

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

H&M HENNES & MAURITZ GBC AB, and
H&M HENNES & MAURITZ L.P.,

Plaintiffs,

v.

WILDFOX COUTURE, LLC, and WILDFOX
COUTURE IP HOLDINGS, LLC,

Defendants.

Civil Action No. _____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiffs H&M Hennes & Mauritz GBC AB and H&M Hennes & Mauritz L.P. (collectively, "H&M" or "Plaintiffs"), by and through their attorneys, for their complaint against Wildfox Couture, LLC and Wildfox Couture IP Holdings, LLC (collectively, "Wildfox" or "Defendants"), alleges as follows:

NATURE OF ACTION AND RELIEF SOUGHT

1. This is an action under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, for a declaratory judgement of non-infringement of Defendants' WILDFOX trademark. Plaintiffs seek a declaration that their use of the term "Wildfox" as part of an ornamental design on a sweatshirt does not infringe Defendants' rights in their WILDFOX trademark.

2. This action arises out of Wildfox's demands that H&M cease and desist from selling a sweatshirt, namely the H&M brand "Sweatshirt with Motif" (the "H&M Motif Sweatshirt") that contains a graphic design depicting the logo of a fictitious basketball team – the "Toronto Wildfox" (hereinafter, the "Basketball Design").

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PARTIES

3. H&M Hennes & Mauritz GBC AB is a Swedish limited liability company having its principal place of business at Mäster Samuelsgatan 46A, 106 38 Stockholm, Sweden.

4. H&M Hennes & Mauritz L.P. is a limited partnership organized under the laws of the State of New York, having its principal place of business at 110 Fifth Avenue, 11th Floor New York, NY 10011.

5. Upon information and belief, Wildfox Couture, LLC is a limited liability company organized under the laws of the State of California, having its principal place of business at 2107 Bellevue Ave. Los Angeles, CA 90026.

6. Upon information and belief, Wildfox Couture IP Holdings, LLC is a limited liability company organized under the laws of the State of California, having its principal place of business at 2107 Bellevue Ave. Los Angeles, CA 90026.

JURISDICTION AND VENUE

7. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1338. The claims alleged in this Complaint arise under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Lanham Act, 15 U.S.C. §§ 1052 and 1125, *et seq.*

8. This Court has personal jurisdiction over Defendants because, upon information and belief, Defendants have established minimum contacts with this forum and further, Defendants have substantial, continuous, and systemic contacts with the State of New York. Upon information and belief, Wildfox sells its apparel through retailers located in the State of New York. In addition, upon information and belief, Wildfox has a showroom located at 343 Canal Street, Floor 3, New York, NY 10013. By virtue of these actions, Defendants have

purposefully availed themselves of the privilege of conducting business in this State and in this judicial District.

9. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c) because, upon information and belief, a substantial part of the events giving rise to Plaintiffs' claims occurred in this District and because the Defendants are subject to personal jurisdiction in this District.

10. An actual case or controversy exists between the parties. Wildfox has repeatedly threatened to take action against H&M, has asserted that H&M is engaging in acts of trademark infringement and unfair competition, and has demanded that H&M immediately cease and desist from selling the H&M Motif Sweatshirt.

GENERAL ALLEGATIONS

11. Plaintiff H&M Hennes & Mauritz GBC AB designs and sells fashion clothing, accessories and other products for men, women, and children under the H&M brand. In the United States, H&M products are sold only in H&M stores, including H&M's e-commerce store, through Plaintiff H&M Hennes & Mauritz L.P.

12. Upon information and belief, Defendant Wildfox Couture, LLC distributes apparel under the brand name WILDFOX.

13. Upon information and belief, Defendant Wildfox Couture IP Holdings, LLC is the record owner of U.S Registration No. 4,093,309 for the mark WILDFOX in International Class 25 for use in connection with "bottoms, dresses, jackets, scarves, swimwear, and tops" ("WILDFOX" Mark). A true and correct copy of the foregoing registration from the U.S. Patent and Trademark Office Trademark Status and Document Retrieval (TSDR) is attached hereto as Exhibit A.

14. H&M Hennes & Mauritz GBC AB created the Basketball Design to evoke the look of a logo for a basketball team. H&M selected the name “Wildfox” arbitrarily as the name of a fictitious team based in Toronto. The Basketball Design appears on one style sweatshirt, the H&M Motif Sweatshirt, sold under the H&M brand. A true and correct copy of an image of the H&M Motif Sweatshirt is attached hereto as Exhibit B.

