

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN**

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KESHAW, INC.,  
a corporation, and  
KURT NEUMANN, SAMUEL LLANAS,  
and ROBERT GRIFFIN, individuals,

Plaintiffs,

vs.

Case No. 00-C-1414

BOSTON BEER COMPANY LIMITED  
PARTNERSHIP,  
a limited partnership,

JURY TRIAL DEMANDED

Defendant.

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**COMPLAINT FOR DILUTION, UNFAIR COMPETITION  
AND INFRINGEMENT OF RIGHT OF PUBLICITY**

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**PARTIES AND JURISDICTION**

1. Plaintiff Keshaw, Inc., is a Wisconsin corporation having its principal place of business in Milwaukee, Wisconsin.

2. Plaintiff Samuel Llanas is a resident of Milwaukee, Wisconsin, a musician, a member of the musical group known as BODEANS and a shareholder of plaintiff Keshaw, Inc.

3. Plaintiff Robert Griffin is a resident of Milwaukee, Wisconsin, a musician, a member of the musical group known as BODEANS and a shareholder of plaintiff Keshaw, Inc.

4. Plaintiff Kurt Neumann is a resident of Austin, Texas, a musician, a member of the musical group known as BODEANS and a shareholder of plaintiff Keshaw, Inc.

5. Defendant, Boston Beer Company Limited Partnership, d/b/a The Boston Beer Company, upon information and belief, is a Massachusetts Limited Partnership having its principal place of business in Boston, Massachusetts.

6. This Court's jurisdiction arises from the fact that this is a civil action brought under the Trademark Laws of the United States, 15 U.S.C. §§1051-1127, jurisdiction being conferred in accordance with 15 U.S.C. §1121 and 28 U.S.C. §1338(a). This Court has jurisdiction over all other claims herein in accordance with 28 U.S.C. §1338(b) and from the fact that this is an action between citizens of different states in which the value of the matter in controversy exceeds seventy-five thousand dollars, exclusive of interest and costs, jurisdiction being conferred in accordance with 28 U.S.C. § 1332.

### **BACKGROUND**

7. Plaintiff Keshaw, Inc. is the corporate entity that furnishes the musical, performing and recording services of the artist and musical group known as BODEANS. The BODEANS musical group was formed in 1983 by plaintiffs Kurt Neumann and Samuel Llanas. Robert Griffin joined in 1985. In September 1985, Keshaw was incorporated as the legal entity through which Neumann, Llanas and Griffin conducted their business and musical activities. Plaintiffs have continuously used the inherently distinctive mark BODEANS in interstate commerce, including commerce within the state of Wisconsin, since at least 1985 for performances and sound recordings of the BODEANS musical group.

8. Plaintiffs have released seven full album length sound recordings since 1985 under the BODEANS mark, which have been distributed and sold throughout the United States.

Plaintiffs have sold millions of dollars worth of sound recordings under the BODEANS mark, and over \$1 million dollars has been expended in advertising and promoting live performing services and sound recordings under the BODEANS mark throughout the United States, including the state of Wisconsin.

9. Plaintiffs have performed several hundred concerts throughout the United States under the BODEANS mark for millions of people and have enjoyed considerable success and exposure as a result of several national and international concert tours and appearances on numerous national television programs, such as *Late Night with David Letterman*, *The Today Show*, *Party Of Five*, *Friday Night Videos*, *American Bandstand*, *Relativity*, VH-1 and MTV.

10. As a result of plaintiffs' aforesaid extensive use, sales, advertising and promotion, plaintiffs' BODEANS mark has acquired a strong distinctiveness and secondary meaning signifying plaintiffs and their services and sound recordings, and has become well and favorably known throughout the United States.

11. Long after plaintiffs' adoption and first use of the BODEANS mark, defendant adopted the mark "BODEAN'S" as a trademark for malt beverages and began marketing and advertising malt beverages as BODEAN'S, BODEAN'S TWISTED TEA, and BODEAN'S TWISTED LEMON TEA. Defendant has also begun supplying retail stores with malt beverages and has advertised the sale thereof in packaging bearing the BODEAN'S mark.

