballs was placed through eBay.com, and shipment was received from “Valken Sports, 5017 North 30th Street, Colorado Springs, CO 80919.” The package was received on October 1, 2016. Images evidencing the purchase and its contents are attached hereto as **Exhibit G**. The images shown below are from the paintballs received as part of the test buy. Each paintball exhibits the randomly blended mixture of two contrasting colors that characterizes the Marballizer Trade Dress.



24. On October 12, 2016, GI sent a Notice of Termination to Valken, as required by Section 15 of the Agreement. A copy of the Notice of Termination is attached hereto as **Exhibit H.**

**COUNT I**  
**Common Law Breach of Contract**

25. GI re-alleges and incorporates herein paragraphs 1 through 24 of this Complaint.

26. GI's predecessor-in-interest agreed to dismiss the 2012 Lawsuit against Valken based on Valken's representation that it would abide by the terms of the Agreement.

27. GI's predecessor-in-interest and Valken, through their authorized representatives, and in association with the official capacities of those representatives, entered into a valid contract governing the exchange of terms of settlement for the 2012 Lawsuit.

28. Pursuant to Section 3.01 (iii) of the Agreement, Valken agreed:

*that on and after [May 20, 2014] it will not within the United States, and other territories where KEE has rights in the Marballizer Trade Dress, manufacture, cause to be manufactured, sell, market or distribute alone or in conjunction with others, the Subject Paintballs.*

29. GI did not provide any subsequent permission for Valken to sell any paintballs bearing the Marballizer Trade Dress. Thus, Valken breached the Agreement when it re-initiated the sale of at least Redemption-brand paintballs bearing the Marballizer Trade Dress.

30. The Agreement expressly identifies “remedies for breach” of the Agreement upon termination for breach, and GI has followed all of the terms of the Agreement required to terminate the Agreement. Accordingly, remedies for breach of the Agreement are expressly available to GI.

31. Valken’s breach of the Agreement was willful, and in direct contravention of the purpose of the contract.

32. Valken’s breach has harmed GI through lost sales and through erosion of the value of GI’s goodwill in its Marballizer Trade Dress.

**COUNT II**  
**Federal Trademark Infringement and Counterfeiting under**  
**15 U.S.C. §§ 1114(1)(a) and 1117(a), (b), and (c)**

33. GI re-alleges and incorporates herein paragraphs 1 through 32 of this Complaint.

34. GI is the owner of all right, title and interest in and to the Registration.

35. Valken’s paintball products, including at least certain of its Graffiti and Redemption brand paintballs, copy and infringe GI’s registered trade dress in violation of 15 U.S.C. §1114(1)(a).

36. Valken had at least constructive knowledge pursuant to 15 U.S.C. §1072 of GI’s rights in the Marballizer Trade Dress prior to the 2012 Lawsuit during Valken’s unauthorized use of that trade dress in association with the offer of directly competing paintballs.



37. Valken also had actual knowledge of GI's rights in its Marballizer Trade Dress at least as early as January 30, 2012, yet it continued to use the trade dress on its paintball products.

38. Valken, thus, has deliberately and willfully used GI's federally registered Marballizer Trade Dress in association with products directly within the designation of GI's federal Registration in an attempt to trade upon and/or diminish the widespread goodwill, reputation and selling power established by GI and its predecessors-in-interest, and to pass Valken's paintball products off as those of GI.

39. Valken has advertised, promoted, sold, offered and distributed paintballs dressed in what Valken knows to be a counterfeit representation of GI's federally registered Marballizer Trade Dress.

40. GI has not consented to Valken's use of GI's trade dress covered by the Registration.

41. Valken's unauthorized use of GI's Marballizer Trade Dress for use with the sale of paintballs that directly compete with those sold by GI is likely to cause confusion, mistake or deception as to the affiliation, connection or association of Valken with GI in violation of 15 U.S.C. §1114.

42. The intentional and willful nature of the aforementioned acts renders this violation subject to damages recoverable by GI in the nature of statutory damages, Valken's profits, GI's actual damages, and recovery of costs, pursuant to 15 U.S.C. §1117(a).

43. The fact that Valken has used and is using a counterfeit trade dress entitles GI to treble damages, statutory damages, and attorney's fees pursuant to 15 U.S.C. §1117(b) and (c).

44. As a result of Valken's aforementioned conduct, GI has suffered and continues to suffer loss of goodwill and other irreparable harm for which GI has no adequate remedy at law. Accordingly, only an injunction from this Court can prevent GI's further irreparable harm at the hands of Valken.

**COUNT III**  
**Federal Unfair Competition (15 U.S.C. §1125(a))**

45. GI re-alleges and incorporates herein paragraphs 1 through 44 of this Complaint.

46. GI is the owner of valid common law rights in its Marballizer Trade Dress, which it has used, together with its predecessors-in-interest, continuously in connection with the sale of paintballs since the Marballizer Trade Dress was first developed in 1994.

47. GI's Marballizer Trade Dress is distinctive by virtue of both inherent distinctiveness and acquired distinctiveness resulting from GI's efforts in promoting and using the trade dress, together with its predecessors-in-interest, since 1994, including use through the sale hundreds of millions of Marballizer brand paintballs throughout the United States over that time, each exhibiting the Marballizer Trade Dress.

48. By using GI's Marballizer Trade Dress, Valken has deliberately and willfully attempted to borrow off of the long-standing and hard-earned goodwill, reputation and selling power established by GI in connection with GI's Marballizer brand paintball products throughout the United States.

49. Valken's actions in this regard evidence an attempt to confuse consumers as to the origin and/or sponsorship of Valken's products.

50. Valken's unauthorized and tortuous conduct has deprived, and will continue to deprive, GI of the ability to control the consumer perception of GI's goods marketed under its

Marballizer Trade Dress, placing the valuable reputation and goodwill of GI in the hands of Valken, over whom GI have no control.

51. Valken's conduct is likely to cause confusion, mistake or deception as to the affiliation, connection or association of Valken's products with GI's products, and as to the origin, sponsorship or approval of Valken and its goods, in violation of Section 43 of the Lanham Act, 15 U.S.C. § 1125(a)(1).

52. Valken's acts have been intentional, with full actual knowledge of and complete disregard for GI's federally registered and incontestable trade dress registration.

53. The intentional and willful nature of the aforementioned acts renders this violation subject to damages recoverable by GI in the nature of statutory damages, Valken's profits, GI's actual damages, recovery of costs, and enhanced damages as an exceptional case, pursuant to 15 U.S.C. §1117.

54. As a result of Valken's aforementioned conduct, GI has suffered and continues to suffer loss of goodwill and other irreparable harm for which GI has no adequate remedy at law. Accordingly, only an injunction from this Court can prevent GI's further irreparable harm at the hands of Valken.

**COUNT IV**  
**Common Law Trademark Infringement**

55. GI re-alleges and incorporates herein paragraphs 1 through 54 of this Complaint.

56. GI is the owner of valid common law rights in its Marballizer Trade Dress, which it has used, together with its predecessors-in-interest, continuously with the sale of paintballs since the Trade Dress was first developed in 1994.

57. GI's Marballizer Trade Dress is distinctive by virtue of both inherent distinctiveness and acquired distinctiveness resulting from GI's efforts in promoting and using

the trade dress, together with its predecessors-in-interest, since 1994, selling hundreds of millions of paintballs using the trade dress across the country over that time.

58. Valken's actions complained of herein are likely to cause, confusion, mistake or deception among consumers as to an affiliation, connection or association between Valken's paintballs and GI and its Marballizer Trade Dress, and as to the origin, sponsorship or approval of Valken's paintballs, in violation of New Jersey common law.

59. Valken's unauthorized conduct also has deprived and will continue to deprive GI of the ability to control the consumer perception of GI's paintballs provided in connection with its Marballizer Trade Dress, placing the valuable reputation and goodwill of GI in the hands of Valken over whom GI has no control.

60. Because Valken had actual and constructive notice of GI's prior use of and rights in its Marballizer Trade Dress before Valken began using its infringing paintball design designation, Valken's unlawful trademark infringement is willful.

61. As a result of Valken's conduct, GI is likely to suffer harm, and has already been injured.

#### **COUNT V**

#### **Unfair Competition Under N.J.S.A. §§ 56:4-1 et. seq.**

62. GI re-alleges and incorporates herein paragraphs 1 through 61 of this Complaint.

63. Valken's actions complained of herein constitute acts of unfair competition through Valken's appropriation for their own use of the reputation and goodwill associated with GI's Marballizer Trade Dress in violation of N.J.S.A. §§ 56:4-1 et seq.

64. Valken committed this infringement willfully, knowingly, maliciously and in conscious disregard of GI's rights in its Marballizer Trade Dress.

65. As a result of Valken's aforementioned conduct, GI has suffered and continues to suffer loss of goodwill and other irreparable harm for which GI has no adequate remedy at law. Accordingly, only an injunction from this Court can prevent GI's further irreparable harm at the hands of Valken.

**JURY DEMAND**

GI requests a trial by jury on all issues so triable.

**PRAYER FOR RELIEF**

WHEREFORE, as to all Counts of this Complaint, GI request that this Court enter a judgment in favor of GI and against Valken on each Count herein, and grant relief as follows:

A. Declaring that Valken has breached the Agreement entered into by GI's predecessors-in-interest and Valken, and awarding GI monetary damages that have resulted from that breach;

B. Permanently enjoining and restraining Valken, its parents, subsidiaries, holding companies, licensees, owners, directors, officers, partners, assigns, related entities, affiliates, predecessors, successors, employees, representatives, trustees, receivers, agents and any other persons or entities acting on behalf of Valken or with Valken's authority, from:

a. selling, offering for sale, distributing, advertising or promoting within the United States any goods under or in connection with the Marballizer Trade Dress, or product designs confusingly similar therewith; and

b. doing any act or thing that is likely to induce the belief that Valken's goods, services or activities are in some way connected with GI's business, or that is likely to injure or damage GI's rights in its Marballizer Trade Dress or the associated goodwill;

C. Requiring that Valken be ordered to recall from the channels of United States trade all products, packaging, advertising and promotional material sold or distributed by Valken or its affiliates that uses or reflects the Marballizer Trade Dress pursuant to 15 U.S.C. §1116(d);

D. Requiring Valken to reimburse GI for all damages GI has suffered by reason of Valken's acts of infringement and unfair competition, to account for and pay to GI all profits derived by reason of such acts, and, based on the willfulness of Valken's actions and its use of a counterfeit of GI's registered trade dress, to remit to GI treble damages, profits, or statutory damages (including as provided by 15 U.S.C. §1117);

E. Finding that this case constitutes an exceptional case pursuant to 15 U.S.C. §1117, and awarding GI its reasonable attorneys' fees and disbursements incurred in bringing this action;

F. Requiring that Valken reimburses GI for all disbursements and costs incurred in bringing this action;

G. Requiring that Valken deliver and destroy all advertisements, brochures, promotional prints, and sales sheets in its possession or control within the United States that use the Marballizer Trade Dress, pursuant to 15 U.S.C. §1118, and immediately cease use of and delete any Internet advertisements featuring said trade dress; and

H. Awarding GI such other and further relief as this Court may deem equitable.

Dated: October 13, 2016

Respectfully Submitted,



---

JOHN M. HANAMIRIAN, ESQUIRE  
HANAMIRIAN LAW FIRM, P.C.  
NJ Attorney I.D.: 002861992  
40 E. Main Street  
Moorestown, New Jersey 08057  
(856) 793-9092  
(856) 793-9121 – f  
[jmh@hanamirian.com](mailto:jmh@hanamirian.com)

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 NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
GI SPORTZ, INC. and GI SPORTZ DIRECT, LLC
(b) County of Residence of First Listed Plaintiff Gloucester
(c) Attorneys (Firm Name, Address, Email and Telephone Number)
John M. Hanamirian, Esq./Hanamirian Law Firm, PC
40 E. Main Street, Moorestown, New Jersey 08057
(856) 793-9092/(856) 793-9121 -f

DEFENDANTS
VALKEN, INC.
County of Residence of First Listed Defendant Gloucester
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

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)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1
2 2
3 3
4 4
5 5
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 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Lanham Act, United States Code Section 1051 and 28 United States Code Sections 1331 and 1338
Brief description of cause:
Federal Trademark Infringement under 15 U.S.C. Sections 1114(1)(a) and 1117(a),(b) and (c)

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint:
JURY DEMAND: X Yes [ ] No

VIII. RELATED CASE(S) IF ANY
(See instructions):
JUDGE Noel L. Hillman, U.S.D.J. DOCKET NUMBER 12-6069 (NLH-KMW)

DATE 10/13/2016
SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE



# **EXHIBIT "A"**

**(TO BE FILED UNDER SEAL)**

# **EXHIBIT “B”**

**Int. Cl.: 28**

**Prior U.S. Cls.: 22, 23, 38 and 50**

**United States Patent and Trademark Office**

**Reg. No. 3,049,101**

Registered Jan. 24, 2006

**TRADEMARK  
PRINCIPAL REGISTER**



PURSUIT MARKETING, INC. (ILLINOIS CORPORATION)

55 EAST HOWARD

DES PLAINES, IL 60018

FOR: PAINTBALLS, IN CLASS 28 (U.S. CLS. 22, 23, 38 AND 50).

