

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

Puff Corporation

Plaintiff,

v.

Kandypens, Inc.,

Defendant.

Civil Action No. 3:20-CV-333

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Puff Corporation (“*Puffco*” or “Plaintiff”) hereby states its complaint against Kandypens, Inc.(“*Kandypens*” or “Defendant”) for trade dress infringement and unfair and deceptive trade practices in violation of the Lanham Act, 15 U.S.C. § 1125(a) and N. C. Gen. Stat. § 75-1.1 *et seq.*

THE PARTIES

1. Plaintiff Puffco is a Delaware Corporation with its principal place of business at 1201 West 5th Street, Suite T-530, Los Angeles, California 90017. Puffco manufactures, advertises, distributes and sells various types of electronic vaporizers throughout the United States, including to consumers physically residing in the state of North Carolina and this District.

2. Upon information and belief, Defendant Kandypens is a Delaware corporation with a principal place of business in Santa Barbara, California.

3. Upon information and belief, Defendant also manufactures, advertises, distributes, and sells various types of electronic vaporizers throughout the United States, including to retailers and consumers physically residing in the State of North Carolina and this District. By way of

example only, and as shown below, Defendant's products, including the accused products, have been and are sold in this judicial district, including, without limitation, Max & Lola Bodega in Charlotte, NC; One Love Smoke Shop and Lifestyle Apparel in Charlotte, NC; Elektrik Avenew in Charlotte, NC; Sunshine Daydreams in Charlotte, NC; and Infinitys End in Charlotte, NC. Below is a screen shot of <https://www.kandypens.com/stores/>, Kandypens' webpage showing a list of dealers of Defendant's products in this judicial district:

The screenshot displays the Kandypens website interface. At the top, a yellow banner reads "COVID-19 INFORMATION: WE ARE SHIPPING". Below this is a red navigation bar with the Kandypens logo, a phone number (855-526-3904), and social media icons. The main navigation menu includes links for products, accessories, faq, artists, videos, news, and MY ACCOUNT. A shopping cart icon shows a balance of \$0.00.

The "Dealers" section on the left lists the following:

- Max & Lola Bodega**
Address: 1501 S. Mint St
Charlotte, 28203
- One Love Smoke Shop and Lifestyle Apparel**
Address: 1041 Central Ave
Charlotte, 28204
- Elektrik Avenew E Cigs**
Address: 2125 N Davidson St
Charlotte, 28205
- Sunshine Daydreams**
Address: 3225 N Davidson St
Charlotte, 28205
- Sunshine Daydreams**
Address: 3225 N Davidson St
Charlotte, 28205
- Infinitys End**
Address: 5119 A South Blvd
Charlotte, 28217
- Infinitys End**

The right side of the page features a "FILTER" section with a "Current Location" dropdown set to "Charlotte, NC, USA" and a "Search Radius" dropdown set to "Everywhere". Below these are "SEARCH" and "LOCATE NEARBY" buttons.

The map shows Charlotte, NC, with several blue circular markers indicating dealer locations. A red pin is also visible near the Charlotte-Douglas International Airport. The map includes street names, highway numbers, and neighborhood names like Myers Park and Mint Hill.

4. Upon information and belief, Defendant operates an interactive website at (<https://www.kandypens.com/oura/>), which displays the infringing trade dress, promotes the infringing products, and allows Internet users to purchase Defendant's infringing products, and this website is directed to and accessible by customers in North Carolina and this District. *See* Exhibit 1, Screen print out of <https://www.kandypens.com/oura/>.

JURISDICTION AND VENUE

5. This Court has original subject matter jurisdiction over Plaintiff's federal claims in this action pursuant to Section 39 of the Lanham Act, 15 § U.S.C. § 1121, and 28 U.S.C. §§ 1331 and 1338. This court has supplemental jurisdiction over Plaintiff's related state law claims pursuant to 28 U.S.C. §§ 1338 and 1367.

