

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
DEPARTMENT OF THE TRIAL COURT
BUSINESS LITIGATION SESSION
CIVIL ACTION NO.

22-0209

THEORY WELLNESS, INC. and
THEORY WELLNESS HOLDINGS LLC

Plaintiffs,

v.

BATTLE GREEN IP, LLC and
BEACON COMPASSION, INC. d/b/a
HIFIVE

Defendants.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2022 MAR 18 P 2:39
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

COMPLAINT AND JURY DEMAND

Plaintiffs Theory Wellness, Inc. and Theory Wellness Holdings LLC (collectively, hereinafter, "Theory Wellness") brings this civil action against Defendants Battle Green IP, LLC (hereinafter "Battle Green") and Beacon Compassion, Inc. d/b/a HiFive (hereinafter "Beacon Compassion") (collectively, hereinafter, "Defendants") for trademark infringement, unfair competition, and unfair and deceptive trade practices.

NATURE OF SUIT

1. For years, Theory Wellness has been providing cannabis dispensary services and selling cannabis-infused consumable products under a variety of well-known trademarks, including the mark HI5, which Theory Wellness currently uses in connection with seltzers and edible gummies. Theory Wellness has steadily grown its HI5 brand, which is sold at many dispensaries throughout Massachusetts and Maine. Theory Wellness also plans on expanding its business outside of these states, into additional product lines, including energy drinks and sodas.

Theory Wellness also will be opening a retail storefront beverage dispensary in Medford, Massachusetts under the name HI5 later this year.

2. Theory Wellness's cannabis goods are cultivated from premium range flowers, and it focuses on small batch, unique genetics which are attributes that consumers seek in their cannabis-infused products to improve experience. Due to the quality of Theory Wellness's goods, and significant use, promotion, and success in the marketplace, Theory Wellness's HI5 mark has become a well-known brand and source indicator with substantial goodwill.

3. Through its affiliate Beacon Compassion, Battle Green plans on opening cannabis dispensaries in West Roxbury, New Bedford, and Framingham, Massachusetts under the name HIFIVE where it will sell cannabis products, including seltzers or gummies.

4. Defendants intend to sell these cannabis products in the same retail channels, and targeting the same consumers, through which Theory Wellness sells its HI5-branded goods.

5. Defendants' use of HIFIVE in connection with its dispensary services are directly competitive with Theory Wellness's cannabis-infused seltzers and gummies and are bound to cause consumers to mistakenly believe that Defendants' services originate from Theory Wellness or are associated with or approved by Theory Wellness.

6. Theory Wellness attempted to resolve this dispute out of court, but Defendants have refused to stop use of the HIFIVE mark. Accordingly, Theory Wellness brings claims seeking injunctive relief and damages for infringement of its registered trademark, unfair competition, and unfair and deceptive trade practices.

THE PARTIES

7. Theory Wellness, Inc. is a Massachusetts corporation with a principal place of business located at 38 Montvale Avenue, Suite 210, Stoneham, MA 02180.

8. Theory Wellness Holdings LLC is a Delaware limited liability company with a principal place of business located at 38 Montvale Avenue, Suite 210, Stoneham, MA 02180.

9. Upon information and belief, Battle Green IP, LLC is a Delaware limited liability company, and it has represented to the U.S. Patent & Trademark Office (“USPTO”) that it has an address at 1209 Orange Street, Wilmington, DE 19801.

10. Upon information and belief, Beacon Compassion, Inc. d/b/a HiFive is a Massachusetts domestic profit corporation with a place of business at 12 Post Office Square, 6th Floor c/o Tenax Strategies, Boston, MA 02109.

JURISDICTION AND VENUE

11. This Court has personal jurisdiction over Defendants pursuant to G.L. c. 223A, § 3 because Defendants transact business in the Commonwealth of Massachusetts, contract to supply services in the Commonwealth, and have caused tortious injury by their proposed acts of infringement in the Commonwealth, and Theory Wellness’s causes of action arise therefrom.

