

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NORTH DAKOTA

MAMA MIA, INC., d/b/a MODE, Plaintiff, vs. MODE MP LLC and TRACY MACKELLAR, Defendants.	Civil No.: COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES
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Plaintiff Mama Mia, Inc., by its attorneys, and for its Complaint for Injunctive Relief and Damages against defendants MODE MP LLC and Tracy Mackellar, states as follows:

PARTIES

1. Plaintiff Mama Mia, Inc. (“MODE”) is a corporation organized and existing under the laws of the State of North Dakota, with its principal place of business in Fargo, North Dakota.

2. Defendant MODE MP LLC is a South Carolina limited liability company, with its principal place of business in Mt. Pleasant, South Carolina. None of its members is a citizen or resident of North Dakota.

3. Defendant Tracy Mackellar is a citizen and resident of South Carolina, and the sole member of MODE MP LLC.

JURISDICTION AND VENUE

4. The Court has original subject matter jurisdiction of this action under 28 U.S.C. §§ 1331, 1338, and 1367, in that this is a civil action involving claims arising under the laws of the United States, including an Act of Congress relating to trademarks, and wherein all other

claims are so related to claims within the Court's original jurisdiction that they form part of the same case or controversy.

5. The Court also has original subject matter jurisdiction of this action under 28 U.S.C. § 1332(a)(1), in that this is a civil action where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs, and is between citizens of different States.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this judicial district, and defendants consented in writing to the jurisdiction of and venue in this Court.

RELEVANT BACKGROUND FACTS

MODE's Business and the MODE Marks

7. MODE owns proprietary know-how and other intellectual property relating to the establishment and operation of retail clothing and accessories stores ("MODE Stores") that utilize distinctive and unique procedures and methods of operation (the "MODE System") and certain trade and service names and marks owned by MODE (the "MODE Marks").

8. MODE both operates MODE Stores and grants franchises to qualified persons to establish and operate franchised MODE Stores. Franchised MODE Stores are operated pursuant to written franchise agreements granting franchisees a limited license to use the MODE System and the MODE Marks solely in connection with the operation of their franchised MODE Stores and only in such manner and at such locations as is expressly authorized by MODE in the franchise agreements and operations manuals given to franchisees by MODE.

9. To identify the source, origin, and sponsorship of its products and services, and to distinguish those products and services from those established, made, offered, and sold by others,

MODE and its authorized franchisees have extensively used the MODE Marks in connection with the operation of authorized MODE Stores.

10. The MODE Marks are registered on the Principal Register of the United States Patent and Trademark Office. The registration of the MODE Marks continues in full force and effect.

11. MODE has given notice to the public of the registration of the MODE Marks as provided in 15 U.S.C. § 1111 and complies with all legal requirements to ensure that it and its authorized franchisees remain the exclusive users of the MODE Marks.

12. MODE and its authorized franchisees have continuously used the MODE Marks in interstate commerce in connection with the promotion, sale, and franchising of MODE Stores, and the promotion and sale of the products and services they offer, in several States across the United States.

13. MODE and its authorized franchisees have extensively advertised and promoted the MODE Marks and the products and services MODE Stores offer in association with those marks in several States across the United States and through various media. As a result of such efforts and the considerable money spent in connection with those efforts, the products and services offered by MODE and its authorized franchisees under the MODE Marks have been met with widespread public approval and have established demand and goodwill among customers and consumers throughout the United States.

Defendants' Franchise Agreement and Guaranty

14. On March 17, 2015, MODE, as franchisor, and MODE MP LLC, as franchisee, entered into a written franchise agreement pursuant to which MODE granted MODE MP LLC a franchise to establish and operate a MODE Store at 976 Houston Northcutt, Suite M, in Mt. Pleasant, South Carolina, for a 10 year term.

15. In the franchise agreement MODE MP LLC agreed, among other things, to operate its franchised MODE Store in accordance with MODE's specifications and quality standards, to meet minimum inventory levels specified by MODE, to offer and sell only products and services authorized and approved by MODE, and to purchase only from MODE all merchandise to be sold in the store.

16. MODE MP LLC also agreed to pay MODE a continuing royalty and service fee in an amount equal to the greater of six percent (6%) of Gross Sales, as that term is defined in the franchise agreement, or \$1,500 per month.