6. This Court has personal jurisdiction over Defendant because, upon information and belief, (a) Defendant has committed acts of trade dress infringement in the State of North Carolina and this judicial district, and Plaintiff's claims arise out of such acts; (b) Defendant's products which infringe Plaintiff's trade dress are available for purchase in the State of North Carolina and this judicial district, (c) Defendant regularly conducts business in the State of North Carolina and this judicial district; and (d) Defendant has otherwise made or established contacts in the State of North Carolina and this judicial district sufficient to permit the exercise of personal jurisdiction. By way of example only, Defendant's products, including the accused products, have been and are sold in this judicial district, including, without limitation, Max & Lola Bodega in Charlotte, NC; One Love Smoke Shop and Lifestyle Apparel in Charlotte, NC; Elektrik Avenew in Charlotte, NC; Sunshine Daydreams in Charlotte, NC, and Infinitys End in Charlotte, NC.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400.

FACTUAL BACKGROUND

A. Puffco's PEAK® Trade Dress

8. Puffco, founded in 2013, is an award winning manufacturer of a variety of electronic vaporizer products. Since the company's launch in 2013, Puffco has become one of the most well-known brands in the electronic vaporizer industry. One of Puffco's most successful products is the PEAK® vaporizer.

9. The PEAK® vaporizer is an electrically-powered oral vaporizer for vaporizing dry herbs, oils, concentrates and other chemical flavorings for personal inhalation.

10. Puffco invested significantly in the development of the overall design and appearance of its PEAK® vaporizer with the desire to create an electronic vaporizer that was unique in the industry and instantly recognizable by consumers due to its sleek, futuristic design.

11. To distinguish Puffco's PEAK® vaporizer from other brands of vaporizers on the market, Puffco adopted a unique, distinctive, and non-functional trade dress which includes both the overall design and shape of the product as well as the uniquely shaped top, the appearance and shape of the detachable base of the vaporizer, and the thin strip of LED lighting which runs horizontally across the middle of the base. The features of the PEAK® Trade Dress (further defined in Paragraph 11) are visually depicted in detail in Exhibits 2 and 3 but can be more generally, and non-exhaustively described, as follows:

- a. A sleek conical design with the base of the device being larger in diameter than the top of the device.
- b. A detachable cone shaped top which is transparent revealing a second smaller piece inside the detachable top which is conical in shape and opaque rather than transparent.

- c. A sleek circular shaped detachable base with a thin band of LED lighting appearing as a diagonal line running 360° around the center of the base.
- d. An atomizer bucket which extends upwardly from the center of the device in a semi-circle shape.

12. All of the features described in Paragraph 10 (a)-(d) above, depicted in Exhibits 2 and 3 below, and the overall shape of the PEAK® vaporizer, make up the “PEAK® Trade Dress.”

13. All of the features of the PEAK® Trade Dress were adopted for the purpose of aesthetics and to serve a source-identifying role; none of the features of the PEAK® Trade Dress are functionally essential to the device’s intended use or purpose. As detailed herein, the PEAK® Trade Dress is non-functional for at least the following reasons: (1) the PEAK® Trade Dress is the subject of ornamental and non-functional design patent or applications, and (2) the existing electronic vaporizers currently on the market utilize alternative designs, confirming that the exterior is non-functional. *See* Exhibit 4, screen print outs showing competitive products with alternative design features.

14. The non-functional design of the glass top of the PEAK® vaporizer is the subject of a design patent which issued on April 28, 2020 and assigned U.S. Patent No. D882867. *See* Exhibit 2, which is a copy of U.S. Patent No. D882867.

15. The non-functional design of the base of the PEAK® vaporizer is the subject of a design patent application which Puffco filed on November 11, 2018. *See* Exhibit 3, which is a copy of the filing receipt for U.S. Patent Application No. 29/669,755.¹

¹ Puffco anticipates U.S. Patent Application No. 29/669,755 will ultimately result in two design patents; one for the base of the PEAK device and a second design patent covering the device in its entirety.

16. Competitors are not at a significant non-reputation related disadvantage by Puffco's exclusive use of the PEAK® Trade Dress as is evident from the existing electronic vaporizers currently on the market which utilize alternative designs in terms of differences in overall appearance, differences in the shape of the base of the vaporizers, (including the absence of and alternatives for, a thin strip of LED lighting running 360° around the base), and differences in the appearance of the top piece (including the absence of the inner cone). *See* Exhibit 4, screen print outs showing competitive products with alternative design features.

