

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

Civil Action No. 07-CV-571

ABERCROMBIE & FITCH TRADING CO.,)	
)	
Plaintiff,)	
)	
v.)	COMPLAINT
)	
BURLINGTON BRANDS, INC.,)	
)	
Defendant.)	JURY TRIAL DEMANDED

Plaintiff Abercrombie & Fitch Trading Co. (“A & F Trading”), for its complaint against defendant Burlington Brands, Inc. (“Burlington”), hereby alleges as follows:

JURISDICTION, PARTIES AND VENUE

1. This is an action for trademark infringement and unfair competition under various provisions of the Lanham Act, 15 U.S.C. §§ 1051 *et seq.* and of North Carolina General Statute § 75-1.1 and common law. This Court has subject matter jurisdiction over the federal claims in this action pursuant to 28 U.S.C. §§ 1331 and 1338 and over the state claims pursuant to 28 U.S.C. § 1367.

2. Plaintiff A & F Trading, is an Ohio corporation with its principal place of business at 6301 Fitch Path, New Albany, Ohio 43054.

3. Upon information and belief, defendant Burlington is a North Carolina corporation with its principal place of business at 1266 Plaza Drive, Burlington, North Carolina 27215.

4. This Court has personal jurisdiction over defendant. Venue is proper in this judicial district under 28 U.S.C. § 1391(b), as defendant resides in this district pursuant to 28 U.S.C. § 1391(c) and a substantial part of the events giving rise to plaintiff's claims has occurred in this district.

BACKGROUND FACTS

5. Abercrombie & Fitch ("Abercrombie") is a national retailer specializing in high-quality casual apparel for young men and women aged 18 through college. Through its several marketing and retailing subsidiaries, including J.M. Hollister, LLC, and Ruehl, Abercrombie operates nearly 950 retail stores nationwide, including nearly 400 Hollister stores, and enjoys an excellent reputation due to its high-quality merchandise, its highly successful marketing efforts directed at its target consumers, and its 115-year history in the retail field. In its fiscal year 2006, Abercrombie had net sales of over \$3.3 billion, and in the fiscal years 2004-2006, Abercrombie expended over \$100 million on catalogs and advertising. A true and correct copy of relevant excerpts from Abercrombie's 2006 10-K Annual Report documenting these figures is attached hereto as Exhibit "A."

6. Abercrombie uses numerous registered and common-law trademarks in the marketing and sale of its clothing goods. These trademarks have been owned since October 2, 2004 by Abercrombie's affiliate, plaintiff A & F Trading, and are licensed to

others of Abercrombie's affiliates. The most relevant registered mark for purposes of this action is U.S. Reg. No. 951,410 for the mark "ABERCROMBIE & FITCH" for numerous clothing goods in International Class 25, issued January 23, 1973. This registration is currently in full force and effect. Other relevant registrations are U.S. Reg. No. 2,530,664 for the mark "A & F" for numerous clothing goods in International Class 25, issued January 15, 2002, and U.S. Reg. No. 2,774,426 for the mark "HOLLISTER CO." for numerous clothing goods in International Class 25, issued October 21, 2003. These registrations are currently in full force and effect. True and correct copies of these registrations and their current status information from the website of the U.S. Patent and Trademark Office are attached hereto as Exhibit "B."

7. In the retail clothing industry, the majority of brand-label clothing sold in U.S. stores is not manufactured in the United States but is made for the retailer overseas by manufacturing agents and/or licensees. Occasionally, an agent or licensee will experience a quantity over-run, or will produce articles of clothing that fail the retailer's quality control standards. When this happens, some retailers permit the agent or licensee to sell off the over-run or rejected garments to discount clothing retailers in the United States, such as Syms and Ross Dress for Less.

8. Abercrombie inspects all garments from its overseas suppliers at its New Albany, Ohio headquarters before distributing them to its retail stores. Therefore, with the exception of certain goods not at issue in this case, Abercrombie does not permit its agents or licensees to sell off over-runs or rejected garments in the United States because

such garments either have not passed through – or have failed – Abercrombie’s quality inspection process. Abercrombie’s agents and licensees must follow Abercrombie’s Sell-Off Compliance Agreement, which, *inter alia*, prohibits the sale or re-sale of goods into the United States, and requires that labels be removed or “black-lined.” Accordingly, when Abercrombie becomes aware that a retail store or website in the United States other than its own is advertising and selling significant quantities of articles of clothing bearing the marks “ABERCROMBIE & FITCH”, “A & F”, “ABERCROMBIE”, “HOLLISTER CO.”, or “HOLLISTER,” including garments with intact labels, Abercrombie can surmise that the store or site is selling either unauthorized over-runs and/or rejected garments that were distributed in violation of the Sell-Off Compliance Agreement – or counterfeit merchandise.