17. MODE MP LLC further agreed to use the MODE Marks as the sole identification of its franchised MODE Store.

18. MODE MP LLC also agreed that MODE shall control the manner and extent in which any of the Marks are used in social media, including but not limited to Facebook, Twitter, private or store-based blogs, and any other websites or applications used for social networking purposes.

19. Mackellar personally guaranteed in writing all of MODE MP LLC's obligations under the franchise agreement.

Termination for Cause of the Franchise Agreement

20. MODE MP LLC breached its obligations under the franchise agreement by, among other things, failing to pay when due continuing royalty and service fees, failing to maintain minimum inventory levels specified by MODE, selling unapproved products purchased from unapproved suppliers, and using a confusingly similar trade name—"MODA"—in connection with the operation of its franchised MODE Store.

21. By written notice of default dated December 20, 2016, and hand delivered to MODE MP LLC the following day, MODE advised MODE MP LLC of its defaults and demanded that MODE MP LLC cure its defaults within the cure periods specified in the franchise agreement. The default notice notified MODE MP LLC that, in the event MODE MP LLC failed to cure its defaults within the cure periods specified, MODE would terminate the franchise agreement for cause.

22. Under the franchise agreement, MODE MP LLC was required to cure its violations of MODE's specifications and quality standards within 48 hours of delivery of the notice of default. MODE MP LLC failed to cure the violations of MODE's specifications and quality standards within 48 hours of delivery of the December 20, 2016, notice of default.

23. By written notice dated December 27, 2016, and delivered to MODE MP LLC on December 29, 2016, MODE terminated the franchise agreement for cause based on MODE MP LLC's defaults and failure to cure them within the cure period specified in the franchise agreement.

MODE MP LLC's Violation of its Post-Termination Obligations

24. MODE MP LLC agreed in the franchise agreement to perform certain post-termination obligations upon termination the franchise agreement. Specifically, MODE MP LLC

agreed that upon termination it would, among other things, cease operating its MODE Store, pay all amounts owed to MODE, not hold itself out as a current or former franchisee of MODE or use any MODE Mark, return to MODE all MODE operations manuals and all materials and items bearing any MODE Mark, cease using and cancel the telephone numbers used in connection with its former MODE Store, and de-identify its former MODE Store premises.

25. In addition, MODE MP LLC and its member Mackellar agreed that, for a period of two (2) years from termination of the franchise agreement, neither of them would have any interest as an owner, partner, director, officer, employee, consultant, representative or agent, or in any other capacity, in any store within a 20 mile radius of their former MODE Store that offers merchandise and products substantially similar to the merchandise and products offered by MODE Stores.

26. Despite termination for cause of the franchise agreement and in violation of their post-termination obligations, defendants have performed none of their post-termination obligations and instead continue to operate a store using the MODE Marks and the name or mark “MODA” and offering the same merchandise and products offered by MODE Stores at the same location as their former franchised MODE Store.

27. Defendants also continue to operate certain social media accounts in connection with the store that use the MODE Marks and the name or mark “MODA” and even changed the passwords connected with those accounts to prevent MODE from protecting against the unlawful use of the MODE Marks.

COUNT I - TRADEMARK INFRINGEMENT

28. MODE repeats and realleges ¶¶ 1 through 27 of its Complaint for Injunctive Relief and Damages as and for this ¶ 28, as if fully set forth herein.

29. Defendants' acts, practices, and conduct constitute an infringing use in interstate commerce of the MODE Marks and have caused and are likely to cause consumer confusion or mistake and deceive the public in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

30. Defendants' wrongful acts were, and continue to be, knowing and willful, as evidenced by their intentional use of the confusingly similar name "MODA" and their efforts to change the passwords to the social media accounts connected with the store.

31. As a direct and proximate result of defendants' infringement, MODE has suffered and, unless defendants' infringement is enjoined, will continue to suffer actual, substantial, and irreparable harm, including, without limitation, diminution in the value of the MODE Marks, diminution in the value of its goodwill and reputation, and incalculable lost revenues and profits.

32. MODE has no adequate remedy at law because the MODE Marks are unique and represent to the public MODE's identity, reputation and goodwill, such that damages alone cannot fully compensate MODE for defendants' misconduct.