15. By letter dated September 15, 2017, counsel for Defendants wrote to H&M Hennes & Mauritz L.P. and claimed that H&M’s promotion and sale of the H&M Motif Sweatshirt constituted trademark infringement and unfair competition in violation of federal, state and common law, including without limitation the Lanham Act, 15 U.S.C. §§ 1114 & 1125(a). A true and correct copy of Defendants’ counsel’s September 15, 2017 letter is attached hereto as Exhibit C.

16. In the September 15, 2017 letter, counsel for Defendants demanded, *inter alia*, that H&M “[i]mmediately halt all sales of any products that incorporate or display the WILDFOX trademark.” Defendants’ counsel also stated that in the event H&M does not comply with their demands, Defendants “will proceed with enforcing [their] rights... [and] will seek compensatory damages, H&M’s profits, trebled damages, punitive damages, injunctive relief, attorney’s fees, and all other remedies afforded by law.”

17. By letter dated October 2, 2017, counsel for Plaintiffs responded on behalf of H&M and explained the reasons why the Basketball Design does not infringe on any of Defendants’ claimed trademark rights and would not likely cause any confusion between the H&M Motif Sweatshirt and Defendants. Among other reasons, H&M counsel explained that the H&M Basketball Design is merely ornamental, and is not used as an indicia of source, and

therefore, typical purchasers would not associate the H&M Design with Defendants. A true and correct copy of H&M counsel's October 2, 2017 letter is attached hereto as Exhibit D.

18. After H&M counsel's October 2, 2017 letter was sent, Defendants continued to threaten litigation. On October 5, 2017, counsel for Defendants reiterated in a telephone conversation with Plaintiffs' counsel that Wildfox was prepared to litigate the matter. Subsequent attempts to resolve the matter were unsuccessful.

19. Defendants' repeated allegations that H&M has infringed the WILDFOX Mark and their demands that H&M stop selling the H&M Motif Sweatshirt created a reasonable apprehension of litigation, and accordingly, there exists an actual case or controversy.

20. Defendants' demands and threats have placed a cloud over H&M's rights to continue selling the H&M Motif Sweatshirt.

21. H&M's use of the term "Wildfox" was merely an element of an ornamental design that consumers would not likely perceive as an indicia of origin, does not constitute a "trademark use," and is not likely to cause confusion or deception.

22. In view of Defendants' threats and allegations, H&M is in need of, and is entitled to, a judicial declaration that: (a) the H&M Basketball Design is merely ornamental and does not function as an indicator of source; (b) there is no likelihood of confusion between Plaintiffs' H&M Motif Sweatshirt on the one hand, and Defendants' WILDFOX Mark on the other; and therefore (c) Plaintiffs' Basketball Design does not infringe any federal trademark rights owned by Defendants and does not constitute unfair competition under federal or state law.

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FIRST CLAIM FOR RELIEF

(Declaratory Judgement of No Federal Trademark Infringement and No Unfair Competition)

23. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 to 22 of this Complaint as if fully set forth herein.

24. Defendants claim that H&M's sale of the H&M Motif Sweatshirt constitutes federal and common law trademark infringement and unfair competition, and, under a threat of litigation, demand that H&M cease selling the H&M Motif Sweatshirt in United States commerce.

25. An actual, present, and justiciable controversy exists between H&M and Defendants concerning H&M's use of the term "Wildfox" in connection with the H&M Basketball Design on the H&M Motif Sweatshirt.

26. Plaintiffs' H&M Motif Sweatshirt is labeled, advertised, marketed and sold in such a manner that there is no likelihood of confusion as between the Defendants' WILDFOX Mark on one hand, and Plaintiffs' H&M Motif Sweatshirt on the other.

27. Plaintiffs seek a declaratory judgment from this Court that the H&M Basketball Design is not likely to cause confusion as to the source, affiliation, or sponsorship of H&M's goods with those of Defendants.

28. Plaintiffs seek declaratory judgment from this Court that the sale of Plaintiffs' H&M Motif Sweatshirt containing the Basketball Design does not constitute trademark infringement under the Lanham Act or under New York state common law.

29. Plaintiffs seek declaratory judgment from this Court that the sale of Plaintiffs' H&M Motif Sweatshirt containing the H&M Basketball Design does not constitute unfair competition under the Lanham Act or under New York state common law.