12. Defendant has filed applications to register BODEAN'S TWISTED TEA (Serial No. 75/933,943) and BODEAN'S TWISTED LEMON TEA (Serial No. 75/933,942) with the United States Patent & Trademark Office. Defendant's holding company parent, KHWHB Holding, Inc., has filed an application to register BODEAN'S (Serial No. 76-841,040) with the

United States Patent & Trademark Office.

13. Defendant's use of the BODEAN'S mark has included the dropped "o" in the stylized version of the mark used by plaintiffs for their sound recordings, *i.e.*, "BoDEANS." Set forth below are the stylized BoDEANS mark used by both parties.



Plaintiffs' BoDEANS mark



Defendant's BoDEANS mark

14. Advertisements for defendant's product are deliberately evocative of plaintiffs. One ad includes a representation of guitars hanging on defendant's BoDEANS malt liquor bottles, and refers to plaintiffs' concert at the Marcus Amphitheater during Summerfest in Milwaukee: "BoDean's Hit Milwaukee July 9th!" Set forth below is a reproduction of that advertisement.



15. Another advertisement for defendant's malt liquor uses the phrase "Moms Rock with BoDEAN'S and Dads Do Too!" "in order to take advantage of plaintiffs' goodwill among the music listening public.

16. Defendant further distributes and advertises a bottle opener displaying the BoDEAN'S mark together with musical notes. Set forth below is a photograph of the bottle opener.



17. Plaintiffs have requested defendant to cease their use of the BODEANS TWISTED TEA mark, but defendant has rejected such requests.

### **COUNT I DILUTION**

18. Plaintiffs reallege paragraphs 1 through 17 herein.

19. By virtue of the inherent distinctiveness of plaintiffs' BODEANS mark, the extent and duration of its use by plaintiffs, the geographic scope and extent of plaintiffs' advertising and sales, the media publicity and exposure of the mark, and its consumer recognition, the BODEANS mark is famous and became famous prior to defendant's adoption and first unauthorized use of its BODEAN'S marks.

20. On information and belief, defendant was aware of plaintiffs' BODEANS mark and willfully intended to trade on plaintiffs' reputation and to dilute and tarnish the distinctiveness of the BODEANS mark.

21. Defendant's commercial use in commerce of its BODEAN'S marks causes dilution of the distinctive quality of plaintiffs' BODEANS mark. Said use has also tarnished and likely will continue to tarnish the reputation of plaintiffs' BODEANS mark by linking it to alcoholic beverages.

22. Defendant's aforesaid use of its BODEAN'S marks violates the dilution laws of the United States, 15 U.S.C. § 1125(c).

23. Defendant's aforesaid use of BODEAN'S is likely to dilute the distinctive quality of plaintiffs' BODEANS mark and injure plaintiffs' business reputation, in violation of the dilution laws of the various states in which Boston Beer sells and promotes its BODEAN'S

product, including the laws of Massachusetts Mass. Laws Ann. Ch. 110B, § 12; California, Cal. Bus. & Prof. Code §§ 14330, 14335; Florida, Fla. Stat. ch. 495.151; Illinois, 765 ILCS 1035/15; and Texas, Tex. Bus. & Com. Code § 16.29.

24. Boston Beer's aforesaid acts will cause irreparable damage to plaintiffs unless enjoined by this Court; wherefore, plaintiffs are without an adequate remedy at law.

## **COUNT II UNFAIR COMPETITION**

25. Plaintiffs reallege paragraphs 1 through 20 herein.

26. On information and belief, defendant has adopted and used the BODEAN'S mark for the purposes of trading upon the goodwill represented by said mark and of giving defendant's products a saleability that they otherwise would not have.

27. Defendant's use of the BODEAN'S mark has caused and is likely to continue to cause confusion, mistake or deception on the behalf of the general public as to the affiliation, connection or association of defendant with plaintiffs, or as to the source, approval or sponsorship of defendant's product by plaintiffs.

