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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 BACKGRID USA, INC.,

13 Plaintiff,

14 vs.

15 FASHION NOVA, INC.

16 Defendants.
17

Case No. 2:19-cv-01476

**DEFENDANT FASHION NOVA,
INC.'S ANSWER TO AMENDED
COMPLAINT**

18
19 Defendant Fashion Nova, Inc. ("Defendant") hereby answers the Amended
20 Complaint ("FAC") filed by Plaintiff BackGrid USA, Inc. ("Plaintiff") for
21 Copyright Infringement and Removal of Copyright Management Information.

22 **PREAMBLE**

23 The preamble to Plaintiff's FAC contains no factual allegations and therefore
24 does not require a response.

25 **JURISDICTION AND VENUE**

26 1. Defendant denies the allegations contained in paragraph 1 as the
27 allegations contained therein are legal conclusions.

28 2. Defendant denies the allegations contained in paragraph 2 as the

1 allegations contained therein are legal conclusions. Defendant further denies that
2 Plaintiff has suffered any injury.

3 **PARTIES**

4 3. Defendant lacks sufficient information to either admit or deny the
5 allegations contained therein and on that basis denies each and every allegation
6 contained in paragraph 3.

7 4. Defendant admits the allegations contained in paragraph 4.

8 **FACTS COMMON TO ALL COUNTS**

9 5. Defendant lacks sufficient information to either admit or deny the
10 allegations contained therein and on that basis denies each and every allegation
11 contained in paragraph 5.

12 6. Defendant lacks sufficient information to either admit or deny the
13 allegations contained therein and on that basis denies each and every allegation
14 contained in paragraph 6.

15 7. Defendant denies the allegations contained in paragraph 7 as the
16 allegations contained therein are legal conclusions.

17 8. Defendant denies the allegations contained in paragraph 8 as the
18 allegations contained therein are legal conclusions.

19 9. Defendant denies the allegations contained in paragraph 9 as the
20 allegations contained therein are legal conclusions.

21 10. Defendant denies the allegations contained in paragraph 10 as the
22 allegations contained therein are legal conclusions.

23 11. Defendant denies the allegations contained in paragraph 11 as the
24 allegations contained therein are legal conclusions.

25 12. Defendant denies the allegations contained in paragraph 12 as the
26 allegations contained therein are legal conclusions.

27 13. Defendant denies the allegations contained in paragraph 13 as the
28 allegations contained therein are legal conclusions.

14. Defendant denies the allegations contained in paragraph 14 as the allegations contained therein are legal conclusions.

15. Defendant denies the allegations contained in paragraph 15 as the allegations contained therein are legal conclusions.

16. Defendant denies the allegations contained in paragraph 16 as the allegations contained therein are legal conclusions.

17. Defendant admits that its website contains the following sentence: “‘Nova Style’ is making the rules, and breaking the rules; our customer is the leader of the pack, the last one standing, in the front row, and always on the list.” Defendant admits that is an apparel retailer that sells its products online and in “brick and mortar” retail locations. Defendant denies the remainder of paragraph 17.

18. Defendant denies the allegations contained in paragraph 18.

19. Defendant denies the allegations contained in paragraph 19.

20. Defendant denies the allegations contained in paragraph 20.

FIRST CLAIM FOR RELIEF

(Infringement of Copyright Registration Number VA0002069876)

21. Paragraph 21 contains no factual allegations, and therefore, does not require a response. To the extent that paragraph 21 re-alleges the allegations of any of paragraphs 1-20, Defendant’s responses to said paragraphs are unchanged here.

22. Defendant denies the allegations contained in paragraph 22 as the allegations contained therein are legal conclusions.

23. Defendant denies the allegations contained in paragraph 23.

24. Defendant denies the allegations contained in paragraph 24.

25. Defendant denies the allegations contained in paragraph 25.

SECOND CLAIM FOR RELIEF

(Infringement of Copyright Registration Number VA0002078339)

26. Paragraph 26 contains no factual allegations, and therefore, does not

1 require a response. To the extent that paragraph 26 re-alleges the allegations of any
2 of paragraphs 1-25, Defendant's responses to said paragraphs are unchanged here.

3 27. Defendant denies the allegations contained in paragraph 27 as the
4 allegations contained therein are legal conclusions.

5 28. Defendant denies the allegations contained in paragraph 28.

6 29. Defendant denies the allegations contained in paragraph 29.

7 30. Defendant denies the allegations contained in paragraph 30.

8 **THIRD CLAIM FOR RELIEF**

9 **(Infringement of Copyright Registration Number VA0002062268)**

10 31. Paragraph 31 contains no factual allegations, and therefore, does not
11 require a response. To the extent that paragraph 31 re-alleges the allegations of any
12 of paragraphs 1-30, Defendant's responses to said paragraphs are unchanged here.

13 32. Defendant denies the allegations contained in paragraph 32 as the
14 allegations contained therein are legal conclusions.

15 33. Defendant denies the allegations contained in paragraph 33.