33. Unless enjoined by the Court, defendants will continue to use and to infringe the MODE Marks to MODE's irreparable injury. This threat of injury to MODE's business, identity, goodwill, and reputation requires injunctive relief to prevent defendants' continued use of the MODE Marks and to ameliorate and mitigate MODE's injuries.

COUNT II - UNFAIR COMPETITION

34. MODE repeats and realleges ¶¶ 1 through 33 of its Complaint for Injunctive Relief and Damages as and for this ¶ 34, as if fully set forth herein.

35. Defendants' acts, practices, and conduct constitute unfair competition, and false or misleading descriptions or representations of fact, in that they are likely to cause confusion or

mistake, to deceive others as to the affiliation, connection, or association of the parties, and/or to misrepresent the nature, characteristic, qualities, or geographic origin of the parties' goods, services, and commercial activities, all in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

36. Defendants' wrongful acts were, and continue to be, knowing and willful, as evidenced by their intentional use of the MODE Marks and the confusingly similar name "MODA" and their efforts to change the passwords to the social media accounts connected with the store.

37. As a direct and proximate result of defendants' unfair competition, MODE has suffered and, unless defendants' unfair competition is enjoined, will continue to suffer actual, substantial, and irreparable harm, including, without limitation, diminution in the value of the MODE Marks, diminution in the value of and damage to its goodwill and reputation, loss of its competitive advantage, and incalculable lost revenues and profits.

38. MODE has no adequate remedy at law because the MODE Marks are unique, were developed at great expense and effort, and represent to the public MODE's identity, reputation, and goodwill, such that damages alone cannot fully compensate MODE for defendants' misconduct.

39. Unless enjoined by the Court, defendants will continue to compete unfairly with MODE to MODE's irreparable injury. This threat of injury to MODE and MODE's business, identity, goodwill, and reputation requires injunctive relief to prevent defendants' continued unfair competition and to ameliorate and mitigate MODE's injuries.

**COUNT III – BREACH OF CONTRACT: FRANCHISE AGREEMENT
SPECIFIC PERFORMANCE**

40. MODE repeats and realleges ¶¶ 1 through 39 of its Complaint for Injunctive Relief and Damages as and for this ¶ 40, as if fully set forth herein.

41. MODE MP LLC's failure and refusal to comply with its post-termination obligations under the franchise agreement, including, without limitation, its noncompetition covenant, constitutes material breaches of the franchise agreement.

42. As a direct and proximate result of these ongoing breaches, MODE has suffered and will continue to suffer actual, substantial, and irreparable harm, including without limitation, loss of customer goodwill and loyalty, franchise system instability, the inability to rebrand the territory formerly serviced by defendants' MODE Store, lost profits, diminution in the value of the MODE System, damage to MODE's goodwill, and loss of competitive advantage.

43. MODE has no adequate remedy at law because the MODE System is unique, was developed at great expense and effort, and affords MODE and its authorized franchisees a competitive edge that is lost if MODE MP LLC is permitted to continue to use it, none of which can be quantified and for which monetary damages alone cannot fully and completely compensate MODE.

44. Absent injunctive relief enjoining MODE MP LLC's misconduct and ordering specific performance of its post-termination obligations, MODE MP LLC's material breaches will continue to MODE's irreparable harm.

**COUNT IV – BREACH OF CONTRACT: GUARANTY
SPECIFIC PERFORMANCE**

45. MODE repeats and realleges ¶¶ 1 through 44 of its Complaint for Injunctive Relief and Damages as and for this ¶ 45, as if fully set forth herein.

46. Mackellar's failure and refusal to comply with or perform the post-termination obligations under the franchise agreement, including, without limitation, the noncompetition covenant, constitutes material breaches of her written guaranty.

47. As a direct and proximate result of Mackellar's ongoing breaches, MODE has suffered and will continue to suffer actual, substantial, and irreparable damage, including, but not limited to, loss of customer goodwill and loyalty, franchise system instability, the inability to relicense the territory formerly serviced by MODE MP LLC's former MODE Store, lost profits, diminution in the value of the MODE System, and loss of competitive advantage.

48. MODE has no adequate remedy at law because the MODE System is unique, was developed at great expense and effort, and affords MODE and its authorized franchisees a competitive edge that is lost if Mackellar is permitted to continue to use it, none of which can be quantified and for which monetary damages alone cannot fully and completely compensate MODE.