FIRST USE 0-0-1994; IN COMMERCE 0-0-1994.

THE MARK CONSISTS OF CONTRASTING COLORS BLENDED RANDOMLY TOGETHER TO FORM THE APPEARANCE OF A FANCIFUL DESIGN ON THE SURFACE OF A PAINTBALL.

SEC. 2(F).

SER. NO. 78-437,779, FILED 6-18-2004.

STEVEN JACKSON, EXAMINING ATTORNEY

---

**From:** TMOfficialNotices@USPTO.GOV  
**Sent:** Monday, November 7, 2011 11:00 PM  
**To:** trademarks@ngelaw.com  
**Subject:** Trademark RN 3049101: Official Notice of Acceptance and Acknowledgement under Sections 8 and 15 of the Trademark Act

---

**Serial Number:** 78437779  
**Registration Number:** 3049101  
**Registration Date:** Jan 24, 2006  
**Mark:** Miscellaneous Design  
**Owner:** Pursuit Marketing, Inc.

Nov 7, 2011

### NOTICE OF ACCEPTANCE UNDER SECTION 8

The declaration of use or excusable nonuse filed for the above-identified registration meets the requirements of Section 8 of the Trademark Act, 15 U.S.C. §1058. **The Section 8 declaration is accepted.**

### NOTICE OF ACKNOWLEDGEMENT UNDER SECTION 15

The declaration of incontestability filed for the above-identified registration meets the requirements of Section 15 of the Trademark Act, 15 U.S.C. §1065. **The Section 15 declaration is acknowledged.**

**The registration will remain in force for the class(es) listed below for the remainder of the ten-year period, calculated from the registration date, unless canceled by an order of the Commissioner for Trademarks or a Federal Court.**

**Class(es):**  
028

TRADEMARK SPECIALIST  
POST-REGISTRATION DIVISION  
571-272-9500

---

### REQUIREMENTS FOR MAINTAINING REGISTRATION

**WARNING: Your registration will be canceled if you do not file the documents below during the specified time periods.**

#### Requirements in the First Ten Years

**What and When to File:** You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between the 9th and 10th years after the registration date. See 15 U.S.C. §§1058 and 1059.

#### Requirements in Successive Ten-Year Periods

**What and When to File:** You must file a Declaration of Use (or Excusable Nonuse) **and** an Application for Renewal between every 9th and 10th-year period, calculated from the registration date. See 15 U.S.C. §§1058 and 1059.

#### Grace Period Filings

The above documents will be considered as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**\*\*\*The USPTO WILL NOT SEND ANY FURTHER NOTICE OR REMINDER OF THESE REQUIREMENTS. THE REGISTRANT SHOULD CONTACT THE USPTO ONE YEAR BEFORE THE EXPIRATION OF THE TIME PERIODS SHOWN ABOVE TO DETERMINE APPROPRIATE REQUIREMENTS AND FEES.\*\*\***

To view this notice and other documents for this application on-line, go to <http://tdr.uspto.gov/search.action?sn=78437779>. NOTE: This notice will only be available on-line the next business day after receipt of this e-mail.

# **EXHIBIT “C”**

NEAL ■ GERBER ■ EISENBERG

Michael G. Kelber  
Attorney at Law

Tel 312.269.5322  
Fax 312.429.3580  
mkelber@ngelaw.com

January 30, 2012

**VIA FEDERAL EXPRESS**

Mr. Gino Postorivo  
Valken Sports  
1 Hawk Ct  
Swedesboro, NJ 08085

**Re: Infringement of KEE Action Sports' Registered Trade Dress**

Dear Mr. Postorivo:

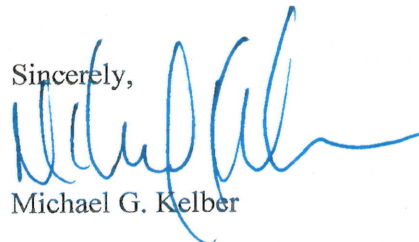
We represent KEE Action Sports ("KEE") with respect to certain intellectual property matters. It has recently come to KEE's attention that Valken Sports ("Valken") is manufacturing and distributing paintball products sold under the name "Redemption" that are colorable imitations of KEE's paintball trade dress.

Given KEE's history as a long-standing producer of paintballs, Valken must be aware of KEE's well-known MARBALLIZER<sup>®</sup> brand paintball and, more specifically, its distinctive trade dress. Through exclusive and continuous use for nearly twenty years, KEE's paintball trade dress has become an extremely valuable asset, and KEE has successfully enforced its trade dress rights against prior infringers. KEE's distinctive paintball trade dress is registered with the United States Trademark Office, Registration No. 3,049,101, and has become incontestable due to Kee's longevity of continuous use.

Because Valken's Redemption product essentially copies KEE's registered trade dress, Valken's offering of this product is likely to deceive and confuse consumers into believing that they are purchasing KEE's MARBALLIZER<sup>®</sup> product. Such use unlawfully trades on the valuable goodwill of our client. Moreover, the tremendous popularity and renown of KEE's registered trade dress suggests that Valken is willfully offering counterfeit paintballs in violation of 15 U.S.C. §§ 1114, 1116, and 1125(a).

Accordingly, KEE demands that Valken immediately discontinue the manufacture, sale and distribution of its Redemption product, and agree in writing to avoid use of KEE's intellectual property in the future by February 6, 2012. Please call if you would like to discuss this matter.

Sincerely,



Michael G. Kelber

MGK:adw  
Enclosure  
NGEDOCS: 1871759.2

Int. Cl.: 28

Prior U.S. Cls.: 22, 23, 38 and 50

Reg. No. 3,049,101

**United States Patent and Trademark Office**

Registered Jan. 24, 2006

**TRADEMARK  
PRINCIPAL REGISTER**



PURSUIT MARKETING, INC. (ILLINOIS CORPORATION)  
55 EAST HOWARD  
DES PLAINES, IL 60018

FOR: PAINTBALLS, IN CLASS 28 (U.S. CLS. 22, 23, 38 AND 50).

FIRST USE 0-0-1994; IN COMMERCE 0-0-1994.

THE MARK CONSISTS OF CONTRASTING COLORS BLENDED RANDOMLY TOGETHER TO FORM THE APPEARANCE OF A FANCIFUL DESIGN ON THE SURFACE OF A PAINTBALL.

SEC. 2(F).

SER. NO. 78-437,779, FILED 6-18-2004.

STEVEN JACKSON, EXAMINING ATTORNEY

**White, Adrienne**

---

**From:** trackingupdates@fedex.com  
**Sent:** Monday, February 06, 2012 11:13 AM  
**Subject:** Online FedEx Tracking - 485242725510

-----  
This tracking update has been requested by:

Name: (not provided by requestor)  
E-mail: (not provided by requestor)  
Tracking number 485242725510

Reference 015501-0006  
Ship date Jan 30, 2012  
Delivered to Receptionist/Front Desk  
Destination Swedesboro, NJ  
Delivery date Jan 31, 2012 9:59 AM  
Signed for by R.PEARCE  
Service type Priority Envelope

Tracking results as of Feb 6, 2012 11:12 AM CST

Date/Time	Location/Activity
Jan 31, 2012 9:59 AM	Swedesboro, NJ/Delivered
Jan 31, 2012 7:52 AM	BELLMAWR, NJ/On FedEx vehicle for delivery
Jan 31, 2012 7:16 AM	BELLMAWR, NJ/At local FedEx facility
Jan 31, 2012 5:47 AM	PHILADELPHIA, PA/At destination sort facility
Jan 31, 2012 2:54 AM	MEMPHIS, TN/Departed FedEx location
Jan 30, 2012 9:35 PM	CHICAGO, IL/Left FedEx origin facility
Jan 30, 2012 8:41 PM	/Shipment information sent to FedEx
Jan 30, 2012 7:31 PM	CHICAGO, IL/Picked up

Disclaimer

-----  
This tracking update has been sent to you by FedEx on the behalf of the Requestor noted above. FedEx does not validate the authenticity of the request and does not validate, guarantee or warrant the authenticity of the request, the requestor's message, or the accuracy of this tracking update. For tracking results and fedex.com's terms of use, go to fedex.com.



# **EXHIBIT “D”**

Christopher M. Mikson  
cmikson@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
2001 Market Street, Suite 4100  
Philadelphia, PA 19103  
Telephone: 215.965.1200  
Facsimile: 215.965.1210

*Attorney for Plaintiffs Kee Action Sports  
LLC and Kee Action Sports II LLC*

*Of Counsel:*

Todd E. Landis  
tlandis@akingump.com  
Fred I. Williams  
fwilliams@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, Texas 75201  
Telephone: 214.969.2800  
Facsimile: 214.969.4343

Ruben H. Munoz  
rmunoz@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
2001 Market Street, Suite 4100  
Philadelphia, PA 19103  
Telephone: 215.965.1200  
Facsimile: 215.965.1210

*Attorneys for Plaintiffs Kee Action Sports  
LLC and Kee Action Sports II LLC*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

**KEE ACTION SPORTS LLC and  
KEE ACTION SPORTS II LLC,**

**Plaintiffs,**

**v.**

**VALKEN INC.,**

**Defendant.**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

**Civil Action No. \_\_\_\_\_**

**JURY TRIAL DEMANDED**

**PLAINTIFFS' ORIGINAL COMPLAINT  
FOR PATENT AND TRADE DRESS INFRINGEMENT**

Plaintiffs Kee Action Sports LLC and Kee Action Sports II LLC (collectively “Kee Action”) by and through their undersigned counsel, for their Original Complaint against Defendant Valken Inc. (“Defendant”), state as follows:

**THE PARTIES**

1. Plaintiff Kee Action Sports LLC is a Delaware Limited Liability Company with its principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080.

2. Plaintiff Kee Action Sports II LLC is a Delaware Limited Liability Company. Kee Action Sports II LLC is a wholly owned subsidiary of Kee Action Sports LLC with its principal place of business at 570 Mantua Boulevard, Sewell, New Jersey 08080.

3. Upon information and belief, Defendant Valken is a New Jersey corporation with its principal place of business at 1 Hawk Court, Swedesboro, New Jersey 08085.

**JURISDICTION AND VENUE**

4. This is an action for patent and trade dress infringement that arises under the Patent Laws of the United States, Title 35, United States Code and under the Trademark Laws of the United States, Title 15, United States Code.

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

6. This Court has personal jurisdiction over the Defendant, and venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), (c) and § 1400(b), in that, upon information and belief, the Defendant resides in this district, has committed acts of infringement or a substantial portion

of the infringing activities giving rise to the claims occurred in this district, and/or the Defendant has a regular and established practice of business in this district.

