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Edited by **Robert E. Freeman**

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. With this newsletter, we hope to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

### Got Milk[crate]? - Plaintiff Claims LeBron-Endorsed Shoe Violates Mark

Most of us know that “milk does the body good,” but few among us would’ve thought that a milk-crate pattern on the bottom of our sneakers might help us run faster or jump higher. Apparently, two competing shoe manufacturers believe so. In a [complaint](#) recently filed in the Southern District of New York against [Nike](#) by [Milkcrate Athletics](#), Milkcrate alleges that Nike’s Zoom LeBron Soldier – a basketball shoe endorsed by superstar LeBron James – prominently features a “milk crate pattern” and the words “milk crate” on its sole, in violation of Milkcrate’s registered mark.

The Zoom LeBron Soldier line of footwear features a [cross-hatched pattern](#) on the sole reminiscent of a plastic milk crate. According to Nike, its “milk crate technology” was “[inspired](#) by the milk crate [LeBron] used as a hoop when he was a kid in Akron.” The shoe’s [name](#) pays homage to James’s repeated success in the playoffs, where, Nike boasts, “the man and the soldier unite and become an army.”

Though perhaps not as well-known as [LeBron](#), the man behind Milkcrate Athletic’s blaze-neon [t-shirts](#) and Warhol-inspired headwear is a celebrity with plenty of street cred of his own. As a “[young skateboard punk](#)” in East Baltimore, Aaron LaCrate – Milkcrate’s founder and CEO – embraced hand drawing and graffiti. He channeled his love of hip-hop culture into a career, and now DJs and produces music for such artists as Madonna, the Cool Kids and Amanda Blank. Superstars like Jay Z and Rakim have been seen sporting Milkcrate threads, and LaCrate recently teamed with HBO to create a [t-shirt](#) line inspired by “The Wire,” which was set in the Baltimore neighborhood in which he grew up.

Milkcrate claims that Nike’s tread and its “milk crate” verbiage run afoul of LaCrate’s own [sneaker line](#), which is manufactured in a joint endeavor with [Vans](#). In its complaint, Milkcrate argues trademark infringement based on theories of consumer confusion and dilution, and asks the court to issue an injunction and require Nike to pay unspecified

damages. And, to the extent that the Zoom Soldier shoe displays the words “milk crate” on its sole, the young and comparatively small design boutique may believe that its suit should be a slam dunk. Milkcrate owns several registered marks, including MILKCRATE, Reg. No. 3,608,409, which specifically covers “basketball sneakers.”

Interestingly, Milkcrate does not explicitly ask the court to enjoin Nike from selling shoes that feature the “milk crate pattern,” but its prayer for relief does request an injunction against the use of any “logo,” “design” or “source designation” connected to Milkcrate. This may be because cases such as [Wal-Mart Stores v. Samara Bros.](#), 529 U.S. 205, 216 (2000), have held that product design – for example, the tread of a shoe – cannot be “inherently distinctive.” As such, Milkcrate would need to prove that the tread design has “secondary meaning” to receive protection – that is, that individual consumers associate the tread design with Milkcrate Athletics. See, e.g., [Yankee Candle Co. v. Bridgewater Candle Co.](#), 259 F.3d 25, 43 (1st Cir. Mass., 2001). Even if Milkcrate argues that its tread design has secondary meaning, Nike may claim that the tread design is “functional” and therefore unprotectable. See, e.g., [Traffix Devices v. Mktg. Displays](#), 532 U.S. 23, 29 (2001). And, if Nike’s attorneys can demonstrate that the shoe’s “milk crate pattern” helps rising stars play better basketball, they may score a win that reverberates in more than one kind of court.

## All Bets Are Off in Dispute over Maryland Casino Law

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East Coast gamblers looking to hit the slots at a new gambling venue in Maryland now will have to wait until at least November to fill their plastic cups with quarters. When a new zoning bill was passed by the [Anne Arundel County Council](#) in December 2009, it looked like Maryland would soon be known as much for slots as for horse racing. But a recent ruling by the Maryland Court of Appeals has given opponents of the gambling venue another roll of the dice.

The zoning bill, signed by County Executive [John R. Leopold](#), opened the door for the development of a casino in an unusual location: the Anne Arundel Mills Mall, located just south of Baltimore. Shortly after passage of the bill, however, opponents commenced a campaign to challenge the casino’s development via a public [referendum](#), which they hoped to get on the ballot as part of the November 2010 elections. In order to get the bill on the ballot, the opponents of the casino first needed to collect signatures on a petition in excess of [10% of the number of votes](#) cast in the last gubernatorial election. In this case, the lucky number was 19,000 signatures.

Opponents of the casino bill include the community group [Stop Slots at Arundel Mills Mall](#), which cites traffic congestion and erosion of a “family-friendly” atmosphere as grounds for opposing the construction, and the [Maryland Jockey Club](#), which operates the [Laurel Park Racetrack](#) and funded the petition drive. Together, they managed to collect over 40,000 signatures in support of their petition; of these, about 23,000 of them [were accepted](#) as valid by the Anne Arundel County Board of Elections.