30. Plaintiffs seek declaratory judgment that Defendants have suffered no, and will not suffer any, damages or loss of goodwill as a result of the sale of Plaintiffs' H&M Motif Sweatshirt.

31. Plaintiffs seek declaratory judgment that Defendants are not entitled to any injunctive relief or damages under 15 U.S.C. § 1125 or the common law of the State of New York.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court enter judgment in their favor as follows:

- A. declaring that Plaintiffs' conduct, including their marketing and sale of Plaintiffs' H&M Motif Sweatshirt containing the H&M Basketball Design, does not constitute trademark infringement or unfair competition under the Lanham Act or under New York State law;
- B. declaring that Defendants are not entitled to any injunctive relief with respect to the sale of Plaintiffs' H&M Motif Sweatshirt with the H&M Basketball Design;
- C. declaring that Defendants have not suffered any and will not suffer any harm or damages, and thus are not entitled to any relief under the Lanham Act or under New York State law;
- D. declaring that Plaintiffs are entitled to sell Plaintiffs' H&M Motif Sweatshirt with the H&M Basketball Design;
- E. awarding Plaintiffs their costs, expenses and attorneys' fees in this action; and
- F. awarding such other further relief to which Plaintiffs may be entitled as a matter of law or equity, or which the Court deems to be just and proper.

Dated: New York, New York
October 16, 2017

Respectfully submitted,

WILSON KEADJIAN BROWNDORF LLP

By: s/Darren W. Saunders
Darren W. Saunders
Mark I. Peroff
114 West 47th Street, 18th Floor
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Mark.Peroff@wkbllp.com

*Attorneys for Plaintiffs
H&M Hennes & Mauritz AB, H&M Hennes
& Mauritz L.P.*

EXHIBIT A

United States of America
United States Patent and Trademark Office

WILDFOX

Reg. No. 4,093,309

SOMMERS, JIMMY (UNITED STATES INDIVIDUAL)
7095 HOLLYWOOD BLVD., #833
LOS ANGELES, CA 90028

Registered Jan. 31, 2012

Int. Cl.: 25

FOR: BOTTOMS; DRESSES; JACKETS; SCARVES; SWIMWEAR; TOPS, IN CLASS 25 (U.S. CLS. 22 AND 39).

TRADEMARK

FIRST USE 8-0-2008; IN COMMERCE 8-0-2008.

PRINCIPAL REGISTER

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 3,719,999.

SER. NO. 85-280,406, FILED 3-29-2011.

ANNE MADDEN, EXAMINING ATTORNEY



David J. Kyffers

Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

Requirements in the First Ten Years*

What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. *See* 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: 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. §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.*

Grace Period Filings*

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

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. *See* 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. *See* 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

EXHIBIT B



Search

SALE / WOMEN / HOODIES & SWEATSHIRTS / SWEATSHIRT WITH MOTIF

SALE



+ ZOOM VIEW FULL SCREEN SHARE



Sweatshirt with Motif

\$7.99 ~~\$17.99~~

COLOR: Gray melange



SIZE: Size S



SIZE GUIDE

ADD TO BAG

Free standard shipping on orders over \$40 using code 0040

PRODUCT DESCRIPTION

DESCRIPTION

Sweatshirt with a motif at front, long raglan sleeves, dropped shoulders, and ribbing at neckline, cuffs, and hem. Slightly longer at back. Soft, brushed inside.

DETAILS

60% cotton, 40% polyester. Imported Art.No. 08-9595



STYLE WITH



PREVIOUS

NEXT

OTHERS ALSO BOUGHT



PREVIOUS

NEXT

DEPARTMENT Women Fashion Men's Fashion Kidswear H&M Home Sale

CORPORATE INFO Career at H&M About H&M group Sustainability Press Investor Relations Corporate Governance

HELP Customer Service My H&M Gift Card Store Locator Size Guide Privacy Policy CA Supply Chains Act FAQ About cookies

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H&M's business concept is to offer fashion and quality at the best price in a sustainable way. H&M has since it was founded in 1947 grown into one of the world's leading fashion companies. The content of this site is copyright-protected and is the property of H & M Hennes & Mauritz AB.