17. Since the time it was first available for pre-sale on January 15, 2018, the PEAK® vaporizer and its associated Trade Dress quickly gained the attention of the media, and the relevant consumers, and has since been the subject of numerous unsolicited media reports.

18. Numerous news media sources, in reporting on the launch of the PEAK® vaporizer, discuss the overall design and appearance of the PEAK® vaporizer as being unique and/or memorable. *See* Exhibit 5, examples of third party media coverage of the PEAK® vaporizer.

19. Puffco has invested significant amounts of money and substantial effort in the nationwide advertising and promotion of its PEAK® vaporizer which has resulted in great commercial success and widespread consumer recognition of the PEAK® Trade Dress as an indicator of source.

20. Since January 15th, 2018, Puffco has sold in excess of 220,000 PEAK® vaporizers resulting in estimated aggregate sales revenue of \$50 Million dollars.

21. Puffco's PEAK® vaporizer has been continuously sold in U.S. commerce nationwide directly from Puffco's online retail store, as well as, through third party retailers who distribute the products through online retail stores and in physical retail locations.

22. As a direct result of Puffco's continuous, wide spread use of the PEAK® Trade Dress in connection with its electronic vaporizer, extensive advertising, promotion, and extensive sales of the product under the PEAK® Trade Dress, the relevant consuming public has come to recognize the PEAK® Trade Dress as identifying Puffco as the source of the goods.

23. The PEAK® Trade Dress has developed primary significance in the minds of the public as identifying Puffco as the source of the PEAK® vaporizer, rather than identifying the product itself.

24. Thus, the PEAK® Trade Dress has acquired valuable goodwill, recognition, and secondary meaning among the relevant consumers.

B. Defendant's Infringing Product Design

25. Upon information and belief, sometime in 2019, and well after the commercial launch of the PEAK®, Defendant began marketing, promoting, manufacturing and selling the Aura vaporizer, which is an electronic vaporizer for use with concentrates. *See* Exhibit 6 screen print out from Defendant's webpage showing the Aura vaporizer available for purchase. <https://www.kandypens.com/oura-black.html>.

26. Upon information and belief, Defendant had not commercially marketed a portable vaporizing device having the configuration of the Aura prior to the commercialization of the Puffco PEAK®.

27. Upon information and belief, Defendant manufactured and sold, and continues to manufacture and sell, among other variations, the Aura vaporizer which copies features of, and is confusingly similar in appearance to, Puffco's PEAK® Trade Dress, and therefore is likely to deceive or confuse the purchasing public as to the source or origin of Defendant's products.

28. Upon information and belief, Defendant was aware of Plaintiff's PEAK® vaporizer and its associated Trade Dress and goodwill associated therewith at the time it adopted and began use of the Infringing Product Design (defined in Paragraph 30 below) with the Aura vaporizer.

29. Upon information and belief, Defendant intentionally and directly copied a number of distinctive, non-functional features from Plaintiff's PEAK® Trade Dress intending capitalize on the popularity of, and demand for, Puffco's PEAK® vaporizer. A side by side comparison is illustrative of the similarities (full size versions of the photos below along with additional comparison photos of the PEAK® vaporizer and the Aura vaporizer are attached as Exhibit 7)- Defendant's Aura vaporizer appears on the left and Puffco's PEAK® vaporizer appears on the right:



Comparison Photo #1



Comparison Photo #2



Comparison Photo #3



Comparison Photo #4



Comparison Photo #5

30. In addition to the Defendant's Oura having a confusingly similar overall appearance and commercial impression as that of Puffco's PEAK®, the following is a summary of some of the distinctive, non-functional features which are confusingly similar to Puffco's PEAK® Trade Dress:

- a. A sleek conical design with the base of the device being larger in diameter than the top of the device.
- b. A detachable top which is transparent revealing a second smaller piece inside the detachable top which is conical in shape and opaque rather than transparent.

- c. A sleek circular shaped detachable base with a thin band of LED lighting appearing as a diagonal line running 360° around the center of the base.
- d. An atomizer bucket which extends upwardly from the center of the device in a semi-circle shape.

The features of the Oura vaporizer described above, the overall design depicted in Comparison Photos 1-5 and the remaining photos in Exhibit 7 are collectively referred to as the “Infringing Product Design.”

