

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

_____	)	
GunBroker.com, LLC,	)	Civil Action No.
	)	
Plaintiff	)	
	)	
v.	)	
	)	COMPLAINT FOR
Heckler & Koch, Inc.	)	DECLARATORY JUDGMENT
	)	
Defendants	)	
_____	)	

**COMPLAINT**

Plaintiff, GunBroker.com, LLC (hereinafter “GunBroker.com”), hereby files this Complaint against Heckler & Koch, Inc., (“H&K”) and alleges as follows:

**NATURE OF THE ACTION**

1. This is an action for declaratory judgment of non-infringement of H&K’s registered trademarks pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, 15 U.S.C. § 1121(a) and for such other relief as the Court deems just and proper.

**PARTIES**

2. Plaintiff, GunBroker.com, is a Delaware limited liability company that operates the commercial website [www.GunBroker.com](http://www.GunBroker.com) (“the Website”), an auction service provided by the Internet featuring firearms, knives and swords, and hunting equipment and accessories. GunBroker.com’s principal place of business is in Atlanta, Georgia.

3. H&K is the United States subsidiary of Heckler & Koch, GmbH, a German manufacturer of firearms. H&K has facilities in Columbus, Georgia, Ashburn, Virginia, and Newington, New Hampshire.

#### **JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction for this Complaint pursuant to 28 U.S.C. § 1331 and 1338(a). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(c).

5. H&K purports to be the owner of many valuable designs, trademarks, trade dress and copyrights for the word H&K, the H&K logo, and the MP5® name and shape (collectively, the “H&K Marks”). Through a series of verbal and written communications, H&K has asserted that sellers on GunBroker.com’s website have infringed upon H&K’s rights in the H&K Marks. H&K has further alleged that as the host of the website, GunBroker.com is contributing to the willful infringement of the H&K Marks. A substantial controversy exists between the parties which is of sufficient immediacy and reality to warrant declaratory relief.

6. This Court has personal jurisdiction over H&K. H&K regularly conducts business in and directed to Georgia. Moreover, H&K’s commercial, civilian and law enforcement sales have been consolidated at the H&K Columbus, Georgia facility since February 1, 2009.

#### **FACTUAL BACKGROUND**

7. GunBroker.com operates a website that allows independent sellers to advertise and sell merchandise to independent purchasers through the website.

8. An individual who wants to sell a gun or other equipment creates the ad and content of the posting and submits it to GunBroker.com. GunBroker.com adds the postings to the site, runs the auction for the postings, notifies the winner of the auction, and explains how the winner can contact the seller.

9. Although GunBroker.com is not responsible for creating the content of the postings, the GunBroker.com Website User Agreement prohibits the posting of items for sale that violate any third party's intellectual property rights, and provides a mechanism to the holders of such rights for reporting such violations.

10. On August, 27, 2008, Ms. Darlene Seymour, of the "Office of the General Counsel" of Continental Enterprises, Inc. ("CE") sent a letter to GB Investments, Inc. as the prior owner of the website ("Seymour Letter")<sup>1</sup>. The Seymour Letter indicated that CE "has been engaged by H&K to help protect their valuable intellectual property."

11. The Seymour Letter asserted that hundreds of listings on the GunBroker.com website violated H&K's intellectual property rights in several trademarks and copyrights. A true and correct copy of the Seymour Letter is attached as Exhibit A.

12. In support of her claim that CE was authorized to act on behalf of H&K, Ms. Seymour provided a letter from James E. Baker, Jr., an attorney with the law firm of Baxter, Baker, Sidle, Conn & Jones, P.A. (the "Baxter Firm") in Baltimore, Maryland.

13. Although the letter from the Baxter Firm purports to "confirm that Heckler & Koch ("H&K") has engaged the services of Continental Enterprises to identify and investigate the unauthorized uses of the intellectual property associated with H&K," the

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<sup>1</sup> On January 16, 2009, ownership of the website was transferred from GB Investments, Inc. to Plaintiff as part of an internal corporate reorganization. Plaintiff is an indirect wholly-owned subsidiary of GB Investments, Inc.

letter does not explain the Baxter Firm's relationship with H&K. Furthermore, nothing in the letter from the Baxter Firm, purporting to authorize CE's activities, establishes that the Baxter Firm is an agent of H&K or otherwise entitled to act on behalf of H&K.

14. In addition to the question of whether there is an actual grant of authority for CE to act on H&K's behalf in pursuing claims of infringement, CE may not be permitted to represent H&K in protecting H&K's intellectual property. CE is located in Indiana and the Indiana Rules of Professional Conduct prohibit a lawyer from entering into a partnership with a non-lawyer and from sharing legal fees with a non-lawyer.

15. News articles indicate that Mr. Karl Manders, a non-lawyer, is the brains behind the outfit and the owner of CE. A true and correct copy of one of these articles is attached as Exhibit B.

16. Upon information and belief, Mr. Manders began his career as a private investigator and now his company, CE, concentrates almost exclusively on intellectual property rights enforcement.