9. As one of the nation’s leading clothing retailers, Abercrombie has on several occasions been confronted with counterfeit and unauthorized merchandise in the marketplace. To combat this problem, Abercrombie employs a Brand Protection Department. When Abercrombie becomes aware of a suspected instance of unauthorized or counterfeit merchandise, one or more Brand Protection Specialists are dispatched to investigate the situation. Typically, the investigators will canvass the store in question to identify the types of Abercrombie-labeled clothing being sold, count the number of units of each article of clothing on the racks, and obtain samples of articles for further examination. In the case of a website, Abercrombie investigators will canvass the site to determine if it appears that the site is offering legitimate used clothing, or if the quantities

for sale indicate that the site operator has purchased shipments from questionable jobbers selling unauthorized or counterfeit merchandise. If the latter is the case, then the Abercrombie investigator will purchase samples of the goods offered at the site for further examination.

10. In or about April 2003, Abercrombie became aware that defendant was selling and offering for sale at its retail store location in Pigeon Forge, Tennessee, several styles of Abercrombie-branded clothing, specifically, men's chinos and shorts, that were suspected of being counterfeit. An Abercrombie Brand Protection Specialist visited the store and purchased samples of these goods, and analysis determined that the goods were counterfeit.

11. Abercrombie delivered a letter to Burlington dated April 16, 2003, a copy of which is attached hereto as Exhibit "C," demanding that Burlington cease and desist from any further infringement of Abercrombie's trademarks. That same date, John Carriero, the Director of Brand Protection for Abercrombie, spoke with Kevin Fitzgerald, the president of defendant regarding the situation. Mr. Fitzgerald represented that defendant would pull the counterfeit merchandise from its sales floor and cease any further infringement.

12. In or about May 2006, Abercrombie learned that defendant was again selling counterfeit or otherwise unauthorized Abercrombie and Hollister merchandise at its store in Pigeon Forge, Tennessee. An Abercrombie Brand Protection Specialist visited the store and purchased a shirt, which analysis determined to be counterfeit.

13. In or about June 2006, in connection with a seizure conducted at a wholesale company in California, Abercrombie discovered an invoice indicating that defendant had purchased several hundred pairs of shorts earlier in 2006 for sale at its stores in Pennsylvania, North Carolina, Tennessee and South Carolina.

14. Based on this information, in or about July 2006 Abercrombie dispatched a Brand Protection Specialist to visit defendant's store named Burlington Too in Burlington, North Carolina. The Specialist observed many different styles of Abercrombie and Hollister shirts being offered for sale and purchased several samples, which analysis determined to be counterfeit.

15. In or about August 2006, Abercrombie assisted the North Carolina Secretary of State's office in conducting a seizure at the Burlington Too store. A total of 836 units of Abercrombie and Hollister branded items at the store were identified as counterfeit and were surrendered for destruction. Matt Braun, an Abercrombie Brand Protection Specialist, spoke with Mr. Fitzgerald, and Mr. Fitzgerald represented that Burlington would cease and desist from any further sale of any products bearing the Abercrombie trademarks. On or about August 6, 2006, Mr. Fitzgerald forwarded over 2000 additional units to Abercrombie and provided some information as to his sources for the goods, but did not, as Abercrombie demanded, provide information as to the scope of Burlington's sales of such goods dating back to 2003.

16. On October 12, 2006, Abercrombie's counsel wrote to Mr. Fitzgerald acknowledging his representation but demanding again that Burlington provide

information regarding the scope of Burlington's sales of Abercrombie goods dating back to 2003. A true and correct copy of this letter is attached hereto as Exhibit "D."

17. Later in 2006 and into 2007 Abercrombie's counsel has had discussions with counsel for Burlington aimed at resolving the parties' dispute. In the course of these discussions, Abercrombie has learned that Burlington has purchased and sold very significant quantities of counterfeit or otherwise unauthorized Abercrombie- and Hollister- labeled merchandise, unjustly enriching Burlington, injuring Abercrombie's reputation, and depriving Abercrombie of profits it would have earned from the sale of legitimate goods.

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

18. Plaintiff hereby realleges and incorporates by reference Paragraphs 1-17 of this Complaint as if fully set forth herein, to the extent not inconsistent herewith.

19. By its actions described above, defendant has used in commerce, without plaintiff's consent, reproductions, counterfeits, copies or colorable imitations of plaintiff's registered trademarks, including, without limitation, "ABERCROMBIE & FITCH", "ABERCROMBIE", "A & F", "HOLLISTER CO." and "HOLLISTER" in connection with the sale, offer for sale, distribution and/or advertising of clothing goods, such use being likely to cause confusion, to cause mistake, or to deceive.

20. Upon information and belief, the foregoing conduct of defendant has been willful and with knowledge of the counterfeit or unauthorized status of the infringing articles.

21. The actions of defendant described in this Count constitute trademark infringement in violation of 15 U.S.C. § 1114. Defendant's actions have caused, and, unless enjoined by this Court, will continue to cause serious and irreparable injury to plaintiff for which plaintiff has no adequate remedy at law.

22. The actions of defendant described in this Count have also caused damage to plaintiff for which plaintiff should be compensated by defendant.

23. This is an exceptional case for which plaintiff should be awarded its reasonable attorneys fees.

COUNT II – UNFAIR COMPETITION
UNDER 15 U.S.C. § 1125(a)

24. Plaintiff hereby realleges and incorporates by reference Paragraphs 1-17 of this Complaint as if fully set forth herein, to the extent not inconsistent herewith.