31. A number of features of the Infringing Product Design of Defendant’s Oura are substantially and confusingly similar to a number of the non-functional, distinctive features of the PEAK® vaporizer and as a result the overall appearance and commercial impression of the Oura is confusingly similar to the overall appearance and commercial impression of Puffco’s PEAK® Trade Dress.

32. Defendant has admitted that it had in its possession a Puffco PEAK® product at the time it created the Oura.

33. Defendant’s intentional direct copying of the PEAK® Trade Dress is consistent with Defendant’s pattern and practice of copying Puffco’s devices.

34. For example, a prior Kandypens device having a design that was copied from Puffco is the “Galaxy ‘The R.O.G’ “vaporizer, which copied the overall look and design of the Puffco Pro® vaporizing pen. An admission of Kandypens’ misappropriation of the Puffco Pro® design is even implicit in the device name, as upon information and belief, the name “The R.O.G.” is intended to refer to the founder and CEO of Puffco, Roger Volodarsky (“Mr. Volodarsky”), who is well-known by enthusiasts in consumption platforms for concentrates. Kandypens has also posted messages on social media promoting the “The R.O.G.,” accompanied by the likenesses of

Mr. Volodarsky, presumably to confirm Kandypens' bad faith intent to misappropriate the likeness of Puffco's CEO and to create the false impression that Kandypens' products are affiliated with, sponsored by, or associated with Mr. Volodarsky and/or Puffco, when they are not. Examples are shown below:

The screenshot shows the top navigation bar of the Kandypens website with the logo and links for products, accessories, faq, artists, news, and my account. The price is listed as \$144.95. The product image features a stylized logo of a bearded man with sunglasses and the text 'THE ROG'. The product specifications list features such as 'Compatible with concentrates', 'Includes Tornado Coil', 'Adjustable Airflow', 'Temperature Controlled Battery (350°, 390°, 430°)', 'Upgraded Mouthpiece with Air Carb (Free Gift)', 'Quartz Crystal Chamber', 'Dual Quartz Rods', 'Titanium Coil', 'Leak Proof Technology™(no clogging or leaking)', '10 Second Auto-Shutoff (Safety Feature)', and 'Deep Chamber'.

35. Further evidence to support Defendant's pattern and practice of copying Puffco products, Kandypens' principal, Graham Gibson, acquired and then returned disassembled Puffco products to Puffco, along with a handwritten note on his business card, stating, "Thanks for the inspiration pal!"





36. Kandypens has also been accused of counterfeiting and selling products that falsely bear the UL® certification mark, when, on information and belief, Kandypens adopted and used the UL® certification mark on its products without any such certification or testing by UL, LLC. The Court may take judicial notice that Kandypens was accused of counterfeiting and infringing the UL® mark in *UL LLC v. AFG Distribution, Inc.*, 19-CV-2724 (N.D. Ill).

37. Kandypens and its owner, Graham Gibson, have also been accused of trademark infringement in *Waxxy Vapir, Inc. v. Gibson et al.*, 0:16-cv-60298-WJZ (S.D. Fla.).

38. Still further, Kandypens' owner, Graham Gibson, was sued by the Federal Trade Commission for making false claims in his ads, including charging customers for “free” trials, and saying his products had been endorsed by Oprah Winfrey and Rachael Ray. In 2012, Gibson settled with the FTC, and agreed to pay the agency \$1.5 million.

39. Defendant is not authorized or licensed to distribute, market, or sell any products incorporating or using the PEAK® Trade Dress or any confusingly similar variation thereof.

40. Defendant is a direct competitor of Puffco and the PEAK® vaporizer and Oura are sold by at least a few of the same online retailers. *See* Exhibit 8, examples of third party retailers currently offering both the PEAK® vaporizer and the Oura vaporizer.

41. Defendant's Oura vaporizer and Puffco's PEAK® vaporizer are marketed and sold to the same consumers.

42. Defendant's marketing, sale, promotion, and use of the Infringing Design is likely to cause retailers and consumers to be confused or deceived or mistakenly believe that Defendant's Infringing Product Design is made, sponsored, endorsed, authorized by, or in some other manner affiliated with Puffco, which it is not. This is especially harmful to Puffco with respect to those consumers who perceive a defect or lack of quality as being attributed to the Puffco instead of to the Defendant.