**PATENTS-IN-SUIT**

7. On March 16, 1999, the United States Patent & Trademark Office (“USPTO”) duly and legally issued U.S. Patent No. 5,881,707 (the “’707 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’707 patent is attached as Exhibit A.

8. On October 19, 1999, the USPTO duly and legally issued U.S. Patent No. 5,967,133 (the “’133 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’133 patent is attached as Exhibit B.

9. On March 14, 2000, the USPTO duly and legally issued U.S. Patent No. 6,035,843 (the “’843 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’843 patent is attached as Exhibit C.

10. On November 5, 2002, the USPTO duly and legally issued U.S. Patent No. 6,474,326 (the “’326 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’326 patent is attached as Exhibit D.

11. On October 28, 2003, the USPTO duly and legally issued U.S. Patent No. 6,637,421 (the “’421 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’421 patent is attached as Exhibit E.

12. On November 11, 2003, the USPTO duly and legally issued U.S. Patent No. 6,644,295 (the “’295 patent”), entitled “Pneumatic Assembly for a Paintball Gun.” A true and correct copy of the ’295 patent is attached as Exhibit F.

13. On June 7, 2005, the USPTO duly and legally issued U.S. Patent No. 6,901,923 (the “’923 patent”), entitled “Pneumatic Assembly for a Paintball Gun.” A true and correct copy of the ’923 patent is attached as Exhibit G.

14. On April 4, 2006, the USPTO duly and legally issued U.S. Patent No. 7,021,302 (the “’302 patent”), entitled “Active Feed Paintball Loader with Flexible Impeller.” A true and correct copy of the ’302 patent is attached as Exhibit H.

15. On September 5, 2006, the USPTO duly and legally issued U.S. Patent No. 7,100,593 (the “’593 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’593 patent is attached as Exhibit I.

16. On April 15, 2008, the USPTO duly and legally issued U.S. Patent No. 7,357,129 (the “’129 patent”), entitled “Active Feed Paintball Loader with Flexible Impeller.” A true and correct copy of the ’129 patent is attached as Exhibit J.

17. On October 20, 2009, the USPTO duly and legally issued U.S. Patent No. 7,603,997 (the “’997 patent”), entitled “Electrical Control Unit for Paintball Gun.” A true and correct copy of the ’997 patent is attached as Exhibit K.

18. On November 3, 2009, the USPTO duly and legally issued U.S. Patent No. 7,610,908 (the “’908 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’908 patent is attached as Exhibit L.

19. On May 24, 2011, the USPTO duly and legally issued U.S. Patent No. 7,946,285 (the “’285 patent”), entitled “Pneumatically Operated Projectile Launching Device.” A true and correct copy of the ’285 patent is attached as Exhibit M.

20. Kee Action is the owner by assignment of the '707, '133, '843, '326, '923, '421, '295, '302, '593, '129, '997, '908, and '285 patents (the "patents-in-suit") and owns all rights, title, and interest in the patents-in-suit, including the right to sue for and recover all past, present, and future damages for infringement of the patents-in-suit.

21. The patents-in-suit are valid, enforceable and were duly issued in full compliance with Title 35 of the United States Code.

### **TRADE DRESS-IN-SUIT**

22. Kee Action is the owner by assignment of the registered trade dress listed as Registration No. 3049101 on the principal register maintained by the U.S. Patent and Trademark Office. A true and correct copy of Kee Action's registration is attached as Exhibit N.

23. Kee Action's registered trade dress is for a design consisting of "contrasting colors blended randomly together to form the appearance of a fanciful design on the surface of a paintball." Kee Action's registered trade dress is distinct and non-functional, and it identifies Kee Action as the source of a product.

24. Kee Action and/or its predecessors-in-interest have used the registered trade dress in commerce continuously since at least as early as 1994 in Kee Action's paint products. Kee Action's registered trade dress has fulfilled the requirements for incontestability under 15 U.S.C. § 1065. The registration is in force and is entitled to the protections and presumptions accorded incontestable registrations under 15 U.S.C. § 1115(b).

### **DEFENDANT'S WILLFULNESS**

25. With actual knowledge of Kee Action's intellectual property rights, Defendant has consciously chosen to pursue a business based on widespread patent infringement and trade dress infringement. In fact, Defendant's President Eugenio Postorivo has been involved

personally in licensing several of the patents-in-suit over the past ten years and, due to his work as an executive of Kee Action's predecessor-in-interest, has actual, extensive knowledge of the patents and trade dress rights at issue in this case. Defendant's infringement has, therefore, been willful at all relevant times.

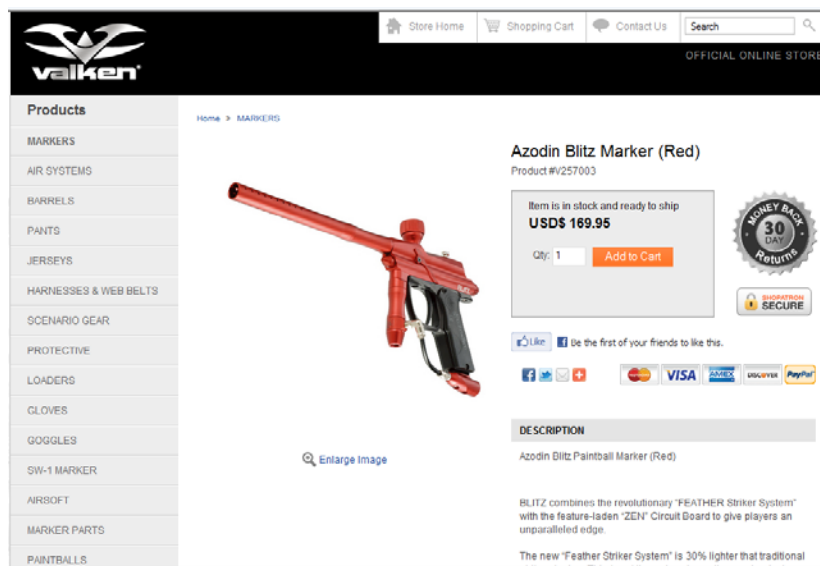
## COUNT I

(Infringement of the '326, '421, and '997 Patents)

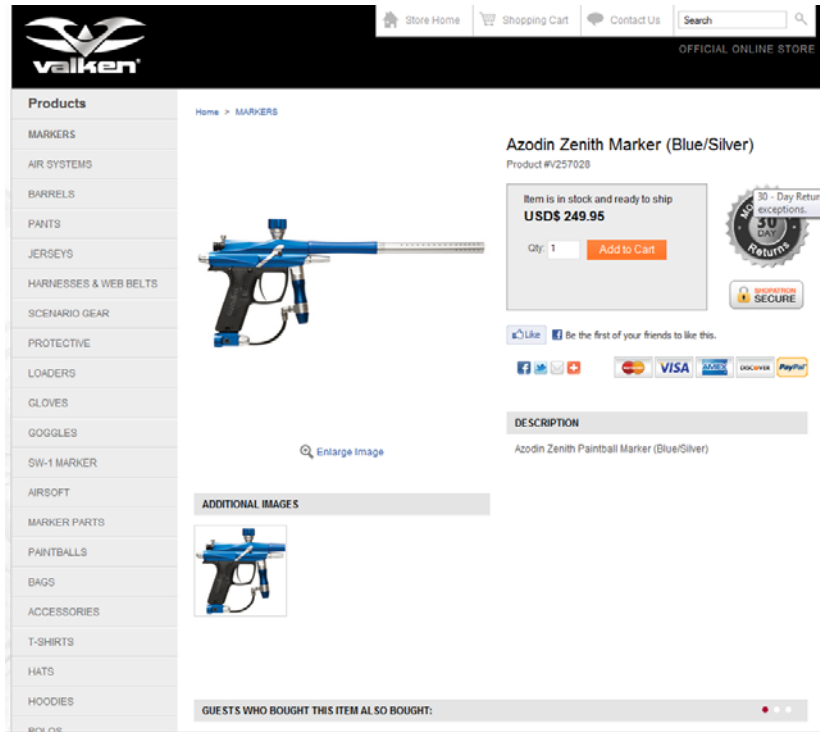
26. Kee Action incorporates paragraphs 1 through 25 herein by reference.

27. Defendant is directly and/or indirectly infringing one or more claims of the '326, '421, and '997 patents in violation of 35 U.S.C. §271, by making, using, offering for sale, selling, and/or importing paintball markers, including without limitation Azodin product models Blitz and Zenith and Vanguard product models Creed and Demon.

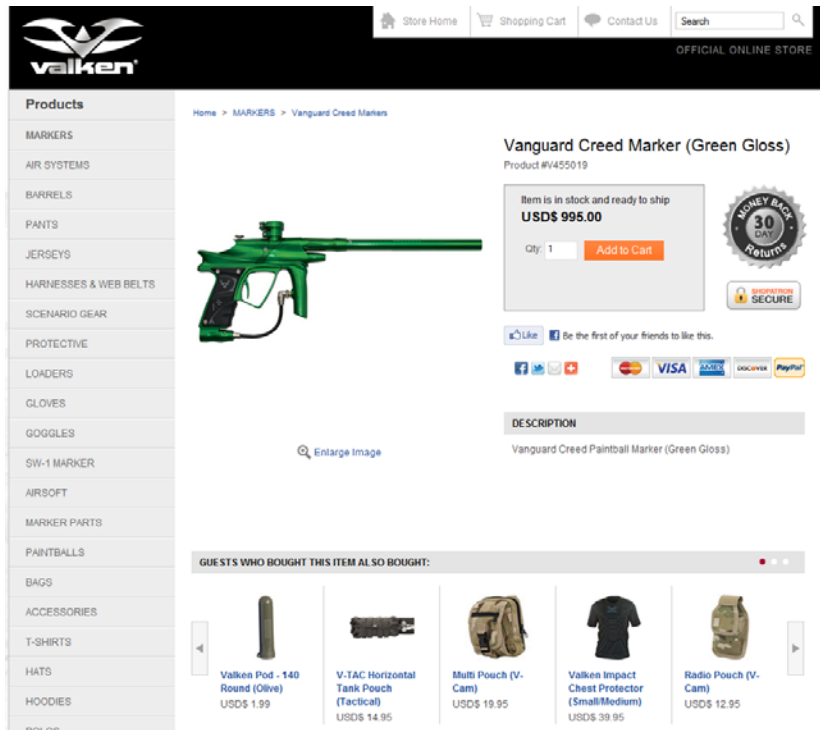
28. The following screen captures from Defendant's website show that it is offering these products for sale:



Azodin Blitz Marker

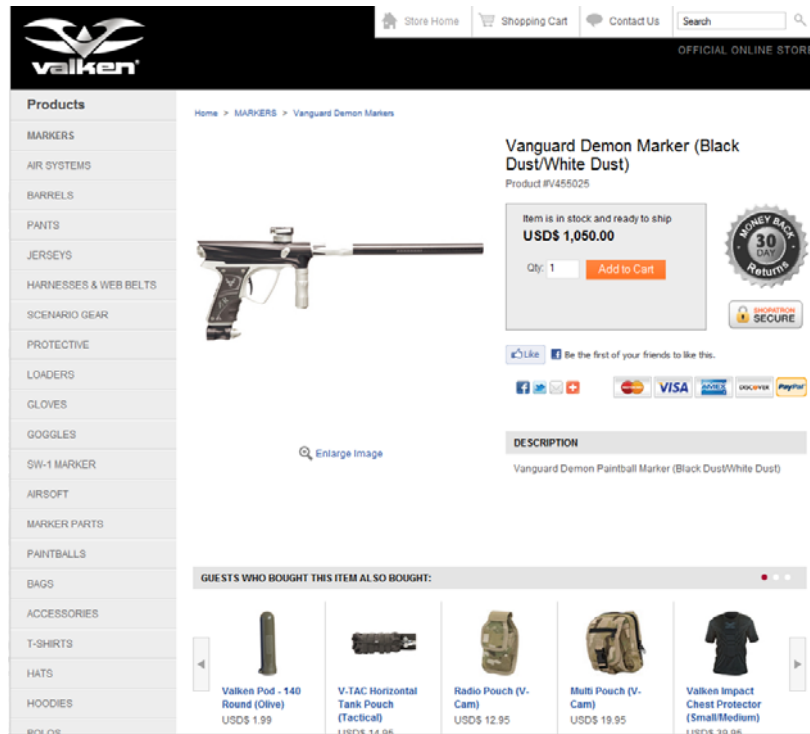


Azodin Zenith Marker



Vanguard Creed Marker





Vanguard Demon Marker

29. Kee Action has been damaged as a result of Defendant's infringing conduct described in this Count and is entitled to recover from Defendant the damages sustained by an amount determined at trial. Defendant's infringement is willful and deliberate, entitling Kee Action to increased damages under 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

## COUNT II

(Infringement of the '707, '133, '843, '295, '923 '593, '908, and '285 Patents)

30. Kee Action incorporates paragraphs 1 through 29 herein by reference.

31. Defendant is directly and/or indirectly infringing one or more claims of the '707, '133, '843, '295, '923, '593, '908, and '285 patents in violation of 35 U.S.C. §271, by making, using, offering for sale, selling, and/or importing paintball markers, including without limitation the Vanguard Creed and Demon product models.