12. This Court has subject matter jurisdiction over Defendants pursuant to G.L. c. 212, § 4.

13. Venue is proper in this Court pursuant to G.L. c. 223, § 1. Upon information and belief, Battle Green, through its affiliate Beacon Compassion, has a usual place of business in West Roxbury, Massachusetts, in Suffolk County and, upon information and belief, Beacon Compassion has its principal place of business in Boston, Massachusetts, in Suffolk County.

BACKGROUND

A. Theory Wellness’s HI5 Mark and Products

14. Originally formed in 2015, Theory Wellness is a leading provider of cannabis-infused goods and dispensary services in Massachusetts and Maine and sells its products under a variety of well-known trademarks, including HI5 for seltzers and gummies, as shown on its

websites: <https://theorywellness.org/cannabis-brands/hi5/> and <https://www.enjoyhi5.com>. A true and correct copy of Theory Wellness's websites are attached as **Exhibit A** (last accessed March 17, 2022).

15. Theory Wellness first used the trademark HI5 in connection with seltzers and gummies anywhere, including in Massachusetts, as of February 24, 2021. Photographs of Theory Wellness's HI5 products are shown immediately below:

Hi5 Seltzer



Hi5 Sour Chews



16. In addition to common law rights, Theory Wellness Holdings LLC is the owner of a Massachusetts Trademark Registration for HI5 for "cannabis infused seltzers, cannabis infused gummies or chews" (MA Reg. No. 90650), which registration is valid and subsisting. A true and correct copy of the registration certificate is attached as **Exhibit B**.

17. Theory Wellness has steadily grown its HI5 brand, which has been sold in dispensaries in Massachusetts and Maine. Theory Wellness plans to soon expand its business outside of these states.

18. In addition, Theory Wellness is actively growing its product line and plans on expanding its use of HI5 to energy drinks and sodas.

19. Theory Wellness will also open a storefront beverage dispensary under the HI5 mark in Medford, Massachusetts later this year where it will sell its HI5-branded products.

20. The commercial success of the HI5 name is due to the well-known quality of Theory Wellness's goods, which are focused on small batch, unique genetics, and cultivated from premium range flowers. These qualities confer attributes that consumers seek in their cannabis products, such as improved experiences.

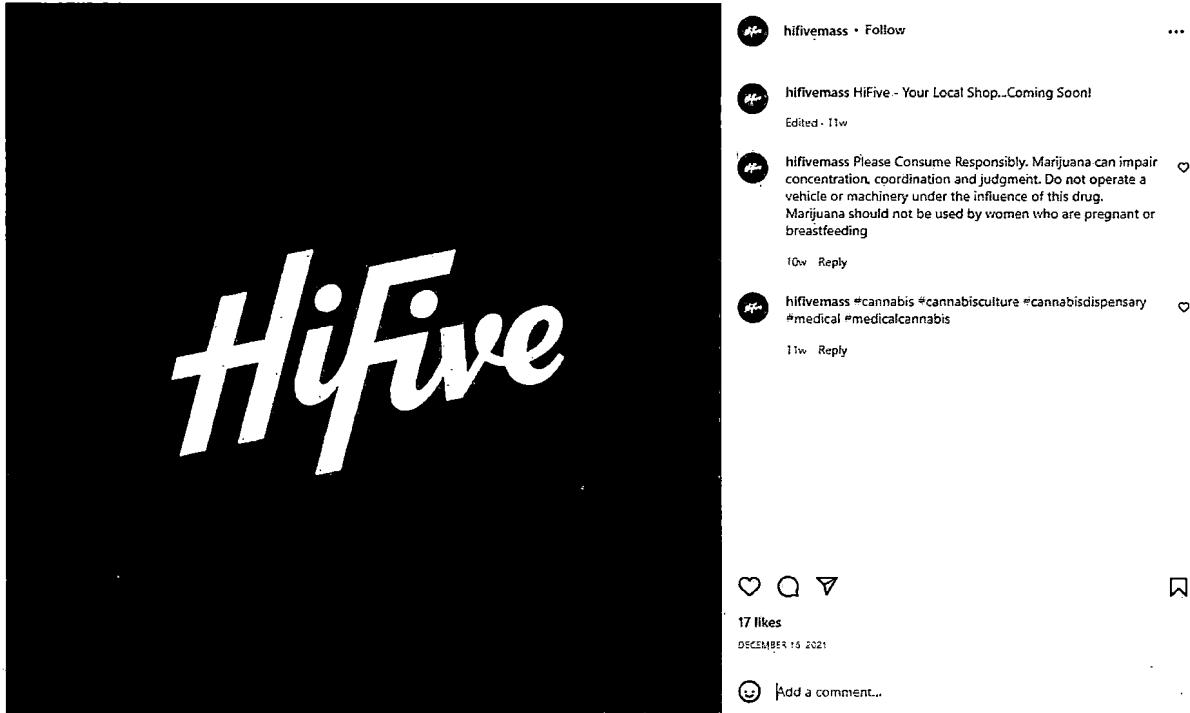
21. Theory Wellness's high-quality goods are widely enjoyed by consumers who look for its HI5 brand when shopping. Through significant use, promotion and success in the marketplace, Theory Wellness's HI5 mark has become well known, and enjoys significant goodwill.