16 34. Defendant denies the allegations contained in paragraph 34.

17 35. Defendant denies the allegations contained in paragraph 35.

18 **FOURTH CLAIM FOR RELIEF**

19 **(Infringement of Copyright Registration Number VA0002069872)**

20 36. Paragraph 36 contains no factual allegations, and therefore, does not
21 require a response. To the extent that paragraph 36 re-alleges the allegations of any
22 of paragraphs 1-35, Defendant's responses to said paragraphs are unchanged here.

23 37. Defendant denies the allegations contained in paragraph 37 as the
24 allegations contained therein are legal conclusions.

25 38. Defendant denies the allegations contained in paragraph 38.

26 39. Defendant denies the allegations contained in paragraph 39.

27 40. Defendant denies the allegations contained in paragraph 40.

FIFTH CLAIM FOR RELIEF

(Infringement of Copyright Registration Number VA0002096161)

41. Paragraph 41 contains no factual allegations, and therefore, does not require a response. To the extent that paragraph 41 re-alleges the allegations of any of paragraphs 1-40, Defendant's responses to said paragraphs are unchanged here.

42. Defendant denies the allegations contained in paragraph 42 as the allegations contained therein are legal conclusions.

43. Defendant denies the allegations contained in paragraph 43.

44. Defendant denies the allegations contained in paragraph 44.

45. Defendant denies the allegations contained in paragraph 45.

SIXTH CLAIM FOR RELIEF

(Removal of Copyright Management Information)

46. Paragraph 46 contains no factual allegations, and therefore, does not require a response. To the extent that paragraph 46 re-alleges the allegations of any of paragraphs 1-45, Defendant's responses to said paragraphs are unchanged here.

47. Defendant lacks sufficient information to either admit or deny the allegations contained therein and on that basis denies each and every allegation contained in paragraph 47.

48. Defendant denies the allegations contained in paragraph 48.

49. Defendant denies the allegations contained in paragraph 49.

50. Defendant denies the allegations contained in paragraph 50.

51. Defendant denies the allegations contained in paragraph 51.

ANSWER TO PLAINTIFF'S PRAYER FOR RELIEF

Defendant denies each and every averment and request for relief contained in the Prayer for Relief of the FAC.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. The FAC and each and every purported claim for relief thereof, fails to state facts sufficient to constitute any claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

2. The FAC, and each and every purported claim for relief thereof, is barred (in whole or in part) because Defendant has not infringed and is not liable for the infringement of the purported copyrights that Plaintiff asserts in this action, among other things, because Defendant did not engage in access to or copying of Plaintiff's purported copyrighted work.

THIRD AFFIRMATIVE DEFENSE

3. The FAC, and each and every purported claim for relief thereof, is barred (in whole in part) because Defendant has not infringed and is not liable for the infringement of the purported copyrights that Plaintiff asserts in this action, among other things, because Defendant is informed and believes and on that basis alleges that any purportedly infringing products have not copied any purported constituent original and protectable elements of Plaintiff's purported copyrighted works, with a reasonable opportunity for investigation or discovery being likely to provide evidentiary support.

FOURTH AFFIRMATIVE DEFENSE

4. Defendant is informed and believes and on that basis alleges that the FAC, and each and every purported claim for relief thereof, is barred (in whole or in part) because the purported copyrights that Plaintiff asserts in this action are invalid, void, or unenforceable.

FIFTH AFFIRMATIVE DEFENSE

5. Defendant is informed and believes and on that basis alleges that the FAC, and each and every purported claim for relief thereof, is barred (in whole or in part) by Plaintiff's fraud or deception in the copyright registration process for

1 which a reasonable opportunity for investigation or discovery is likely to provide
2 evidentiary support.

3 **SIXTH AFFIRMATIVE DEFENSE**

4 6. Defendant is informed and believes and on that basis alleges that the
5 FAC, and each and every purported claim for relief thereof, is barred (in whole or
6 in part) by Plaintiff's misuse of the purported copyrights for which a reasonable
7 opportunity for investigation or discovery is likely to provide evidentiary support.

8 **SEVENTH AFFIRMATIVE DEFENSE**

9 7. Plaintiff's claims and the relief requested are barred based on fair use.

10 **EIGHTH AFFIRMATIVE DEFENSE**

11 8. Plaintiff's claims are barred, in whole or in part, because Plaintiff does
12 not have standing to bring its copyright claim.

13 **NINTH AFFIRMATIVE DEFENSE**

14 9. Defendant is informed and believes and on that basis alleges that the
15 FAC, and each and every purported claim for relief thereof, is barred (in whole or
16 in part) because of Plaintiff's unclean hands for which a reasonable opportunity for
17 investigation or discovery is likely to provide evidentiary support.

18 **TENTH AFFIRMATIVE DEFENSE**

19 10. Defendant is informed and believes and on that basis alleges that the
20 FAC, and each and every purported claim for relief thereof, is barred (in whole or
21 in part) because Defendant was privileged and justified in acting as it did as a
22 company acting for business purposes in the marketplace, protected by the privilege
23 for competitors with a reasonable opportunity for investigation or discovery being
24 likely to, provide evidentiary support.