32. Kee Action has been damaged as a result of Defendant's infringing conduct described in this Count and is entitled to recover from Defendant the damages sustained by an amount determined at trial. Defendant's infringement is willful and deliberate, entitling Kee Action to increased damages under 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

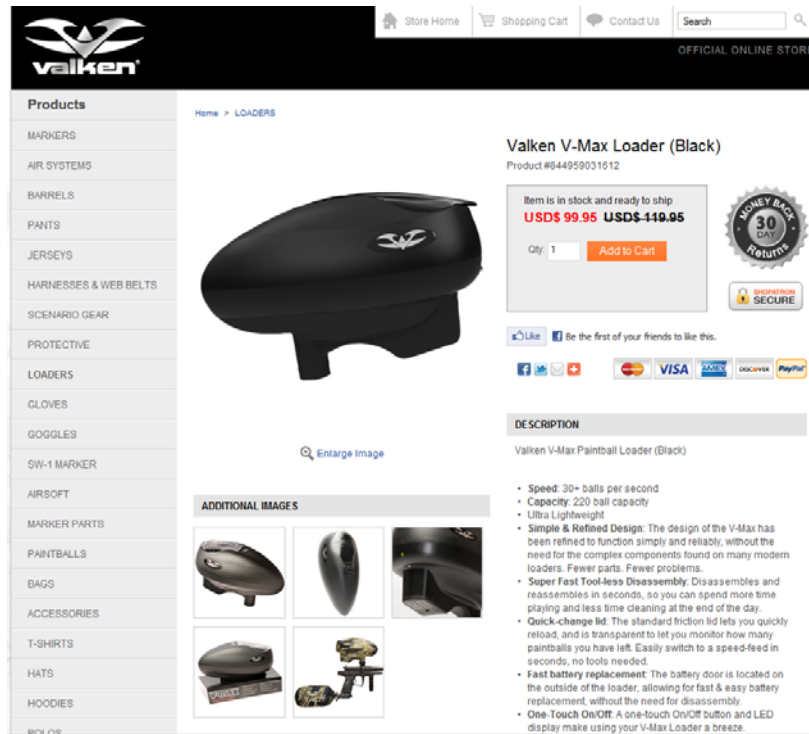
### **COUNT III**

(Infringement of the '302 and '129 Patents)

33. Kee Action incorporates paragraphs 1 through 32 herein by reference.

34. Defendant is directly and/or indirectly infringing one or more claims of the '302 and '129 patents in violation of 35 U.S.C. §271, by making, using, offering for sale, selling, and/or importing paintball loaders, including without limitation the Valken V-Max product model.

35. The following screen capture from Defendant's website shows that it is offering the product for sale:



Valken V-Max Loader

36. Kee Action has been damaged as a result of Defendant’s infringing conduct described in this Count and is entitled to recover from Defendant the damages sustained by an amount determined at trial. Defendant’s infringement is willful and deliberate, entitling Kee Action to increased damages under 35 U.S.C. § 284 and to attorneys’ fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

**COUNT IV**

(Infringement of Kee Action’s Registered Trade Dress)

37. Kee Action incorporates paragraphs 1 through 36 herein by reference.

38. Kee Action is the owner by assignment of the registered trade dress.

39. U.S. Registration No. 3049101 is for a design consisting of “contrasting colors blended randomly together to form the appearance of a fanciful design on the surface of a paintball.”

40. Defendant’s paintball products, including but not limited to the Graffiti and the Redemption paintball products, copy and infringe Kee Action’s registered trade dress in violation of 15 U.S.C. §1114(1)(a).

41. Defendant’s unauthorized use of Kee Action’s registered trade dress and/or Defendant’s manufacture and/or distribution of its paintball products with shell design features that copy elements of Kee Action’s registered trade dress is likely to cause confusion, or to cause mistake, or to deceive the consumer as to the affiliation, connection or association of Defendant with Kee Action, or as to the origin, sponsorship, or approval by Kee Action of Defendant’s goods, services, or commercial activities in violation of 15 U.S.C. §1114(1)(a).

42. Defendant’s manufacture and/or distribution of its paintball products with shell design features that copy elements of Kee Action’s registered trade dress enables Defendant to benefit unfairly from Kee Action’s reputation and success, thereby giving Defendant’s infringing products sales and commercial value they would not otherwise have.

43. Prior to Defendant’s first use of Kee Action’s registered trade dress, Defendant was aware of Kee Action’s business and had either actual notice and knowledge, or constructive notice of Kee Action’s registered trade dress. On January 30, 2012, Kee Action demanded that Defendant cease its infringement of the registered trade dress. Defendant failed to cease its infringement after receipt of Kee Action’s cease-and-desist letter.

44. Defendant's infringement of Kee Action's registered trade dress as described herein has been and continues to be intentional, willful, and without regard for Kee Action's registered trade dress.

45. Upon information and belief, Defendant has gained profits by virtue of its infringement of Kee Action's registered trade dress.

46. Kee Action has been and will continue to be harmed irreparably as a result of Defendant's infringing conduct described in this Count. Kee Action lacks an adequate remedy at law to compensate it for the loss of business reputation, customers, market position, confusion of potential customers, and goodwill flowing from the Defendant's infringing activities. Pursuant to 15 U.S.C. §1116, Kee Action is entitled to an injunction against Defendant's continuing infringement of Kee Action's registered trade dress. Unless enjoined, Defendant will continue its infringing conduct.

47. Because Defendant's actions have been committed with intent to damage Kee Action and to confuse and deceive the public, Kee Action is entitled to treble its actual damages or Defendant's profits, whichever is greater, and to an award of costs and, this being an exceptional case, reasonable attorneys' fees pursuant to 15 U.S.C. §1117 (a) and 1117(b).

#### **JURY DEMAND**

Plaintiff Kee Action, under Federal Rule of Civil Procedure 38, requests a trial by jury on all issues so triable.

#### **PRAYER FOR RELIEF**

WHEREFORE, Kee Action requests entry of judgment in its favor and against Defendant that:

(i) Defendant has infringed, either literally and/or under the doctrine of equivalents, one or more claims of the patents-in-suit in violation of 35 U.S.C. § 271;

(ii) Defendant has infringed Kee Action's registered trade dress in violation of 15 U.S.C. § 1114;

(iii) Defendant is entitled to preliminary and permanent injunctive relief enjoining Defendant and its officers, agents, servants, employees, owners and representatives, and all other persons, firms, or corporations in active concert or participation with them, from infringing Kee Action's patents and registered trade dress;

(iv) Defendant surrender for destruction all counterfeit infringing products as well as all material, catalogs, promotional materials, and the like which display or otherwise depict the goods at issue and other materials constituting infringement of Kee Action's rights, in Defendant's possession, custody, or control pursuant to 15 U.S.C. § 1118;

(v) Defendant file with the Court and serve on Kee Action, within 30 days after the service on Defendant of the Court's injunction, a report in writing under oath setting forth in detail the manner and form in which Defendant has complied with the injunction pursuant to 15 U.S.C. § 1116(a);

(vi) Defendant account for and pays to Kee Action all profits and damages resulting from Defendant's infringing activities and other conduct complained of herein;

(vii) Defendant's infringement was willful and awarding treble damages to Kee Action for such willful infringement;

(viii) Defendant account for and pay to Kee Action a reasonable, ongoing, post judgment royalty because of Defendant's infringing activities and other conduct complained of herein;

(ix) Kee Action is awarded pre-judgment interest and post-judgment interest on the damages caused by Defendant's infringing activities and other conduct complained of herein;

(x) This is an exceptional case and granting Kee Action its reasonable attorneys' fees in accordance with 35 U.S.C. § 285; and

(xi) Kee Action is granted such other and further relief as the Court may deem just and proper under the circumstances.

Respectfully submitted,

Dated: September 27, 2012

**OF COUNSEL:**

Todd E. Landis  
tlandis@akingump.com  
Fred I. Williams  
fwilliams@akingump.com  
AKIN GUMP STRAUSS HAUER &  
FELD LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, Texas 75201  
Telephone: 214.969.2800  
Facsimile: 214.969.4343

Ruben H. Munoz  
rmunoz@akingump.com  
AKIN GUMP STRAUSS HAUER &  
FELD LLP  
2001 Market Street, Suite 4100  
Philadelphia, PA 19103  
Telephone: 215.965.1200  
Facsimile: 215.965.1210

By: /s/ Christopher M. Mikson  
Christopher M. Mikson  
cmikson@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
2001 Market Street, Suite 4100  
Philadelphia, PA 19103  
Telephone: 215.965.1200  
Facsimile: 215.965.1210

**ATTORNEYS FOR PLAINTIFFS  
KEE ACTION SPORTS LLC AND KEE  
ACTION SPORTS II LLC**

**CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2**

The undersigned hereby certifies, pursuant to Local Civil Rule 11.2, that with respect to the matter in controversy herein, neither plaintiffs nor plaintiffs' attorney is aware of any other action pending in any court, or of any pending arbitration or administrative proceeding, to which this matter is subject.

Dated: September 27, 2012

By: /s/ Christopher M. Mikson  
Christopher M. Mikson  
cmikson@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
2001 Market Street, Suite 4100  
Philadelphia, PA 19103  
Telephone: 215.965.1200  
Facsimile: 215.965.1210

**OF COUNSEL:**

Todd E. Landis  
tlandis@akingump.com  
Fred I. Williams  
fwilliams@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
1700 Pacific Avenue, Suite 4100  
Dallas, Texas 75201  
Telephone: 214.969.2800  
Facsimile: 214.969.4343

Ruben H. Munoz  
rmunoz@akingump.com  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
2001 Market Street, Suite 4100  
Philadelphia, PA 19103  
Telephone: 215.965.1200  
Facsimile: 215.965.1210

**ATTORNEYS FOR PLAINTIFFS  
KEE ACTION SPORTS LLC AND KEE  
ACTION SPORTS II LLC**



# **EXHIBIT “E”**

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

---

KEE ACTION SPORTS LLC, et  
al.,

Civ. No. 12-6069 (NLH/KMW)

Plaintiffs,

**OPINION**

v.

VALKEN INC.,

Defendant.

---

**APPEARANCES:**

Christopher Mark Mikson, Esquire  
Akin Gump Strauss Hauer & Feld LLP  
2001 Market Street - Suite 4100  
Philadelphia, Pennsylvania 19103  
*Attorney for Plaintiffs Kee Action Sports LLC and  
Kee Action Sports II LLC*

Anthony J. DiMarino, III, Esquire  
Emmett Stephan Collazo, Esquire  
A.J. DiMarino, III, PC  
57 Euclid Street - Suite A  
Woodbury, New Jersey 08096

Jane A. Lorber, Esquire  
Valken, Inc.  
1 Hawk Court  
Swedesboro, New Jersey 08085  
*Attorneys for Defendant Valken Inc.*

**HILLMAN, District Judge**

This matter comes before the Court by way of Defendant Valken Inc.'s motion [Doc. No. 17] seeking to dismiss Count IV of Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be

granted. The Court has considered the parties' submissions and decides this matter pursuant to Federal Rule of Civil Procedure 78.