43. Thus, the likelihood of mistake, confusion, and deception caused by the Defendant's use of the Infringing Product Design has caused and will cause in the future, irreparable harm to the goodwill symbolized by the PEAK® Trade Dress and the reputation it embodies.

44. The forgoing activities by Defendant have caused and will continue to cause Puffco to suffer damages, including but not limited to lost sales, lost profits, and damaged goodwill.

CAUSES OF ACTION

COUNT I-TRADE DRESS INFRINGEMENT UNDER SECTION 32 OF THE LANHAM ACT (15 U.S.C. §1125(a))

45. Puffco repeats and realleges each of the allegations above as if fully set forth herein.

46. Puffco is the owner of the PEAK® Trade Dress, which is protectable at law, under the Lanham Act. The PEAK® Trade Dress is primarily non-functional, highly distinctive, and has become widely associated to the relevant consumers as identifying a single source of the electronic vaporizer, namely, Puffco.

47. The PEAK® Trade Dress is primarily non-functional for at least the following reasons: (1) all of the features of the PEAK® Trade Dress were adopted for the purpose of aesthetics and to serve a source-identifying role, (2) none of the features of the PEAK® Trade Dress are functionally essential to the device's intended use or purpose, (3) the PEAK® Trade Dress is the subject of ornamental and non-functional design patent or applications (*See* Exhibits 2-3), and (4) the existing electronic vaporizers currently on the market utilize alternative designs, confirming that the exterior is non-functional (*See* Exhibit 4) screen print outs showing competitive products with alternative design features.

48. The PEAK® Trade Dress is primarily non-functional as evidenced by the existing electronic vaporizers currently on the market which utilize alternative designs in terms of differences in overall appearance, differences in the shape of the base of the vaporizers, (including the absence of and alternatives for, a thin strip of LED lighting running 360° around the base), and differences in the appearance of the top piece (including the absence of the inner cone). *See* Exhibit 4, screen print outs showing competitive products with alternative design features.

49. The PEAK® Trade Dress has acquired secondary meaning by virtue of its extensive promotion, media attention, and widespread, nationwide, commercial sales in excess of 220,000 units generating aggregate sales revenue of approximately \$50 Million.

50. The PEAK® Trade Dress acquired secondary meaning before the defendant adopted and began use of the Infringing Product Design. Additionally, upon information and belief, Defendant intentionally copied the PEAK® Trade Dress, which creates a presumption of secondary meaning in this District.

51. The Infringing Product Design is confusingly similar in appearance to Plaintiff's PEAK® Trade Dress in light of the culmination of at least the following shared features: both devices appear as sleek conical designs with the base of the devices being larger in diameter than the top of the devices, both devices feature a detachable tops which are transparent revealing a second smaller piece inside the detachable tops which are conical in shape and opaque rather than transparent, both devices feature sleek circular shaped detachable bases with a thin band of LED lighting appearing as a diagonal line running 360° around the center of the base, and both devices feature atomizer buckets which extend upwardly from the center of the device in a semi-circle shape. The location of the power button under the atomizer bucket, the location of the charging port under the parties respective logos, the location of the parties respective logos on the device, the shape of the carbon cap and shape of the tether that attaches the carbon cap to the atomizer, are also identical in both devices.

52. The thin band of LED lighting within the Infringing Product Design is identical to the LED lighting featured in the PEAK® Trade Dress.

53. The conical shaped piece inside the detachable top of the Infringing Product Design is practically identical to the conical shaped piece inside the detachable top of the PEAK® Trade Dress.

54. The overall commercial impression of the Infringing Product Design is confusingly similar to the commercial impression of the PEAK® Trade Dress.

55. Defendant's Oura vaporizer and Plaintiff's PEAK® vaporizer are highly similar if not substantially identical in light of both being, generally, electronic vaporizers for use in connection with personal inhalation of concentrates and the products are also similar in size, weight, and price.

56. The Defendant's Oura vaporizer and Puffco's PEAK® vaporizers are marketed and sold to the same consumers and travel in the same channels of trade.