EXHIBIT C

BROWNE GEORGE ROSS LLP
Los Angeles · New York · San Francisco

2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
T (310) 274-7100 F (310) 275-5697

Keith J. Wesley
kwesley@bgrfirm.com

September 15, 2017

Via E-Mail and U.S. Mail

Howland R. Gordon, Esq.
General Counsel
H&M Hennes & Mauritz L.P.
110 5th Ave., Fl. 11
New York, NY 10011
E-Mail: howland.gordon@hm.com

Re: Infringement of the WILDFOX Trademarks

Dear Mr. Gordon:

We represent Wildfox Couture IP Holdings, LLC (“Wildfox”) in connection with trademark enforcement matters. Based in Los Angeles, Wildfox is a contemporary women’s fashion line launched in 2007 and distributed through high-end domestic and foreign department stores and boutiques. Wildfox’s line includes a full range of tops, bottoms, sunglasses, dresses, intimates, and swimwear.

Wildfox is the owner of several U.S. Patent and Trademark Office registrations for the WILDFOX trademark, including registration number 4,093,309 in International Class 25 for, among other things, jackets and tops.¹ Wildfox expends a significant amount of time, money and resources to promote the Wildfox brand, and to protect and enforce its intellectual property rights. Wildfox has used the WILDFOX trademark continuously since 2007. During this time Wildfox apparel has been featured in dozens of publications, including Seventeen, Vogue, Elle, Redbook, Nylon, Women’s Health, Malibu Magazine, Allure, Good Housekeeping, Flaunt, Women’s Wear Daily and many others. As a result of the extensive promotion and significant sales of Wildfox apparel, Wildfox has acquired strong consumer recognition and common-law rights in the mark.

¹ A copy of Registration No. 4,093,309 is attached as Exhibit A.

Browne George Ross LLP

Howland R. Gordon, Esq.
September 15, 2017
Page 2

It has come to our attention that H&M is promoting and selling clothing that infringes upon the WILDFOX trademark. A picture of a sweatshirt sold by H&M that prominently displays an exact copy of the WILDFOX trademark is attached as Exhibit B. The sweatshirt is currently available on the www.hm.com United States and Canadian websites, and we understand it is also sold at H&M's United States stores.

H&M's unauthorized use of the WILDFOX trademark constitutes trademark infringement and unfair competition in violation of federal, state and common law, including without limitation the federal Lanham Act. *See, e.g.*, 15 U.S.C. §§ 1114 & 1125(a). H&M's infringement entitles Wildfox to injunctive and monetary relief, including an accounting and surrender of any profits from the sales of goods bearing the Infringing Mark. *See* 15 U.S.C. § 1117. Given the recognition and fame of the Wildfox brand, and H&M's use of the identical trademark on its products, it is evident that H&M has willfully sought to trade off of the goodwill of Wildfox's brand, as well as the strength and selling power of the WILDFOX trademark.

By this letter we demand that H&M immediately take the following steps and confirm the same in writing within seven (7) days of the date of this letter:

- Immediately and permanently cease all uses of the WILDFOX trademark and any variations thereof;
- Immediately halt all sales of any products that incorporate or display the WILDFOX trademark, or any confusingly similar variations of the WILDFOX trademark ("Infringing Products");
- Provide us an accounting of all revenue generated by H&M and its affiliates in connection with sales of all Infringing Products; and
- Identify all suppliers and manufacturers of the Infringing Products.

We wish to resolve this matter amicably. Nonetheless, if we do not receive a satisfactory response to this letter by the close of business on Friday, September 22, 2017, we will proceed with enforcing our client's rights. In that event, we will seek compensatory damages, H&M's profits, trebled damages, punitive damages, injunctive relief, attorney's fees, and all other remedies afforded by law.

Browne George Ross LLP

Howland R. Gordon, Esq.
September 15, 2017
Page 3

This letter is written without prejudice to Wildfox's rights and remedies, all of which are hereby expressly reserved.

Very truly yours,



Keith J. Wesley

KJW/vb
Encl.

EXHIBIT A

United States of America
United States Patent and Trademark Office

WILDFOX

Reg. No. 4,093,309

SOMMERS, JIMMY (UNITED STATES INDIVIDUAL)

Registered Jan. 31, 2012

7095 HOLLYWOOD BLVD., #833
LOS ANGELES, CA 90028

Int. Cl.: 25

FOR: BOTTOMS; DRESSES; JACKETS; SCARVES; SWIMWEAR; TOPS, IN CLASS 25 (U.S. CLS. 22 AND 39).

TRADEMARK

FIRST USE 8-0-2008; IN COMMERCE 8-0-2008.