For the reasons expressed below, Defendant's motion will be denied.

**I. JURISDICTION**

In this action, Plaintiffs assert claims for both patent and trade dress infringement arising under 35 U.S.C. § 271 and 15 U.S.C. § 1114, respectively. The Court exercises jurisdiction over Plaintiffs' federal patent and trade dress infringement claims pursuant to 28 U.S.C. §§ 1331, 1338.

**II. BACKGROUND**

Although not specifically alleged in the complaint, Plaintiffs Kee Action Sports LLC and Kee Actions Sports II LLC (hereinafter, "Kee" or "Kee Action") together<sup>1</sup> are "a major supplier of paintball products[,] "paintballs (also called 'paint'), and markers, ... the devices that shoot ... paintballs." (Kee's Opp'n to Valken's Mot. of Dismiss [Doc. No. 19] (hereinafter, "Kee's Opp'n"), 7.) On September 27, 2012, Kee Action filed a four count complaint asserting claims for patent

---

<sup>1</sup> Kee Action Sports II LLC is a wholly owned subsidiary of Kee Action Sports LLC. (Compl. ¶ 2.)

infringement in Counts I, II, and III, and a claim for infringement of Kee Action's registered trade dress pursuant to 15 U.S.C. § 1114(1)(a) in Count IV.<sup>2</sup>

Count IV of the complaint alleges that Kee Action is the "owner by assignment of the registered trade dress" - U.S. Registration No. 3049101 - for paintballs with "a design consisting of 'contrasting colors blended randomly together to form the appearance of a fanciful design on the surface of a paintball.'" (Pls.' Compl. [Doc. No. 1] ¶¶ 38-39.) Plaintiffs allege that Defendant's "paintball products, including by not limited to the Graffiti and the Redemption paintball products, copy and infringe on Kee Action's registered trade dress in violation of 15 U.S.C. § 1114(1)(a)." (Id. ¶ 40.) Plaintiffs essentially contend that both Defendant's unauthorized use of Kee Action's registered trade dress, along with its manufacture and distribution of "paintball products with shell design features that copy elements of Kee Actions' registered trade dress[, are,] likely to cause confusion," mistake, or to deceive the consumer with respect to the origin or sponsorship of the paintballs.

---

<sup>2</sup> Because the present motion seeks to dismiss only Count IV of the complaint, this Opinion addresses solely those issues relevant to Plaintiffs' claim for trade dress infringement.

(Id. ¶ 41.) According to Plaintiffs, Defendant's manufacture and distribution of the allegedly infringing paintballs "enables Defendant to benefit unfairly from Kee Action's reputation and success, thereby giving Defendant's infringing products sales and commercial value they would not otherwise have[.]" (Id. ¶ 43.) Plaintiffs assert that Defendant has received profits by virtue of this alleged infringement of Plaintiffs' registered trade dress. (Id. ¶ 45.)

### **III. DISCUSSION**

#### **A. Standard on Motion to Dismiss**

Defendant now moves to dismiss Count IV of Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). When considering a motion to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005). It is well settled that a pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

A district court, in weighing a motion to dismiss, asks

"not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims[.]'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007) (quoting Scheuer v. Rhoades, 416 U.S. 232, 236 (1974)); see also Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1953 (2009) ("Our decision in Twombly expounded the pleading standard for 'all civil actions[.]'" (citation omitted). The Third Circuit has instructed district courts to conduct a two-part analysis in deciding a motion to dismiss. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009).

First, a district court "must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." Fowler, 578 F.3d at 210-11 (citing Iqbal, 129 S. Ct. at 1949). Second, a district court must "determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" Fowler, 578 F.3d at 211 (citing Iqbal, 129 S. Ct. at 1950). "[A] complaint must do more than allege the plaintiff's entitlement to relief." Fowler, 578 F.3d at 211; see also Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) ("The Supreme Court's Twombly formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough factual

matter (taken as true) to suggest' the required element. This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element.") (citing Twombly, 550 U.S. at 556).

A court need not credit "'bald assertions'" or "'legal conclusions'" in a complaint when deciding a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997). The defendant has the burden of demonstrating that no claim has been presented. Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005) (citing Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991)).

However, "if a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile." Phillips, 515 F.3d at 245; see also Alston v. Parker, 363 F.3d 229, 235 (3d Cir. 2004) ("We have held that even when a plaintiff does not seek leave to amend, if a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile."); Burrell v. DFS Servs., LLC, 753 F. Supp. 2d 438, 444 (D.N.J. 2010) ("When a claim is dismissed pursuant to Federal Rule of Civil

Procedure 12(b)(6), leave to amend and reassert that claim is ordinarily granted. . . . A claim may be dismissed with prejudice, however, if amending the complaint would be futile.”) (citation omitted).

#### **B. Trade Dress Infringement**

“The purpose of trade dress protection, like trademark protection, is to ‘secure the owner of the [trade dress] the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.’” Shire US Inc. v. Barr Labs., Inc., 329 F.3d 348, 353 (3d Cir. 2003) (citing Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 774 (1992)). “‘Trade dress’ originally referred to the packaging or displays associated with trademarked goods.” Duraco Prods., Inc. v. Joy Plastic Enters., Ltd., 40 F.3d 1431, 1438 (3d Cir. 1994); see also Shire, 329 F.3d at 353 (“‘[t]rade dress’ refers to the design or packaging of a product which serves to identify the product’s source.”) (citing TrafFix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23, 28 (2001)).

The Third Circuit has since explained that “[t]rade dress has [now] been defined as the total image or overall appearance of a product, and includes, but is not limited to, such features as size, shape, color or color combinations, texture, graphics, or



even a particular sales technique.” Rose Art Indus., Inc. v. Swanson, 235 F.3d 165, 171 (3d Cir. 2000) (citing Two Pesos, 505 U.S. at 765 n.1). “To establish trade dress infringement under the Lanham Act, a plaintiff must prove that (1) the allegedly infringing design is non-functional; (2) the design is inherently distinctive or has acquired secondary meaning; and (3) consumers are likely to confuse the source of the plaintiff’s product with that of the defendant’s product.” McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC, 511 F.3d 350, 357 (3d Cir. 2007); see also Shire, 329 F.3d at 353 (citing Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 210-211 (2000)).<sup>3</sup>

#### IV. ANALYSIS

Defendant makes two arguments in support of dismissal of Count IV for infringement of a registered trade dress. Initially, Defendant contends that “[t]o assert a claim for trade dress infringement, a plaintiff must provide a ‘precise expression of the character and scope of the claimed trade dress’

---

<sup>3</sup> Rose Art, McNeil, and Shire analyzed trade dress infringement claims asserted under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), for unregistered trade dress. The parties agree that the same standard is applicable to Plaintiffs’ trade dress infringement claim brought under Section 2 of the Act, 15 U.S.C. § 1114(1), for protection of registered trade dress. (See Def.’s Mem. 10 n.3; Kee’s Opp’n 2); see also Wal-Mart, 529 U.S. at 210; Two Pesos, 505 U.S. at 768.

that describes the trade dress that it seeks to protect." (Mem. of Law in Supp. of Mot. to Dismiss Count IV of Pls.' Compl. [Doc. No. 17-1] (hereinafter, "Def.'s Mem."), 7.) Defendant argues that requiring Plaintiffs to provide "a precise expression of the alleged trade dress [being infringed] is necessary to protect consumers and competition generally" because "'granting trade dress protection to an ordinary product design would create a monopoly in the goods themselves.'" (Def.'s Mem. at 9) (citing Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373, 381 (2d Cir. 1997)).

Secondly, Defendant asserts that in addition to the three-part test for trade dress infringement claims set forth supra, Plaintiffs must identify and plead a recognizable and consistent overall look of the trade dress in question. (Def.'s Mem. 10-11) (citing Rose Art, 235 F.3d at 172-73). Defendant argues that because Plaintiffs have failed to plead both a precise expression of the trade dress at issue and a recognizable and consistent overall look of the trade dress, Count IV of the complaint must be dismissed. The Court first addresses Defendant's argument that Plaintiffs must plead a recognizable and consistent overall look before turning to Defendant's precise expression argument.

**A. Recognizable and Consistent Overall Look**

Defendant contends that Kee Action is required to identify and plead the "recognizable and consistent overall look" of the trade dress for which it seeks protection in this case. (Def.'s Mem. 10.) Defendant's argument relies entirely upon a short passage from the Third Circuit's opinion in Rose Art which provides:

This three-part inquiry alone, however, is insufficient when the plaintiff in a trade dress action seeks protection under the Lanham Act for a series or line of products or packaging. As the Second Circuit Court of Appeals has noted, in contrast to a situation where the plaintiff is seeking protection for a specific package or a single product, "when protection is sought for an entire line of products, our concern for protecting competition is acute."

Rose Art, 235 F.3d at 172 (citing Landscape Forms, 113 F.3d at 380).

Defendant goes on to argue that the Third Circuit "has adopted the Landscape Forms reasoning regarding the anticompetitive dangers of overbroad trade dress protection[.]" (Def.'s Mem. 11.) Defendant emphasizes the Third Circuit's holding that "[a] plaintiff, seeking protection for a series or line of products, must first demonstrate that the series or line has a recognizable and consistent overall look" before "the trial court determine[s] whether the trade dress is distinctive, ...

nonfunctional, and whether the defendant's use of plaintiff's trade dress is likely to cause consumer confusion." (Def.'s Mem. 11) (citing Rose Art, 235 F.3d at 172-73).<sup>4</sup>

In its opposition, Kee Action recognizes Defendant's "argument that a trade dress infringement claim should be dismissed if the plaintiff does not allege ... a 'recognizable and consistent overall look' of the trade dress for a 'series' or 'line of products[.]'" (Kee's Opp'n 10.) Kee Action counters, however, that Defendant's argument is inapposite and substantively inapplicable here because Kee Action "seeks [trade dress] protection for a single product - the Marballizer paintball - a paint with a consistent overall look that is consistently the same size and substance while sold in an array of colors." (Id. at 12.)

Upon closer examination, Defendant's argument regarding the need to plead a "recognizable and consistent overall look" fails given the circumstances of this particular case because

---

<sup>4</sup> The Third Circuit in Rose Art agreed with "the District Court that 'if a plaintiff seeking trade dress protection cannot show that its packages have a "consistent overall look," the trade dress that the defendant is allegedly infringing "does not exist," and the defendant must prevail.'" 235 F.3d at 173 (citing Rose Art Indus., Inc. v. Raymond Geddes & Co., 31 F. Supp. 2d 367, 374 (D.N.J. 1998)).

Plaintiffs seek trade dress protection for a single product, not an entire line or series of products. Even a cursory reading of Rose Art makes clear that the “recognizable and consistent overall look” threshold inquiry is only relevant in cases where the plaintiff seeks protection for a series or an entire line of products. 235 F.3d at 172-73 (clarifying that “[b]ecause of the broad reach that protection of trade dress for a *series or line of products* would embrace, we will require this more stringent test before the non-functionality/distinctiveness/likelihood of confusion test is applied. [Therefore,] [a] plaintiff, seeking protection for a series or line of products, must first demonstrate that the series or line has a recognizable and consistent overall look.”) (emphasis added).