25. By its actions described above, defendant has, without plaintiff's consent, on or in connection with clothing goods, used in commerce a word, term, name, symbol, device, or any combination thereof, including, without limitation, plaintiff's marks "ABERCROMBIE & FITCH", "ABERCROMBIE", "A & F", "HOLLISTER CO.," and "HOLLISTER," which is likely to cause confusion, to cause mistake, or to deceive as to the affiliation, connection and/or association of defendant with plaintiff, and/or as to the

origin, sponsorship, and/or approval of defendant's counterfeit and/or unauthorized clothing goods by plaintiff.

26. Upon information and belief, the foregoing conduct of defendant has been willful and with knowledge of the counterfeit or unauthorized status of the infringing articles.

27. The actions of defendant described in this Count constitute unfair competition in violation of 15 U.S.C. § 1125(a). Defendant's acts have caused and, unless enjoined by this Court, will continue to cause serious and irreparable injury to plaintiff for which plaintiff has no adequate remedy at law.

28. The acts of defendant described in this Count have also caused damage to plaintiff for which plaintiff should be compensated by defendant.

29. This is an exceptional case for which plaintiff should be awarded its reasonable attorneys fees.

COUNT III – UNFAIR COMPETITION
UNDER N.C. GEN. STAT. § 75-1.1

30. Plaintiff hereby realleges and incorporates by reference Paragraphs 1-17 of this Complaint as if fully set forth herein, to the extent not inconsistent herewith.

31. By its actions described above, defendant has engaged in an unfair method of competition and/or unfair or deceptive acts or practices in or affecting commerce as set forth in N.C. Gen. Stat. § 75-1.1.

32. Upon information and belief, the foregoing conduct of defendant has been willful and with knowledge of the counterfeit or unauthorized status of the infringing articles.

33. The actions of defendants described in this Count constitute an unfair method of competition and/or unfair or deceptive act or practice in or affecting commerce in violation of N.C. Gen. Stat. § 75-1.1. Defendant's actions have caused, and, unless enjoined by this Court, will continue to cause serious and irreparable injury to plaintiff for which plaintiff has no adequate remedy at law.

34. The actions of defendant described in this Count have also caused damage to plaintiff for which plaintiff should be compensated by defendant in an amount to be determined at trial. Plaintiff is entitled to have its damages trebled and to costs and interest, and plaintiff should be awarded its reasonable attorneys fees.

COUNT IV – COMMON LAW TRADEMARK INFRINGEMENT

35. Plaintiff hereby realleges and incorporates by reference Paragraphs 1-17 of this Complaint as if fully set forth herein, to the extent not inconsistent herewith.

36. By its actions described above, defendant has, without plaintiff's consent, on or in connection with clothing goods, used in commerce a word, term, name, symbol, device, or any combination thereof, including, without limitation, plaintiff's marks "ABERCROMBIE & FITCH", "ABERCROMBIE", "A & F", "HOLLISTER CO.", and "HOLLISTER," which is likely to cause confusion, to cause mistake, or to deceive as to

the affiliation, connection and/or association of defendant with plaintiff, and/or as to the origin, sponsorship, and/or approval of defendant's counterfeit and/or unauthorized clothing goods by plaintiff.

37. Upon information and belief, the foregoing conduct of defendant has been willful and with knowledge of the counterfeit or unauthorized status of the infringing articles.

38. Defendant's acts have caused and, unless enjoined by this Court, will continue to cause serious and irreparable injury to plaintiff for which plaintiff has no adequate remedy at law.

39. The acts of defendant described in this Court have also caused damage to plaintiff for which plaintiff should be compensated by defendant.

WHEREFORE, plaintiff prays:

a) that defendant be found to have infringed plaintiff's rights in its marks, including, without limitation, "ABERCROMBIE & FITCH", "ABERCROMBIE", "A & F", "HOLLISTER CO.", and "HOLLISTER," and that defendant be found liable on each of the causes of action enumerated in this Complaint;

b) that defendant, its officers, directors, employees, agents and affiliated entities, and all persons in active participation or concert with defendant, be preliminarily and permanently enjoined from infringing plaintiff's marks, and from unfairly competing with plaintiff in any other manner;

c) that defendant be required to deliver up and/or to destroy any and all articles of clothing bearing plaintiff's marks in its possession, as well as all labels, literature, and advertisements bearing the marks, together with any means for producing same;

d) that defendant be ordered to provide an accounting of all profits derived from its sales of goods in connection with the acts complained of herein, and to pay such profits, or such greater sum as this Court deems just and proper, to plaintiff;

e) that defendant be ordered to pay damages to plaintiff adequate to compensate plaintiff for the acts described in this Complaint, or, upon plaintiff's election, statutory damages pursuant to 35 U.S.C. § 1117(c) and/or other state statutes, that such damages be trebled, and that defendant be ordered to pay plaintiff its costs and reasonable attorneys' fees, plus interest and costs;

f) that plaintiff have such other and further relief as this Court may deem just and proper.

Respectfully submitted, this the 27th day of July, 2007.

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