28. Defendant's aforesaid acts enable defendant and others to misrepresent and deceptively advertise, merchandise, market, and promote defendant's products as sponsored, endorsed or emanating from plaintiffs or a concern legitimately connected with or authorized by plaintiffs.

29. Defendant's aforesaid use of its BODEANS marks violates Section 43(a) of the United States Trademark Act, 15 U.S.C. § 1125(a).

30. Defendant's aforesaid acts greatly and irreparably damage plaintiffs and will continue to damage plaintiffs, unless enjoined by this Court; wherefore, plaintiffs are without an adequate remedy at law.

### **COUNT III COMMON LAW UNFAIR COMPETITION**

31. Plaintiffs reallege paragraphs 1 through 17, 19 through 23, and 26 through 28 herein.

32. Defendant's aforesaid acts constitute unfair competition with plaintiffs under the common law of the various states, including the State of Wisconsin, and result in the unjust enrichment of defendant.

33. Defendant's aforesaid acts greatly and irreparably damage plaintiffs and will continue to damage plaintiffs, unless enjoined by this Court; wherefore, plaintiffs are without an adequate remedy at law.

### **COUNT IV RIGHT OF PUBLICITY INFRINGEMENT**

34. Plaintiffs reallege paragraphs 1 through 17 herein.

35. Plaintiffs each have a right of publicity in the stage name BODEANS.

36. Defendant's aforesaid use of the name BODEANS violates plaintiffs' right of publicity in the stage name BODEANS under the common law and statutory law of Wisconsin, Wis. Stat. §895.50(2)(b), and similar laws of the states in which defendant has promoted and sold its BODEAN'S product.

WHEREFORE, plaintiffs pray that:

1. Defendant, its agents, and all others holding by, through or under defendant, or in active concert or participation with defendant, be enjoined and restrained during the pendency of this action, and permanently thereafter, from:

- (a) using "BODEANS" or any other colorable imitation or simulation of plaintiffs' name and mark in whole or in part without authorization from plaintiffs;
- (b) doing any other act or thing likely to induce a mistaken belief that defendant's products are connected with plaintiffs or are sponsored or approved by plaintiffs; and
- (c) doing any other act or thing likely to diminish or debilitate the selling power or otherwise dilute the distinctive quality of plaintiffs' BODEANS mark or injure plaintiffs' business reputation.

2. Defendant be required to deliver up for destruction all unauthorized labels, signs, invoices, prints, packages, wrappers, receptacles, advertisements, and other material in their possession or control bearing the BODEANS name and mark and all unauthorized material bearing plaintiffs' mark and all plates, molds, matrices and other means of making the same.

3. Defendant be required to pay to plaintiffs all damages plaintiffs have suffered by reason of defendant's use of its BODEAN'S and plaintiffs' mark.

4. Defendant be required to account for and pay to plaintiffs all profits wrongfully derived by defendant through its use of plaintiffs' mark and its unfair competition and infringement.

5. Defendant be required to pay plaintiff three times defendant's profits or plaintiffs' damages, whichever is greater, pursuant to 15 U.S.C. § 1117.

6. Defendant be required to pay to plaintiffs punitive damages in an amount to be determined by this Court for defendant's deliberate and willful unfair competition and violation of plaintiffs' right of publicity.

7. Defendant be required to pay to plaintiffs the costs of this action and plaintiffs' reasonable attorneys' fees and disbursements incurred herein, pursuant to 15 U.S.C. § 1117.

8. Defendant be required to file with this Court and serve on plaintiffs a report in writing under oath setting forth in detail the manner and form in which defendant has complied with the terms of any injunction entered by this Court.

9. Such other and further relief as this Court deems just and equitable.

Respectfully submitted,

DOMNITZ, MAWICKE & GOISMAN, S.C.,  
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Neumann, Samuel Llanas, and Robert Griffin,

By \_\_\_\_\_  
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**JURY DEMAND**

Plaintiffs request a trial by jury on all issues so triable herein.

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