Here, Defendant offers nothing more than conclusory statements that Plaintiff seeks trade dress protection for an entire line of products, apparently relying on the fact that the Marballizer paintball is sold in an array of colors. (See Reply to Pls.’ Mem. In Opp’n [Doc. No. 21] (hereinafter, “Def.’s Reply”), 1, n.1) (“Plaintiffs seek trade dress protection for a line of paintball products - not one specific paintball, but a

line of paintballs sold in an array of colors.”)<sup>5</sup> The Court’s reading of the complaint and the present motion make clear that Plaintiffs are not asserting a broad formulaic trade dress spanning all of its paintball products. Rather Plaintiffs are claiming infringement of their trade dress for a single product – a single type of paintball that utilizes the trademarked design registered to Plaintiffs. The fact that this product is available in an array of colors does not transform it into a “line” of products. The Marballizer paintball is unlike the line

---

<sup>5</sup> Defendant cites Liko AB v. Rise Lifts, Inc., No. 07-5302, 2008 WL 2977869, at \*6-7 (E.D. Pa. July 31, 2008), for the proposition that “[c]ourts have dismissed counts for trade dress infringement where plaintiffs fail to meet this stringent test” of demonstrating a recognizable and consistent overall look. However, Liko is distinguishable because the court there specifically examined the plaintiff’s trade dress infringement claim where “Count II ... allege[d] that Defendants’ products infringe[d] upon the trade dress of Plaintiff’s *Viking product line*.” Id. at \*6 (emphasis added).

Moreover, even though the court in Liko found that the plaintiff failed to allege a recognizable and consistent overall look of the trade dress for the product line in question, the court permitted the plaintiff to amend the complaint to allege that threshold requirement. Id. at \*6-7. The court’s willingness to permit amendment in Liko undercuts Defendant’s argument that Count IV of Kee Action’s complaint should be dismissed with prejudice. (See Def.’s Proposed Order [Doc. No. 17-2] 1) (seeking dismissal of Count IV with prejudice). Even assuming the Court agreed with Defendant that Plaintiffs were required to plead a recognizable and consistent overall look and had failed to do so, the Court would grant Plaintiffs leave to amend to attempt to correct any pleading deficiency.

of outdoor furniture at issue in Landscape Forms, which included two different outdoor trash cans, six benches with backs, and two benches without backs. 113 F.3d at 375. This one type of paintball - which the Court considers as a single product available in several colors - is also distinct from the three various lines of packaging at issue in Rose Art which were relevant to multiple products including crayons, markers, colored pencils, modeling clay, and chalk. 235 F.3d at 170.

Defendant fails to adequately demonstrate to the Court that this case is like Rose Art or Landscape Forms where trade dress protection was sought for an entire line of distinct but related products. There is simply no evidence in the complaint from which the Court can conclude that Plaintiffs are seeking trade dress protection for anything more than a singular type of paintball. Accordingly, the more stringent test set forth in Rose Art requiring that a series or line of products have a recognizable and consistent overall look is simply inapplicable in this single product case. Cf. Dayco Products, LLC v. Dorman Products, Inc., No. 09-13139, 2010 WL 3855221, at \*4 (E.D. Mich. Sept. 28, 2010) ("Because Dayco is not attempting to assert a consistent overall look across its entire line of automatic belt tensioners, its failure to allege a consistent overall look is

not fatal to its individual claims of trade dress infringement.”)

**B. Precise Expression**

In opposing Defendant’s motion, Kee Action also argues that “Third Circuit precedent [only] requires a trade dress plaintiff to plead that ‘(1) the allegedly infringing design is non-functional; (2) the design is inherently distinctive or has acquired secondary meaning; and (3) consumers are likely to confuse the source of the plaintiff’s products with that of the defendant’s product.’” (Kee’s Opp’n 8) (citing McNeil, 511 F.3d at 357). Kee Action counters that Defendant is seeking to inject a new element into a trade dress infringement cause of action by claiming that Plaintiffs must plead a “precise expression” of the trade dress at issue here. (Id. at 10.) Kee Action further points out that Defendant has failed to cite a case from the Third Circuit which requires this “precise expression” element as part of a trade dress infringement cause of action. (Id. at 11.)

A thorough review of Defendant’s brief and the cases cited in support of its argument requiring the “precise expression” element reveals that Valken relies entirely upon non-binding case law from courts other than the Court of Appeals for the Third Circuit. For example, Defendant primarily relies on the Second Circuit’s opinion in Landscape Forms, Inc., v. Columbia Cascade



Company, 113 F.3d 373, (2d Cir. 1997). (Def.'s Mem. 8.) In Landscape Forms, the Second Circuit noted that in cases where trade dress "protection is sought for an entire line of products[,] litigation "will be difficult" if the plaintiff does not articulate "a precise expression of the character and scope of the claimed trade dress" because courts would be "unable to evaluate how unique and unexpected the design elements are in the relevant market." 113 F.3d at 380-81. Thus, the precise expression element is required in the Second Circuit.

As a threshold matter, however, the Second Circuit's opinion in Landscape Forms is not binding precedent upon this Court, and the Court need not consider it in resolving the present motion.<sup>6</sup>

---

<sup>6</sup> In a similar vein, none of the other cases Defendant cites in support of the "precise expression" element are binding upon this Court. By way of example, Defendant cites two other cases from the Second Circuit, both of which explicitly rely on Landscape Forms, and neither of these serve as precedent for this Court. (See Def.'s Mem. 8) (citing Sherwood 48 Assocs. v. Sony Corp. of Am., 6 F. App'x 389, 391 (2d Cir. 2003); Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 115-16 (2d Cir. 2001)).

Defendant cites four other cases from the United States District Courts for the District of Connecticut and the Southern District of New York. (See Def.'s Mem. 8, n.1) (citing ID7D Co., Ltd. v. Sears Holding Corp., No. 3:11cv1054, 2012 WL 1247329, \*6 (D. Conn. Apr. 13, 2012); Nat'l Lighting Co., Inc. v. Bridge Metal Indus., LLC, 601 F. Supp. 2d 556, 560-61 (S.D.N.Y. 2009); Heller Inc. v. Design Within Reach, Inc., No. 09-1909, 2009 WL 2486054, \*6 (S.D.N.Y. Aug. 14, 2009); Cartier, Inc. v. Four Star Jewelry Creations, Inc., 348 F. Supp. 2d 217, 223 (S.D.N.Y. 2004)). The Court notes however, that each of the District Courts issuing

Third Circuit case law is clear that the elements of a cause of action for trade dress infringement require proof that (1) the allegedly infringing design is non-functional; (2) the design is inherently distinctive or has acquired secondary meaning; and (3) consumers are likely to confuse the source of the plaintiff's product with that of the defendant's product. See, e.g., McNeil, 511 F.3d at 357; Shire, 329 F.3d at 353 (citing Wal-Mart Stores, 529 U.S. at 210-211); Rose Art, 235 F.3d at 171 (recognizing that the basic elements for a trade dress infringement claim are "(1) inherent distinctiveness or secondary meaning, (2) non-functionality, and (3) likelihood of confusion."); Versa Products Co. v. Bifold Co. (Mfg.) Ltd., 50 F.3d 189, 199 (3d Cir. 1995).

---

these decisions was bound - unlike this Court - by the Second Circuit's opinion in Landscape Forms.

Defendant cites only two cases from District Courts within the Third Circuit. The first, from the Western District of Pennsylvania, American Beverage Corp. v. Diageo North America, Inc., 936 F. Supp. 2d 555, 595 (W.D. Pa. 2013), specifically relies on Landscape Forms in requiring the precise expression element of a trade dress infringement claim. The second case, from the District of the Virgin Islands, Fair Wind Sailing, Inc. v. Dempster, No. 2011-55, 2013 WL 1091310, \*4, 6 (D.V.I. Mar. 15, 2013), cites to Landscape Forms and to case law from the Sixth Circuit requiring this precise expression element.

Although these District Courts are within the same Circuit as this Court, the Court is not persuaded by their reasoning which is drawn from case law established by Courts of Appeals other than the Third Circuit. The Court remains unconvinced that the precise expression element urged by Defendant is required under Third Circuit precedent to survive a motion to dismiss under Rule 12(b)(6).

Moreover, the Court's independent review has failed to reveal a single case from the Third Circuit or from any court in the District of New Jersey where precise expression of the claimed trade dress was regarded as an essential element that must be pled in order to withstand a motion to dismiss under Rule 12(b)(6).<sup>7</sup> As a result, the Court is unpersuaded by Defendant's argument that Kee Action is required to assert a precise expression of the character and scope of its claimed trade dress in the complaint under the law in this Circuit.

Even if the Court were to consider Landscape Forms, however, the present case is distinguishable from Landscape Forms for two primary reasons. Initially, and as set forth supra, it is clear from the pleadings and the briefing on this motion that unlike

---

<sup>7</sup> In fact, courts within the District of New Jersey consistently apply the Third Circuit's three-part inquiry as set forth above when analyzing claims for trade dress infringement. See, e.g., Coach, Inc. v. Fashion Paradise, LLC, No. 10-4888, 2012 WL 194092, at \*3 (D.N.J. Jan. 20, 2012) (citing McNeil); IDT Corp. v. Unlimited Recharge, Inc., No. 11-4992, 2011 WL 6020571, at \*4 (D.N.J. Dec. 2, 2011) (citing McNeil for three elements of trade dress infringement claim brought under 15 U.S.C. § 1114(1)); Star Pac. Corp. v. Star Atl. Corp., No. 08-04957, 2011 WL 2413150, at \*6 (D.N.J. June 10, 2011) (citing McNeil, Shire); Katiroll Co., v. Kati Roll and Platters Inc., No. 10-3620, 2011 WL 346502, at \*6 (D.N.J. Feb. 1, 2011) (citing McNeil, Shire); Euro Pro Corp. v. Tristar Products, Inc., 172 F. Supp. 2d 567, 572 (D.N.J. 2001) (citing Wal-Mart, Two Pesos, American Greetings Corp. v. Dan-Dee Imports, Inc., 807 F.2d 1136, 1141 (3d Cir. 1986)).

the plaintiff in Landscape Forms, Kee Action is seeking protection, not for an entire line of products, but rather for a single product - the Marballizer paintball - that comes in a variety of colors. By contrast, the Landscape Forms plaintiff sought protection for an entire line of outdoor furniture known as the Petoskey line, which included "two different outdoor trash cans, two benches without back support, and six benches with backs." 113 F.3d at 375.

It was in this specific context that the Second Circuit went on to note that its "concern for protecting competition is acute" where trade dress "protection is sought for an entire line of products[.]" Id. at 380. Therefore, to the extent the Second Circuit requires "a precise expression of the character and scope of the claimed trade dress" and does not permit a plaintiff to "focus on the overall look of a product" in order to establish trade dress protection, id. at 381, Landscape Forms makes clear that this requirement arose where protection was sought for an entire line of separate and varied products (trash cans, benches with backs, benches without backs) that were connected only by their similar design aspects and overall appearance. Here, however, the fact that Kee Action is seeking protection for one product (the Marballizer paintball) - as opposed to an entire

line of products - minimizes the need to require a plaintiff to allege a precise expression of the trade dress at issue.

Moreover, to fully understand why the Second Circuit's precise expression requirement arose in Landscape Forms, it is worth examining the language used by the plaintiff in that case to articulate the claimed trade dress. As the Second Circuit noted, the plaintiff's complaint stated only that "[t]he product design and configuration of [Landscape's] Petoskey Group Collection employs a number of distinctive elements which, when taken together, constitute a trade dress recognizable by architects, landscape architects and designers, as well as the public at large.'" Id. The Second Circuit specifically observed that these so-called "distinctive elements" [were] not enumerated." Id.

Here, defendant provides the Court with dictionary definitions of nearly each word used to describe the trade dress at issue in an attempt to demonstrate the alleged lack of precision used in articulating the trade dress. The Court finds this argument unpersuasive. Unlike the plaintiff in Landscape Form which asserted a very broad and general trade dress for an entire line of products and failed to define its "distinctive elements," Kee Action has sufficiently plead the nature of the

asserted trade dress it alleges Defendant infringed upon. With respect to the Marballizer paintball, paragraph 23 of the complaint alleges that "Kee Action's registered trade dress is for a design consisting of 'contrasting colors blended randomly together to form the appearance of a fanciful design on the surface of a paintball.'" (Compl. ¶ 23.) The Court is satisfied at this initial pleading stage that Kee Action has sufficiently pled the nature of the claimed trade dress to satisfy the notice requirements of Federal Rule of Civil Procedure 8.