In response to the petition, the developers – [Cordish Cos.](#), and more specifically, PPE Casino Resorts Maryland, LLC (“PPE”), a subsidiary of Cordish – decided to double down. In February 2010, PPE sued the elections board and contested the process by which the petition signatures were verified. At a June trial before the Anne Arundel County Circuit Court, lawyers for PPE contended that [many of the signatures had defects](#) such as missing or incomplete dates, signatures not exactly matching the printed name

and, in one case, a person who appeared to sign as both husband and wife. Presiding [Judge Ronald A. Silkworth](#), however, [refused to allow testimony](#) by a handwriting expert in support of PPE's argument that as many as one in three of the approved signatures were forged or fraudulent, on the ground that the proceeding was a judicial review of an administrative ruling in which no additional evidence is allowed.

A few weeks following the completion of the trial, Judge Silkworth [blocked the referendum](#) on technical grounds completely unrelated to the alleged irregularities in the petition. Despite the anti-slots group's argument that the bill was nothing more than a zoning law, Judge Silkworth relied on [Kelly v. Marylanders for Sports Sanity, Inc.](#) and ruled that the bill was in fact part of a larger and inseparable, state appropriations package, which [could not be put to a referendum](#). According to Maryland law, "under both reserved powers of referendum, a law that is both an appropriation and for maintaining the government may not be subject to referendum."

Gamblers looking to hit the jackpot were quickly disappointed, however. Opponents of the casino filed an appeal, which was heard by the Maryland Court of Appeals on July 20. Just hours after closing arguments, the appeals court [summarily overturned](#) Judge Silkworth's decision in an order that will be expanded upon in a later opinion.

Preparations are already under way to include the zoning bill referendum on the November ballot, when Anne Arundel County voters will get their chance to call the shot.

## To the Hoop, Y'all: Fledgling Three-on-Three Leagues in Courtroom Brawl

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[Three-on-three](#) basketball has rapidly increased in popularity, with [tournaments](#) popping up across the country. So it is not surprising that more than one fledgling league has launched in an effort to monetize that popularity. One start-up – 3BA International LLC ("3BA") – hopes to create a faster-paced game through the use of a [72 by 50 foot](#) court (which is shorter than an NBA court), an 18-second shot clock, four 11-minute quarters, and other altered rules. And by all public accounts, 3BA has enjoyed a successful run of [exhibition games](#), [celebrity franchisees](#) and [high-profile participants](#). It now appears that 3BA's success is not limited to three-on-three basketball courts; in a recent dispute with two of 3BA's former employees – Kevin LuBahn and Kevin Ellis – 3BA took it strong to the hole and first obtained a [temporary restraining order](#), then a [preliminary injunction](#), to prevent LuBahn, Ellis and their almost identically titled start-up league, 3BA Properties LLC ("[3BA Properties](#)"), from hindering 3BA's development efforts.

3BA's suit against 3BA Properties, LuBahn and Ellis – [3BA International LLC v. Kevin LuBahn](#) – was filed in the U.S. District Court for the Western District of Washington and [stated](#) eleven interrelated causes of action, including breach of the duty of loyalty, misappropriation of trade secrets in violation of the [Uniform Trade Secrets Act, Chapter 19.108 RCW](#), tortious interference, copyright infringement, and trademark infringement in violation of the [Lanham Act, 15 USC § 1125](#). 3BA sought damages, as well as equitable and [injunctive](#) relief aimed at prohibiting the defendants from damaging 3BA's relationships with potential franchisees and investors, and from developing 3BA Properties using 3BA's intellectual property and information.

After a hearing, Judge Richard A. Jones granted 3BA a [preliminary injunction](#), finding, among other things, that 3BA owned all of 3BA's intellectual property, including

trademarks, copyrights and domain names, some of which 3BA had initially acquired from LuBahn's bankruptcy estate (after which 3BA hired LuBahn and Ellis as board members of the 3BA). The judge also found that, while employed by 3BA, the defendants formed plans to create their own three-on-three basketball league, using 3BA's proprietary information and documents. Further, they met with potential 3BA franchisees, persuaded some of them not to invest in 3BA, and attempted to convince them to invest instead in 3BA Properties. The defendants also apparently used 3BA passwords to take over 3BA's [Web site](#) and e-mail systems once their employment was terminated.

Judge Jones found that there was "ample evidence" to demonstrate that 3BA's expectations of entering into franchise agreements with potential franchisees were being thwarted by the defendants. Further, he found that the activities also demonstrated that the defendants were not interested in fair competition, and that "there [was] no reason to expect that they [would] compete fairly absent injunctive relief." Thus, the court held that that 3BA was likely to succeed on its claim for tortious interference and granted the requested preliminary relief.

The defendants, like "Clyde, Rick Barry, and Pistol Pete, continue to believe that they can't be beat."<sup>1</sup> Recently, LuBahn filed a response to 3BA's complaint in which he categorically denies and disputes all of the allegations. Further, the granted injunction is only a preliminary one, so the substantive allegations of the complaint have yet to be proved on the merits. In short, the buzzer has not yet sounded.

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<sup>1</sup> With a shout-out to Kurtis Blow.

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