B. Defendants' Infringing Use of HIFIVE

22. Upon information and belief, Battle Green, through its affiliate Beacon Compassion, will soon begin providing cannabis dispensary services under the name HIFIVE in West Roxbury, New Bedford, and Framingham, Massachusetts, all between 20-70 miles from Theory Wellness's principal place of business in Stoneham, Massachusetts, and all within only 15-60 miles from Theory Wellness's planned location for its HI5 beverage dispensary in Medford, Massachusetts. Defendants' dispensary services are advertised on its website at <https://hifivedispensary.com/>. A true and correct copy of Defendants' website is attached as **Exhibit C** (last accessed March 17, 2022).

23. Upon information and belief, Defendants' first public use of HIFIVE was when it published an announcement on its Instagram page stating, "HiFive - Your Local Shop...Coming

Soon!” A true and correct copy of this announcement is shown immediately below (last accessed March 17, 2022):



24. Battle Green is the owner of a federal trademark application for HIFIVE for “non-medicated moisturizer, cleansing creams, lotions, oils, and anti-aging treatments for the face; non-medicated moisturizer, cleansing creams, lotions, oils and anti-aging treatments for the body; hair shampoos and conditioners; cosmetics; all the foregoing containing cannabidiol (CBD) solely derived from hemp with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis; moisturizer, cleansing creams, lotions, oils, and anti-aging treatments for the face not containing any cannabinoids, hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts; moisturizer, cleansing creams, lotions, oils and anti-aging treatments for the body not containing any cannabinoids, hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts; hair shampoos and conditioners not containing any cannabinoids, hemp, marijuana,

cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts; cosmetics not containing any cannabinoids, hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts;” “medicated sports recovery creams and supplements not containing any cannabinoids, hemp, marijuana or any other ingredients derived from the cannabis sativa L plant or its extracts; topical pain relief treatments for medical purposes not containing any cannabinoids, hemp, marijuana or any other ingredients derived from the cannabis sativa L plant or its extracts; natural sleep aid preparations not containing any cannabinoids, hemp, marijuana or any other ingredients derived from the cannabis sativa L plant or its extracts; medicated confectionary not containing any cannabinoids, hemp, marijuana or any other ingredients derived from the cannabis sativa L plant or its extracts;” “sunglasses;” “jewelry;” “blank journals; silk screen prints;” “scent-proof all-purpose carrying bags; tote bags; none of the foregoing for use with ingredients from the cannabis sativa L plant;” “t-shirts, hoodies, sweatshirts, shirts, hats, skull caps, baseball caps, yoga pants, tunics, dresses;” “meditation blankets; yoga blankets; meditation cushions;” “candy; confectionery, namely, caramels and chewy candy; chocolate; cookies; brownies; tea-based beverages; none of the foregoing containing any cannabinoids, hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts;” “non-alcoholic carbonated beverages; fruit beverages; sports drinks, namely, recovery drinks; none of the foregoing containing any cannabinoids, hemp, marijuana or any other ingredients derived from the cannabis sativa L plant or its extracts;” “alcoholic beverages, except beer; none of the foregoing containing any cannabinoids, hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts;” “electric vaporizers for the inhalation of cannabidiol (CBD) derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; electric vaporizers for the