Having rejected Defendant's recognizable and consistent overall look argument as well as its precise expression argument, the Court notes that Valken does not challenge the pleading sufficiency of the complaint under Rule 12(b)(6) with respect to the non-functionality, distinctiveness, and likelihood of confusion. Therefore, at this time, the Court need not address whether Plaintiffs' complaint sufficiently pleads the three elements of the trade dress infringement claim.

**V. CONCLUSION**

For the foregoing reasons, Defendant's motion to dismiss will be denied. An Order consistent with this Opinion will be entered.

Dated: December 17, 2013  
At Camden, New Jersey

s/ Noel L. Hillman  
NOEL L. HILLMAN, U.S.D.J.

# **EXHIBIT “F”**

NEAL ■ GERBER ■ EISENBERG

Michael G. Kelber  
Attorney at Law

Tel 312.269.5322  
Fax 312.429.3580  
mkelber@ngelaw.com

August 23, 2016

**VIA FEDERAL EXPRESS, SIGNATURE REQUIRED**

Mr. Gino Postorivo  
Chief Executive Officer and President  
Valken, Inc.  
1 Hawk Court  
Swedesboro, NJ 08085

**Re: Notice of Breach of Settlement Agreement**

Dear Mr. Postorivo:

This firm represents G.I. Sportz, Inc., together with its subsidiary GI Sportz Direct, LLC (formerly known as, Kee Action Sports II, LLC), with respect to certain matters. It has come to our client's attention that Valken has reinitiated sales of paintballs having an exterior design that infringes G.I. Sportz's registered and incontestable "Marballizer" trade dress in violation of 15 USC §§ 1114 and 1117. This determination has been made based on recent purchases of and inspection of at least certain Redemption brand paintballs offered by Valken.

In addition to willful infringement and counterfeiting of G.I. Sportz's registered trade dress, Valken's sale of such paintballs constitutes a breach of the Litigation Settlement Agreement entered into between Valken and Kee Action Sports on May 20, 2014 ("the Agreement"), a copy of which is attached to this letter. Specifically, Section 3.01 (iii) of the Agreement provides as follows:

*Valken agrees that on and after the Effective Date of this Settlement Agreement it will not within the United States, and other territories where KEE has rights in the Marballizer Trade Dress, manufacture, cause to be manufactured, sell, market or distribute alone or in conjunction with others, the Subject Paintballs.*

An example of the Marballizer Trade Dress is shown in Exhibit C of the Agreement. Moreover, in denying Valken's Motion to Dismiss the Marballizer trade dress claim, the Court expressly held that the registration describes the distinctiveness of the protected trade dress, as follows: "a design consisting of 'contrasting colors blended randomly together to form the appearance of a fanciful design on the surface of a paintball.'" See Attached Order, p.21.

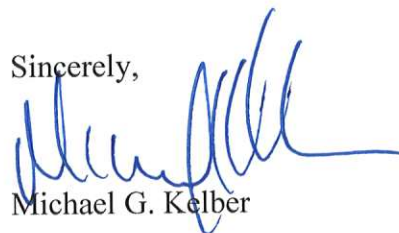


NEAL, GERBER & EISENBERG LLP

Mr. Gino Postorivo  
Valken, Inc.  
August 23, 2016  
Page 2

This letter serves as formal notification of breach of the Agreement, pursuant to Section 15.

Sincerely,



Michael G. Kelber

MGK/adc  
Enclosures

24948690.2



October 13,2016

Dear Customer:

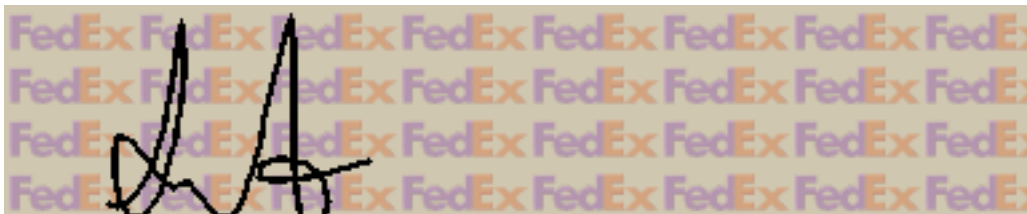
The following is the proof-of-delivery for tracking number **777062803547**.

---

**Delivery Information:**

---

<b>Status:</b>	Delivered	<b>Delivered to:</b>	Shipping/Receiving
<b>Signed for by:</b>	S.EATON	<b>Delivery location:</b>	1 HAWK CT SWEDESBORO, NJ 08085
<b>Service type:</b>	FedEx Standard Overnight	<b>Delivery date:</b>	Aug 24, 2016 14:54
<b>Special Handling:</b>	Deliver Weekday  Direct Signature Required		



---

**Shipping Information:**

---

<b>Tracking number:</b>	777062803547	<b>Ship date:</b>	Aug 23, 2016
		<b>Weight:</b>	0.5 lbs/0.2 kg

**Recipient:**  
Mr. Gino Postorivo  
Valken Inc.  
1 Hawk Court  
SWEDESBORO, NJ 08085 US

**Shipper:**  
Adrienne Crawford  
Neal, Gerber, Eisenberg LLP  
2 N Lasalle  
Suite 1700  
Chicago, IL 60602 US  
015501.0710

**Reference**

Thank you for choosing FedEx.

# **EXHIBIT “G”**

9/19/2016

Valken Redemption 2000 Count Paintballs Rounds Case Box Orange Fill | eBay

Hi! Sign in Sell

My eBay

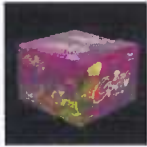


All Categories

Back to home page | Listed in category: Sporting Goods > Outdoor Sports > Paintball > Paintballs > See more Valken Redemption - Case of 2000 Paintballs

People who viewed this item also viewed

Feedback on our suggestions



Valken Graffiti 2000 Count Paintballs... \$59.95 + \$18.00



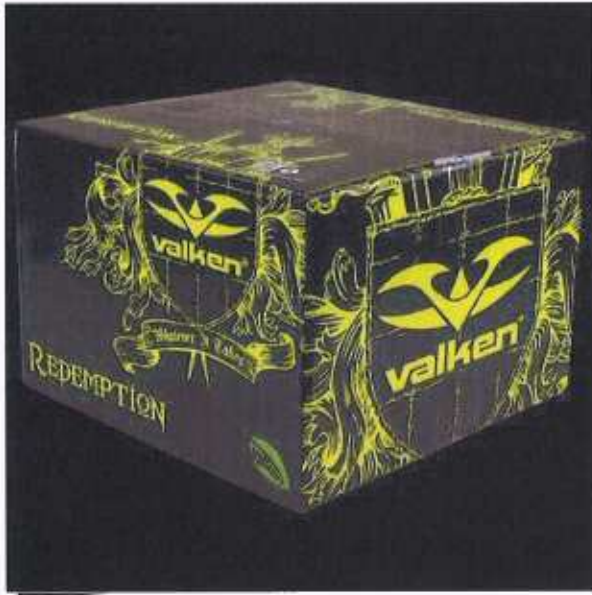
Valken Redemption 2000 Count Paintballs... \$64.95 + \$18.00



Valken Graffiti 2000 Count Paintballs... \$59.95 + \$18.00



Valken Graffiti 2000 Count Paintballs... \$59.95 + \$18.00



Click to view larger image

### Valken Redemption 2000 Count Paintballs Rounds Case Box - Orange Fill

Be the first to write a review

[Add to watch list](#)

Seller: **three-tech** (13003) **99% Positive feedback**

[Follow this seller](#) | [See other items](#) | Visit store: [3-Tech Digital World](#)

Item condition: **New**

Price: **US \$64.95**

[Buy It Now](#)

[Add to cart](#)

1 watching

[Add to watch list](#)

[Add to collection](#)

**Experienced seller**

30-day returns

New condition

Shipping: **\$18.00** Standard Shipping | [See details](#)

Item location: United States, United States

Ships to: United States [See exclusions](#)

Delivery: Estimated between **Thu. Sep. 22** and **Thu. Sep. 29**

Payments:

Credit Cards processed by PayPal

#### PayPal CREDIT

Get more time to pay. [Apply Now](#) | [See Terms](#)

[See details](#)

Returns: 30 days money back or item exchange, buyer pays return shipping, 20% restocking fee may apply | [See details](#)

Guarantee: [See details](#)

Get the item you ordered or get your money back. Covers your purchase price and original shipping.

Description

Shipping and payments

[Report item](#)

eBay item number: 301790382635

Seller assumes all responsibility for this listing.

Last updated on Sep 07, 2016 05:14:20 PDT [View all revisions](#)

#### Item specifics

Condition: New: A brand-new, unused, unopened, undamaged item in its original packaging (where packaging is

Brand: Valken

9/19/2016

Valken Redemption 2000 Count Paintballs Rounds Case Box Orange Fill | eBay

[... Read more](#)

MPN: 31599

UPC: 844959031599

These will be shipped straight from Valken warehouse for consistency and freshness.

Shell Color:Swirl Black/Orange

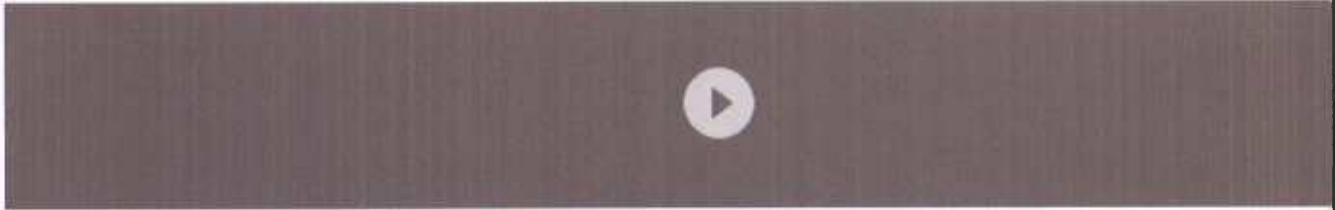
Redemption is the world's top-of-the-line paint from Valken. It has a very thin, brittle shell that reliably breaks on ta making it perfect for high-stakes tournaments where you can't risk a bounce. The fill is bright and thick, practically exploding on target; there's no missing a Redemption ball break.

**Made of 100% PEG, safer for the environment than oil-based paintballs.**

**\*Redemption is also available in a Winter Fill.**



inkfrog Analytics



**Questions and answers about this item**

No questions or answers have been posted about this item.

[Ask a question](#)

No ratings or reviews yet

Be the first to [write a review](#)

People were also interested in



9/19/2016

Valken Redemption 2000 Count Paintballs Rounds Case Box Orange Fill | eBay



.68 Caliber-Markin Paintball pr...

**\$5.49**

Buy It Now



500 X .68 Cal. ReBalls Self Defense T...

**\$69.95**

Buy It Now  
Free shipping



.68 Caliber PowderBalls (Paintball) 1...

**\$6.99**

Buy It Now



.68 Caliber PowderBalls BAG OF 500 ...

**\$180.95**

Buy It Now



.68 Caliber Less-Lethal Paintball pro...

**\$6.49**

Buy It Now



First Strike Round Compatible Shaped ...

**\$8.95**

Buy It Now

See what other people are watching 1/4

Feedback on our suggestions



TPX Less Lethal, Self Defense, 68 Cal...

**\$127.77**

Buy It Now

Almost gone



500 Paintball Pellets .68 Caliber

**\$15.54**

Buy It Now  
Free shipping



Valken FATE Paintballs Case of 2000 C...

**\$39.95**

Buy It Now  
Free shipping



Bulls Breaker Balls - 30 Pack

**\$27.00**

Buy It Now



Empire Paintball 02964 Marballizer De...