25 **ELEVENTH AFFIRMATIVE DEFENSE**

26 11. Defendant is informed and believes and on that basis, alleges that the
27 FAC, and each and every purported claim for relief thereof, is barred (in whole or
28 in part) because Plaintiff has failed to name parties necessary for a full and

1 complete adjudication of its claims, including without limitation as required by
2 Rule 19 of the *Federal Rules of Civil Procedure* with a reasonable opportunity for
3 investigation or discovery being likely to provide evidentiary support.

4 **TWELFTH AFFIRMATIVE DEFENSE**

5 12. The FAC, and each and every purported claim for relief thereof, is
6 barred (in whole or in part) by the applicable statute of limitations, and among other
7 things, Plaintiff is barred from seeking recovery for any of Defendant's alleged
8 infringements occurring more than three years before the filing of the FAC, under
9 Section 507 of Title 17 of the United States Code.

10 **THIRTEENTH AFFIRMATIVE DEFENSE**

11 13. Defendant is informed and believes and on that basis alleges that the
12 FAC, and each and every purported claim for relief thereof; is barred (in whole or
13 in part) because Plaintiff has sustained no loss or damages for which a reasonable
14 opportunity for investigation or discovery is likely to provide evidentiary support.

15 **FOURTEENTH AFFIRMATIVE DEFENSE**

16 14. If Plaintiff suffered any damages, which Defendant denies, Defendant
17 acted in good faith, innocent of any knowledge or intent to infringe Plaintiff's rights
18 or cause damage to Plaintiff; and if such good faith and lack of intent does not
19 preclude liability, any general or statutory damages awarded to Plaintiff should be
20 reduced accordingly.

21 **FIFTEENTH AFFIRMATIVE DEFENSE**

22 15. The FAC, and each and every purported claim for relief thereof, fails
23 to state facts sufficient to permit recovery of statutory damages against Defendant;
24 and therefore, no such award should be granted.

25 **SIXTEENTH AFFIRMATIVE DEFENSE**

26 16. The FAC, and each and every purported claim for relief thereof, fails
27 to state facts sufficient to permit recovery of attorneys' fees against Defendant; and
28 therefore, no such award should be granted.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. Plaintiff has failed to mitigate the damages, if any, that Plaintiff has allegedly suffered.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. Defendant, upon information and belief, alleges that Plaintiff failed to mark properly its alleged copyrighted design and failed to give Defendant notice of the alleged copyright infringement.

NINETEENTH AFFIRMATIVE DEFENSE

19. Defendant alleges that any purported damages sought by the Plaintiff in the form of Defendant's profits are limited by the apportionment theory based on the percentage of profits attributable to the alleged infringement of the allegedly copyrighted work.

TWENTIETH AFFIRMATIVE DEFENSE

20. Defendant alleges that it is legally impossible for it to have engaged in infringement of Plaintiff's purported copyrighted works, as Defendant did not supply, produce, license, manufacture, distribute, or sell Plaintiff's purported copyrighted work.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. Plaintiff's claims and the relief requested are barred as Plaintiff's alleged works are not copyrightable.

TWENTY-THIRD AFFIRMATIVE DEFENSE

22. Plaintiff's purported copyrighted works and Defendant's works are not substantially similar, and thus Plaintiff cannot prove its claim of copyright infringement.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

23. Plaintiff's purported copyrighted works and Defendant's works are not strikingly similar, and thus Plaintiff is obligated to prove access by Defendant to Plaintiff's work in order to succeed on its claim of copyright infringement.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

24. Defendant alleges that it is legally impossible for it to have engaged in infringement of Plaintiff's purported copyrighted works, as Defendant has been granted a license for Plaintiff's purported copyrighted works or otherwise is permitted to possess, utilize, and/or reproduce Plaintiff's purported copyrighted works.

WHEREFORE, Defendant prays as follows:

1. That Plaintiff takes nothing, whether in the form of damages or injunctive relief, by its FAC;
2. For a judgment dismissing the FAC with prejudice;
3. For costs of suit including, without limitation, reasonable attorneys' fees as may be allowed under Section 505 of Title 17 of the United States Code and as may otherwise be allowed by law;
4. For a determination that Plaintiff's works are not copyrightable and an order that any related Certificates of Registration be cancelled; and
5. For such other and further relief as the Court deems just and proper.

Dated: May 24, 2019

NIXON PEABODY LLP

By: /s/ Staci Jennifer Riordan
Staci Jennifer Riordan
Neal J. Gauger
Attorneys for Defendant
FASHION NOVA, INC.

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JURY DEMAND

Defendant hereby demands a trial by jury on all issues properly triable before a jury.

Dated: May 24, 2019

NIXON PEABODY LLP

By: /s/ Staci Jennifer Riordan

Staci Jennifer Riordan
Neal J. Gauger
Attorneys for Defendant
FASHION NOVA, INC.