vaporization of cannabidiol (CBD) e-liquid derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis for inhalation and not for medical purposes; electric vaporizers, namely, smokeless vaporizer pipes for the inhalation of herbal matter derived from legal sources in the nature of CBD solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; oral vaporizers for smokers for exclusive use with CBD solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; oral vaporizers for smoking purposes for exclusive use with CBD solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; smokeless electronic cigarettes for exclusive use with CBD solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; tobacco substitutes in the nature of hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; tobacco substitutes in the nature of CBD derived from hemp and hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; pipes for smoking hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; ashtrays; vape pens containing CBD or exclusively for use with CBD products solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; e-cigarettes containing CBD or exclusively for use with CBD products solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis; vaping oil, other than essential oils, in the nature of CBD oil for e-cigarettes solely derived from hemp with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis;” “marketing services; advertising and promotion services; business consulting services; business development consulting services; business consulting services in the field of health and wellness; business consulting services for the cannabis industry; business consulting services in the field of medical

marijuana; promoting public awareness of medical marijuana; retail store services featuring apparel, cosmetics and non-medicated body care products containing cannabidiol (CBD) solely derived from hemp with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis; apothecary services;” “educational services, namely, providing seminars and programs in the fields of health and wellness, yoga, alternative medicine, horticulture and the cannabis industry; nightclub services; none of the foregoing services include possessing, obtaining, ordering, delivering, dispensing or distribution of hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts;” “cafe services, bar and cocktail lounge services; none of the foregoing services providing foods and beverages containing hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts nor do the foregoing services include possessing, obtaining, ordering, delivering, dispensing or distribution of hemp, marijuana, cannabis or any other ingredients derived from the cannabis sativa L plant or its extracts;” “consulting services in the field of health and wellness; providing information online in the field of alternative medicine; providing information online in the field of medical marijuana and cannabis; providing information online in the field of health and wellness relating to recreational marijuana and cannabis; agronomic consulting services” (U.S. Application Serial No. 90/610,569). The application was filed on March 29, 2021 on an intent-to-use basis. A true and correct copy of the USPTO records for the application is attached as **Exhibit D**.

25. Defendants’ goods and services overlap and directly compete with the goods and services offered by Theory Wellness, especially considering both are in the cannabis space and provided in the Commonwealth of Massachusetts.

26. The HI5 and HIFIVE marks are confusingly similar in terms of appearance, sound, and overall commercial impression.

II. Theory Wellness's Efforts to Resolve this Dispute without Litigation

27. On December 23, 2021, Theory Wellness's counsel sent a letter to Defendants advising of its rights in the HI5 mark in connection with cannabis-related goods and services and requesting that Defendants cease use and registration of the HIFIVE mark. A true and correct copy of the December 23, 2021 letter is attached as **Exhibit E**.

28. On January 19, 2022, Defendants' attorneys responded to Theory Wellness's letter by denying that Defendants' use of HIFIVE creates a likelihood of confusion with Theory Wellness's HI5 mark.

29. On February 3, 2022, Theory Wellness's counsel sent another letter reiterating that Defendants must abandon use of and Battle Green's application for the HIFIVE mark to avoid causing marketplace confusion with Theory Wellness's HI5 mark. A true and correct copy of the February 3, 2022 letter is attached as **Exhibit F**.

30. Based on at least this correspondence and Theory Wellness Holdings LLC's trademark registration, Defendants had actual and constructive notice of Theory Wellness's prior rights in its HI5 mark before Defendants began using the HIFIVE mark in commerce.

COUNT I **TRADEMARK INFRINGEMENT, G.L. C. 110H AND COMMON LAW**

31. Theory Wellness incorporates by reference each and every allegation contained in the above paragraphs as if fully set forth herein.