**\$19.99**

1 bid



pepper balls, 68 cal

.68cal pepper balls tube 10 count- Le...

**\$34.95**

Buy It Now  
Free shipping

Sponsored Links



Valken Redemption Pro Paintball

**\$74.95**

ANSgear Paintball



Valken Redemption Paintball Case

**\$64.95**

ANSgear Paintball



Valken Redemption Paintball Case

**\$65.77**

ANSgear Paintball



Valken Redemption Paintball Case

**\$32.48**

ANSgear Paintball



Valken Redemption Paintball Case

**\$32.77**

ANSgear Paintball



Valken Redemption Paintball Case

**\$64.95**

ANSgear Paintball

Back to home page | See More Details about "Valken Redemption - Case of 2000 Paintballs"

Return to top

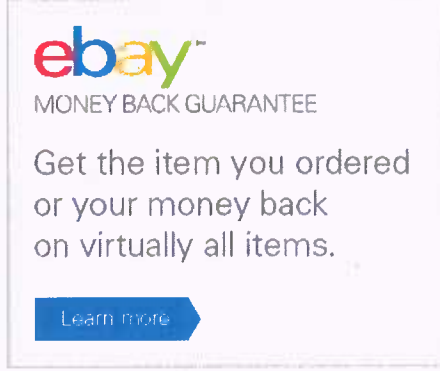
More to explore : [Valken Paintball Remotes & Filling Stations](#), [Valken Paintball Equipment Bags & Cases](#), [Valken Paintball](#), [Valken Paintballs](#), [Valken Paintball Barrels](#), [Valken Paintball Harnesses & Pods](#)

9/19/2016

Valken Redemption 2000 Count Paintballs Rounds Case Box Orange Fill | eBay

[About eBay](#) [Announcements](#) [Community](#) [Security Center](#) [Resolution Center](#) [Seller Information Center](#) [Policies](#) [Affiliates](#) [Help & Contact](#)  
[Site Map](#)

Copyright © 1995-2016 eBay Inc. All Rights Reserved. [User Agreement](#) [Privacy](#) [Cookies](#) and [AdChoice](#)



10/5/2016

Gmail - GUEST ORDER: Valken Redemption 2000 Count Paintballs Rounds Case Box - Orange Fill



## GUEST ORDER: Valken Redemption 2000 Count Paintballs Rounds Case Box - Orange Fill

2 messages

eBay <ebay@ebay.com>

Wed, Sep 21, 2016 at 5:38 PM

To: [Redacted]

Confirmed. ETA: Fri. Sep. 30. eBay will update the estimate when it ships to [Redacted]



Hi Tanvi - Thank you for purchasing as an eBay Guest. We will update you when your order ships to [Redacted]

**PAID : \$82.95 with PayPal**

Please login as a guest user with the email: [Redacted] and access code **GFWOQWJY** to view your order details.

[View order details](#)



**Valken Redemption 2000 Count Paintballs Rounds Case Box - Orange Fill**

Estimated delivery: Fri. Sep. 30

Item Id: 301790382635  
Transaction Id 1301089845020  
Quantity: 1

Have a question about this purchase? Click [here](#).

To complement your purchase



10/5/2016

Gmail - GUEST ORDER SHIPPED: Valken Redemption 2000 Count Paintballs Rounds Case Box - Orange Fill



# GUEST ORDER SHIPPED: Valken Redemption 2000 Count Paintballs Rounds Case Box - Orange Fill

1 message

eBay <ebay@ebay.com>

Thu, Sep 22, 2016 at 1:24 PM

To: [Redacted]

ETA: Fri. Sep. 30 to [Redacted]



Hi [Redacted] - Thank you for purchasing as an eBay Guest. Your order has shipped to [Redacted]

Please login as a guest user with the email: [Redacted] and access code **GFWOQWJY** to view your order details.



**Estimated delivery : Fri. Sep. 30**

Shipping service : UPS Ground  
Item # : 301790382635  
Transaction id : 1301089845020

[Track your order](#)

Have a question about this purchase? Click [here](#).

### [Message From: three-tech -](#)

Hello [Redacted]

Thank you for your purchase. Your item has been shipped and you may track your package anytime.

- three-tech

## To complement your purchase

10/5/2016

Gmail - GUEST ORDER SHIPPED: Valken Redemption 2000 Count Paintballs Rounds Case Box - Orange Fill



On/Off Quick Change 12g 12 Gram CO2 C...

**\$39.99**

Buy it now  
Free Shipping



Tippmann A-5 Low Pressure Kit

**\$60.00**

Buy it now



Crosman Pellgunoil Air Gun Lubricatin...

**\$6.59**

Buy it now  
Free Shipping



Liquid Bearings, BEST 100%-synthetic

**\$8.99**

Buy it now



Spyder Xtra Marker Paintball Marker C...

**\$60.00**

Buy it now



Crosman Pellgunoil Air Gun Lubricatin...

**\$3.91**

Buy it now  
Free Shipping



WGP AUTOCOCKER LOWER INTERNALS ECLIPSE...

**\$27.99**

Buy it now  
Free Shipping



RAP4 PAINTBALL CO2 AIR TANK ON/OFF AD...

**\$16.19**

Buy it now  
Free Shipping

**Email reference id: [#75c34b81455840eb9a6bd75144a0a067#]**

We don't check this mailbox, so please don't reply to this message. If you have a question, go to Help & Contact.

eBay sent this message to Tanvi Patel (pat1046-m6hzhog). Learn more about account protection. eBay is committed to your privacy. Learn more about our privacy notice and user agreement.

©2016 eBay Inc., 2145 Hamilton Avenue, San Jose, CA 95125

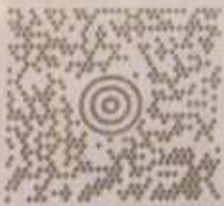
FULFILLMENT CENTER  
856 812 2833  
VALKEN SPORTS  
5017 NORTH 30TH STREET  
COLORADO SPRINGS CO 80918

17 LBS

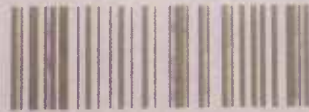
1 OF 1

DWT 11.6.0

SHIP TO:

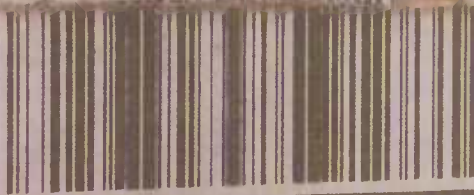


IL 606 9-02



UPS GROUND

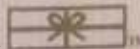
TRACKING #: 1Z 865 794 03 9391 1458



BILLING: P/P  
DESC: null

Reference No. 1: SOC07626  
Reference No. 2: 45386  
XOL 16.08.02

NV45 78 0A 07/2016



5794039391 1458  
148-7234  
1.85  
TLVRA S:RIDE  
00 11 80861 - 55900  
502  
DESPAINES ST  
PATEL

B-1



**B-2**

**VALKEN**

# REDEMPTION

**68 CALIBER  
2000 PAINTBALLS**

JM GREEN / YELLOW  
4-10-15-2000000

YELLOW FILLER  
AT FBCA

**B-3**



**B-4**

B-5





**B-6**





**B-7**

# **EXHIBIT “H”**

NEAL ■ GERBER ■ EISENBERG

Michael G. Kelber  
Attorney at Law

Tel 312.269.5322  
Fax 312.429.3580  
mkelber@ngelaw.com

October 11, 2016

**VIA FEDERAL EXPRESS, SIGNATURE REQUIRED**

Mr. Gino Postorivo  
Chief Executive Officer and President  
Valken, Inc.  
1 Hawk Court  
Swedesboro, NJ 08085

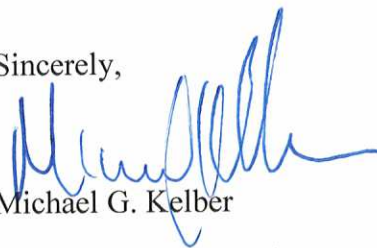
**Re: Notice of Termination of Settlement Agreement**

Dear Mr. Postorivo:

This letter follows up to our letter to you dated August 23, 2016, in which we advised you of Valken's breach of the Settlement Agreement between Valken and Kee Action Sports. A copy of our initial letter is attached for your convenience.

It has now been more than thirty (30) days since your receipt of our initial letter. Inasmuch as Valken has not invoked the dispute resolution process set forth in Paragraph 14 of the Settlement Agreement and has taken no steps to cure its breach of the Settlement Agreement, G.I. Sportz, Inc., as survivor-in-interest to all rights of Kee Action Sports, LLC and Kee Action Sports II, LLC under the Settlement Agreement, hereby declares the Settlement Agreement terminated in accordance with Paragraph 15 thereof. In addition, and based on the same authority and for the same reasons, the License Agreement associated with the Settlement Agreement is also hereby terminated.

Sincerely,



Michael G. Kelber

MGK/adc  
Enclosure

25263309.1

My Profile | Support | Locations | English Search or tracking number **Subr**



Shipping | Tracking | Manage | Learn | FedEx Office®

**Login**

**IMPORTANT!**

**Flooding is causing hazardous conditions in the Southeast, U.S.** [Learn More](#)

FedEx® Tracking

**777438745190**

Ship date: <b>Wed 10/12/2016</b>  Chicago, IL US	<b>Delivered</b> <i>Signed for by: W.CALON</i>	Actual delivery: <b>Thu 10/13/2016 10:37 am</b>  SWEDESBORO, NJ US
---	---	---

---

**Travel History**

Date/Time	Activity	Location
<b>10/13/2016 - Thursday</b>		
10:37 am	Delivered	SWEDESBORO, NJ
8:00 am	On FedEx vehicle for delivery	BELLMAWR, NJ
7:16 am	At local FedEx facility	BELLMAWR, NJ
6:16 am	At destination sort facility	PHILADELPHIA, PA
3:26 am	Departed FedEx location	MEMPHIS, TN
12:23 am	Arrived at FedEx location	MEMPHIS, TN
<b>10/12/2016 - Wednesday</b>		
9:20 pm	Left FedEx origin facility	CHICAGO, IL
10:50 am	Picked up Tendered at FedEx Office	CHICAGO, IL
<b>10/11/2016 - Tuesday</b>		
11:30 am	Shipment information sent to FedEx	

---

**Shipment Facts**

<b>Tracking number</b>	777438745190	<b>Service</b>	FedEx Standard Overnight
<b>Weight</b>	0.5 lbs / 0.23 kgs	<b>Signature services</b>	Adult signature required
<b>Delivered To</b>	Shipping/Receiving	<b>Total pieces</b>	1
<b>Total shipment weight</b>	0.5 lbs / 0.23 kgs	<b>Terms</b>	Shipper
<b>Shipper reference</b>	015501.0710	<b>Packaging</b>	FedEx Envelope
<b>Special handling section</b>	Deliver Weekday, Adult Signature Required	<b>Standard transit</b>	10/13/2016 by 4:30 pm



Search or tracking number **Subr**

**Customer Focus**  
 New Customer Center  
 Small Business Center  
 Service Guide  
 Customer Support

**Company Information**  
 About FedEx  
 Careers  
 Investor Relations  
 Subscribe to FedEx email

**Featured Services**  
 FedEx Delivery Manager  
 FedEx SameDay  
 FedEx Home Delivery  
 FedEx TechConnect  
 Healthcare Solutions  
 Online Retail Solutions  
 Packaging Services  
 Ancillary Clearance Services

**Other Resources**  
 FedEx Compatible  
 Developer Resource Center  
 FedEx Ship Manager Software  
 FedEx Mobile

**Companies**  
 FedEx Express  
 FedEx Ground  
 FedEx Office  
 FedEx Freight  
 FedEx Custom Critical  
 FedEx Trade Networks  
 FedEx CrossBorder  
 FedEx SupplyChain

**Follow FedEx**

United States - English

**Ask FedEx**