57. Defendant's acts of distributing, marketing, and selling its Oura vaporizer designed in a way that is confusingly similar to Plaintiff's PEAK® Trade Dress constitutes unfair competition, false designation of origin and false descriptive of fact that is likely to cause consumers to be confused as to the source, affiliation, connection, association, or approval of Defendant or Defendant's goods in violation of the Lanham Act, 15 U.S.C. § 1125(a).

58. Upon information and belief, the Defendant's activities described above have been willful and in deliberate disregard of Plaintiff's trade dress rights, and for the purpose of intentionally misappropriating and capitalizing off of Plaintiff's goodwill.

59. Defendant's acts are exceptional within the meaning of 15 U.S.C. § 1117.

60. As a direct and proximate result of Defendant's unlawful conduct and willful infringement, Plaintiff has suffered and will continue to suffer, damage to its valuable brand, and other damages in an amount to be proved at trial, including Defendant's profits and Plaintiff's lost profits.

61. Plaintiff Puffco has no adequate remedy at law and will continue to suffer irreparable harm and injury to its good will and reputation if the Defendant's activities are not enjoined.

COUNT II-VIOLATION OF THE UNFAIR COMPETITION AND DECEPTIVE TRADE PRACTICES ACT UNDER NORTH CAROLINA LAW

62. Puffco repeats and realleges each of the allegations above as if fully set forth herein.

63. Defendant's adoption and use of the Infringing Product Design is likely to cause confusion, deception, or mistake as to the source, affiliation, connection, association, or approval of Defendant or Defendant's products.

64. Defendant's conduct alleged above constitutes unfair methods of competition and unfair or deceptive acts or practices in or affecting North Carolina commerce, as defined by N.C. Gen. Stat. §75-1.1.

65. As a direct and proximate result of Defendant's conduct, Plaintiff has suffered and will continue to suffer pecuniary damages, including, but not limited to, losses and damages in an amount to be determined at trial.

66. Defendant's conduct justifies an award of treble damages pursuant to N.C. Gen. Stat. § 75.16.

67. The damage suffered by Plaintiff as a result of Defendant's conduct is, and will be, irreparable leaving Plaintiff without an adequate remedy at law and entitling Plaintiff to preliminary and permanent injunctive relief.

68. Defendant willfully engaged in the acts and practices alleged in this complaint entitling Plaintiff to recover its attorney's fees from Defendant under N.C. Gen. Stat. § 75-16.1(1).

PRAYER

WHEREFORE, Puffco prays for judgment against Kandypens as follows:

(1) That the Court preliminary and permanently enjoin defendant Kandypens and/or their respective employees, officers, directors, agents, representatives, attorneys, successors, and assigns, and all persons in active concert or participation with any of them, from using the PEAK® Trade Dress, and/or any confusingly similar variations thereof, in any

manner or form, or any other reproduction, counterfeit, copy, or colorable imitation of such trade dress, either alone or in combination with any other designation, on or in connection with any advertising, marketing, promoting, offer for sale, or sale of Defendant's goods; and from otherwise infringing the distinctive nature of Puffco's PEAK® Trade Dress; and from otherwise competing unfairly with Puffco;

(2) That the Court order Kandypens to destroy and/or obliterate any and all electronic vaporizers which reflect the Infringing Product Design, including and not limited to the Oura, any signs, brochures, advertisements, and other items in their possession, or under their control, upon which appear or reflect any of Puffco's PEAK® Trade Dress and/or any confusingly similar variations thereof, in any manner or form, or any other reproduction, counterfeit, copy, or colorable imitation of Puffco's PEAK® Trade Dress either alone or in combination with any designation, and all molds, matrices and other means of making the same;

(3) That the Court order Kandypens to pay Puffco its costs and expenses incurred in and related to this action;

(4) That the court order Kandypens to account for and pay to Puffco all profits realized by Kandypens as a direct and proximate cause of Kandypens' unlawful conduct;

(5) That Puffco recover any actual damages suffered as a direct and proximate cause of Kandypens unlawful conduct;

(6) That the Court order Kandypens to pay Puffco's attorneys' fees; and

(7) That the Court award such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted this 12th day of June, 2020.

/s/ Benjamin F. Sidbury
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