32. Theory Wellness is the rightful owner of the trademark HI5 for "cannabis infused seltzers, cannabis infused gummies or chews" under G.L. c. 110H § 5(b) and under common law.

33. Defendants have violated and continues to violate Theory Wellness's statutory rights under G.L. c. 110H and common law rights in its HI5 mark for "cannabis infused seltzers, cannabis infused gummies or chews."

34. Without authorization from Theory Wellness, Defendants are preparing to open dispensaries in the Commonwealth of Massachusetts under the confusingly similar name HIFIVE in connection with goods and services directly related to and overlapping with those of Theory Wellness.

35. Defendants' past, present, and future use of HIFIVE is likely to cause confusion, mistake, and deception of consumers, suppliers, distributors, and others as to source, sponsorship, or affiliation of Defendants' goods and services. Customers and potential customers, suppliers, distributors, and others are likely to believe that the goods and services offered under Defendants' HIFIVE mark emanate from, or are licensed or approved by, Theory Wellness. Any dissatisfaction with Defendants' goods or services will reflect upon and irreparably damage the reputation of Theory Wellness as embodied in its HI5 mark, and constitutes an infringement of Theory Wellness's rights, subjecting Defendants to liability under the Massachusetts State Trademark Act and common law.

36. Such use by Defendants knowingly and willfully trades on the goodwill established by Theory Wellness in its HI5 mark.

37. Theory Wellness has been damaged and continues to be damaged by Defendants' conduct in an amount to be determined at trial, and Theory Wellness is entitled to attorneys' fees, treble damages, and injunctive relief therefor.

38. Defendants' infringing activities will continue unless enjoined by this Court.

COUNT II
UNFAIR COMPETITION AND UNFAIR AND DECEPTIVE TRADE PRACTICES,
G.L. C. 93A AND COMMON LAW

39. Theory Wellness incorporates by reference each and every allegation contained in the above paragraphs as if fully set forth herein.

40. Defendants have offered to provide goods and services and, on information and belief, will provide goods and services under the name HIFIVE within the Commonwealth of Massachusetts.

41. By the above-described conduct, Defendants have engaged in unfair competition and unfair and deceptive trade practices in violation of G.L. c. 93A and common law.

42. Defendants' unfair competition and unfair and deceptive trade practices have been willful and knowing.

43. Theory Wellness has been damaged and continues to be damaged by Defendants' conduct in an amount to be determined at trial, and Theory Wellness is entitled to attorneys' fees, treble damages, and injunctive relief therefor.

44. Defendants' infringing activities will continue unless enjoined by this Court.

REQUEST FOR RELIEF

Theory Wellness requests that the Court enter judgment in its favor and against Defendants as follows:

- A. Award Theory Wellness actual damages in an amount to be determined at trial;
- B. Award Theory Wellness treble said actual damages in an amount to be determined at trial;
- C. Enter injunctive, declaratory, and equitable relief requiring Defendants to cease and desist from using, employing, applying for, claiming rights in, or licensing HIFIVE, HI5, or any confusingly similar variations in connection with cannabis-related goods and services;

- D. Order Defendants to change the name HIFIVE to a name that does not include the terms “HI” or “FIVE” or “5” and is not confusingly similar to Theory Wellness’s trademark HI5;
- E. Award Theory Wellness its reasonable litigation expenses and attorneys’ fees;
- F. Award Theory Wellness pre- and post-judgment interest; and
- G. Grant Theory Wellness such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Theory Wellness demands a trial by jury on all claims so triable.

Date: March 18, 2022

Respectfully Submitted,



John Strand, BBO No. 654985
JStrand@wolfgreenfield.com
Kira-Khanh McCarthy, BBO No. 707476
KKMcCarthy@wolfgreenfield.com
WOLF, GREENFIELD & SACKS, P.C.
600 Atlantic Avenue
Boston, MA 02210
617.646.8000 Phone
617.646.8646 Fax

*Attorneys for Theory Wellness, Inc. and
Theory Wellness Holdings, LLC*