PRINCIPAL REGISTER

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 3,719,999.

SER. NO. 85-280,406, FILED 3-29-2011.

ANNE MADDEN, EXAMINING ATTORNEY



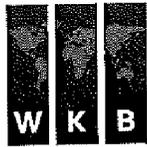
David J. Kybas

Director of the United States Patent and Trademark Office

EXHIBIT B



EXHIBIT D



**WILSON
KEADJIAN
BROWNDORF**

Darren W. Saunders
Partner
114 West 47th Street, Suite 1810
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DID: (646) 783-3653
FAX: (646) 553-5899
dsaunders@wkbllp.com

October 2, 2017

VIA E-MAIL AND FIRST CLASS MAIL

Keith J. Wesley
Browne George Ross LLP
2121 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
kwesley@bgrfirm.com

Re: *Wildfox Couture IP Holdings, LLC*

Dear Mr. Wesley:

We have completed our inquiry into the matter raised in your September 15, 2017 letter. We disagree that a likelihood of confusion exists between the H&M sweatshirt and your client. Nevertheless, H&M shares your client's interest in resolving the matter amicably.

The design in issue was created by H&M to evoke the look of a logo for a basketball team. The term "Wildfox" was used arbitrarily as the name of a fictitious team based in Toronto. The design appears only on one sweatshirt of the thousands of different clothing products currently sold by H&M in the U.S.

As you know, the law does not prohibit all third-party uses of a word or phrase that is registered as a trademark, but only those uses that are likely to cause confusion as to an appreciable number of the relevant purchasers. Moreover, the use of a term as part of an ornamental design which is not likely perceived by customers as an indicia of origin, does not constitute a "trademark use," and therefore does not give rise to an actionable claim under the Lanham Act or common law. As professor McCarthy explains in his leading treatise, "[u]sually, when viewed in context, if it is not immediately obvious that [an] ornamental design is being used as an indication of origin, then probably it is not." 1 McCarthy on Trademarks and Unfair Competition § 7:24 (4th ed.).

Here, in the context of the overall design, the term "Wildfox" would likely be perceived as having no indication of source, and merely as part of an ornamental design. Alternatively, viewers might believe that Wildfox is the name of a basketball team based in Toronto. Either way, typical purchasers of the H&M sweatshirts are not likely to make any connection between the H&M design and your client. In any event, the design was created and used by H&M entirely in good faith, and without any intent

Patagonia, AZ

Irvine, CA

Los Angeles, CA

Washington, D.C.

Western Springs, IL

Worcester, MA

Merrillville, IN

National Harbor, MD

Cherry Hill, NJ

New York, NY

Philadelphia, PA

Brookfield, WI

Cologne, Germany

London, United Kingdom

October 2, 2017

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to misappropriate anyone else's goodwill. Indeed, as part of our inquiry into this matter, we located another design for a fictitious sports team called the "Wildfox." (*See* Exhibit A, hereto).

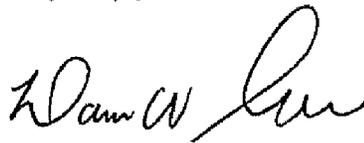
Moreover, the channels of trade through which the parties' respective products are sold are distinct. The H&M sweatshirts are sold only in H&M stores, including its online store. Accordingly, there is no overlap in the retail outlets in which the products are sold. Finally, although actual consumer confusion is not required to prove a claim of trademark infringement, we expect that you would have identified any such instances in your letter had you been aware of them.

In sum, in view of the ornamental nature of the H&M design, the differences in the trade channels, the lack of intent by H&M to cause any confusion, and the lack of any instances of actual confusion, among other reasons, we conclude that the H&M sweatshirt design is not likely to be confused with your client or any of its products. Accordingly, H&M is not agreeable to complying with the demands set forth in your letter. Nevertheless, as "Wildfox" is of no importance to H&M, it has no plans to use this term on its clothing or other products in the future.

Under the circumstances, we are hopeful that the parties can reach an amicable resolution. We look forward to your response. Please feel free to contact me by telephone should you wish to discuss the matter.

H&M expressly reserves all rights and remedies in connection with this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Darren W. Saunders". The signature is fluid and cursive, with the first name being the most prominent.

Darren W. Saunders

EXHIBIT A

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Add photo or note



eShirtLabs saved to Sports Logos
NUCB WILDFOX identity concept on Behance

Comments