49. Absent injunctive relief enjoining Mackellar's misconduct and ordering specific performance of her post-termination obligations, Mackellar's material breaches will continue to cause MODE's irreparable harm.

COUNT V—BREACH OF CONTRACT: FRANCHISE AGREEMENT
DAMAGES

50. MODE repeats and realleges ¶¶ 1 through 27 of its Complaint for Injunctive Relief and Damages as and for this ¶ 50, as if fully set forth herein.

51. MODE MP LLC breached its obligations under the franchise agreement by, among other things, failing to pay when due continuing royalty and service fees, failing to maintain minimum inventory levels specified by MODE, selling unapproved products purchased

from unapproved suppliers, and using a confusingly similar trade name—“MODA”—in connection with the operation of its franchised MODE Store.

52. MODE MP LLC is further in continuing breach of the franchise agreement by failing to perform its post-termination obligations and violating its noncompetition covenant.

53. As a direct and proximate result of MODE MP LLC’s breaches MODE has suffered and continues to suffer damages in an amount in excess of \$75,000, exclusive of interest and costs, to be proven at trial.

**COUNT VI—BREACH OF CONTRACT: GUARANTY
DAMAGES**

54. MODE repeats and realleges ¶¶ 1 through 27 of its Complaint for Injunctive Relief and Damages as and for this ¶ 54 as if fully set forth herein.

55. Mackellar breached her guaranty of MODE MP LLC’s obligations under the franchise agreement by, among other things, failing to pay when due continuing royalty and service fees, failing to maintain minimum inventory levels specified by MODE, selling unapproved products purchased from unapproved suppliers, and using a confusingly similar trade name—“MODA”—in connection with the operation of its franchised MODE Store.

56. Mackellar is further in continuing breach of her guaranty of MODE MP LLC’s obligations under the franchise agreement by failing to perform the post-termination obligations specified in the franchise agreement and violating her noncompetition covenant.

57. As a direct and proximate result of Mackellar’s breaches of her guaranty MODE has suffered and continues to suffer damages in an amount in excess of \$75,000, exclusive of interest and costs, to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, MODE demands judgment in its favor and against defendants, jointly and severally, as follows:

A. A preliminary and permanent injunction enjoining defendants, and each of them and their respective agents, servants, and employees, and all persons in active concert or participation with them, from:

1. Using the MODE Marks or any trademark, service mark, logo, or trade name, including the “MODA” mark or name, that is confusingly similar to the MODE Marks;
2. Otherwise infringing the MODE Marks or using any similar designation, whether alone or in combination with any other components;
3. Passing off any products or services as those of MODE or of MODE’s authorized franchisees;
4. Causing a likelihood of confusion or misunderstanding as to the source or sponsorship of their business, products, or services;
5. Causing a likelihood of confusion or misunderstanding as to their affiliation, connection, or association with MODE or with MODE’s franchisees, or with any of their products or services; and
6. Unfairly competing with MODE or with MODE’s franchisees, in any manner.

B. A preliminary and permanent injunction directing defendants, and each of them and their respective agents, servants, and employees, and all persons in active concert or

participation with them, to fully perform their post-termination obligations, including, without limitation, their obligations to:

1. Not to compete with MODE in the manner required by the franchise agreement and guaranty for two years from the later of entry of the Court's order or their compliance with it, within a 20 mile radius of their former franchised MODE Store;
2. Cease any and all use the MODE System and any of the MODE Marks;
3. Return to MODE any and all information and material containing any component of the MODE System and any of the MODE Marks;
4. Cease any use of the telephone numbers associated with their former franchised MODE Store and remove all directory and online listings, websites, domains, and email addresses used in connection with their former franchised MODE Store.

C. An order that defendants file with the Court and serve upon MODE's counsel within 10 days after entry of any injunction or order issued herein, a written report, under oath, setting forth in detail the manner in which they have complied with such injunction or order and attaching supporting documentation;

D. An award of damages caused by their infringement and unfair competition;


E. An award of treble damages caused by their infringement and unfair competition on account of their willful and intentional misconduct;

F. An award of damages caused by their breaches of the franchise agreement and guaranty, including, without limitation, lost future continuing royalty and service fees;

G. An award of the costs and expenses, including reasonable attorneys' fees and costs, incurred by MODE in connection with this action;

H. Such other and further relief as the Court deems just and proper.

Dated: December 29, 2016



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