17. Upon information and belief, CE obtains a percentage of settlement proceeds or a percentage of a company's sales for his efforts.

18. An Indiana State Bar Legal Ethics Opinion indicates that Indiana Bar Rule at issue, 5.4(a), was designed to combat "the possibility of control by a lay person who is interested in profit, rather than the client's interests, and control by a person who is unregulated by the profession." Indiana State Bar Association, Legal Ethics Committee, Opinion #7, 1991. A true and correct copy is attached as Exhibit C.

19. In its pursuit of profits from allegations of trademark and copyright infringement, CE has initiated legal proceedings in Indiana on behalf of Heineken USA,

Inc., Just Born, Inc., and Big Dog Holdings, Inc. True and correct copies of excerpts from the complaints are attached as Exhibit D.

20. Based on the Seymour Letter and subsequent interactions with GunBroker.com, it appears that GunBroker.com is now in the cross-hairs of CE's sights.

21. Although the Seymour Letter indicates that the "specific" infringing items are included in an exhibit to the letter, the exhibit was nothing more than a 16 page print-out from the GunBroker.com website that simply showed a list of all the item listings (over 340) posted by the third party sellers on the Website attempting to sell merchandise bearing the H&K Marks.

22. CE has made no effort to distinguish between the allegedly infringing use of H&K's Marks and the proper use of H&K's Marks by sellers listing authentic H&K products or other listings making a fair use of the H&K Marks.

23. CE's broad based allegations of infringement do nothing but attempt to improperly shift H&K's obligations to actively monitor and enforce its intellectual property rights to GunBroker.com.

24. Despite repeated requests to CE, CE and H&K have failed and refused to utilize the mechanism on GunBroker.com for the holder of intellectual property rights to report specific violations or to clarify which, if any, specific postings on GunBroker.com CE and H&K believe potentially infringe on H&K's marks.

25. Nevertheless, CE has threatened that any further advertisement or sale of the unspecified, but allegedly infringing merchandise would be considered "willful infringement," which is "subject to enhanced penalties, including, but not limited to, treble or statutory damages and attorneys fees."

26. CE has further threatened that it would “advise H&K to take whatever steps it deems necessary to fully protect its intellectual property rights.”

27. GunBroker.com believes that (a) there has been no infringing use of H&K’s Marks on the Website, (b) to the extent there has been any infringing use of H&K’s Marks on the Website, the infringement is by the particular sellers who drafted the content of their postings, not GunBroker.com, and (c) H&K has waived any right to complain against GunBroker.com because it has never utilized the mechanism that GunBroker.com provides to the holders of such intellectual property rights for reporting alleged violations by sellers.

**COUNT 1 – DECLARATORY JUDGMENT**

GunBroker.com repeats and incorporates by reference, as though specifically pleaded herein, the allegations of paragraphs 1 through 27.

28. CE has brought claims of infringement against others in the past and upon information and belief continues to have a financial incentive to assert similar claims.

29. It is unclear whether CE is authorized by H&K and permitted by Indiana Rules of Professional Conduct to assert claims of intellectual property violations on behalf of H&K.

30. CE has failed to articulate specific claims of infringement against GunBroker.com.

31. Nevertheless, CE has threatened to bring claims of copyright and trademark infringement against GunBroker.com.

32. In light of the foregoing, there is an actual controversy between GunBroker.com and H&K.

### **PRAYER FOR RELIEF**

WHEREFORE, GunBroker.com prays for the following relief:

- (a) A Judgment declaring GunBroker.com has not infringed on H&K's Marks;
- (b) A Judgment declaring GunBroker.com has not contributed to the infringement of H&K's Marks by allowing sellers to list postings on the GunBroker.com website that (i) accurately compare listed products to an H&K product; (ii) accurately represent the listed product is compatible with an H&K product; (iii) accurately represent that a listed product is a knock-off or look alike; or (iv) resell used H&K products.
- (c) A Judgment declaring that it is a fair use and therefore non-infringing use for sellers to accurately compare listed products to an H&K product.
- (d) A Judgment declaring that it is a fair use and therefore non-infringing use for sellers to accurately represent the listed product is compatible with an H&K product.
- (e) A Judgment declaring that it is a fair use and therefore non-infringing use for sellers to accurately represent that a listed product is a knock-off or look alike.
- (f) A Judgment declaring that it is a fair use and therefore non-infringing use for the seller to resell and used H&K product.
- (g) An order declaring that GunBroker.com is a prevailing party and that this is an exceptional case; awarding GunBroker.com its costs, expenses, disbursements and reasonable attorneys fees under 35 U.S.C. § 285.

Respectfully submitted this 14th day of May, 2009.

FSB LEGAL COUNSEL  
A Fisher Broyles LLC

/s/ Jenna Moore Colvin  
Jenna Moore Colvin  
Georgia Bar No. 519729  
David J. Myers  
Georgia Bar No. 533072

377 Grant Street  
Atlanta, GA 30189  
(678) 279-7339 Telephone  
(404) 420-2327 Facsimile  
Attorney for Plaintiff