

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Equipt4 LLC
12028 Edgepark Court
Potomac, Montgomery County
Maryland 20854,

Plaintiff,

v.

Pick Punch LLC
12827 Buff Stone Court
Fishers, Indiana 46037

and

William Von Luhmann
12827 Buff Stone Court
Fishers, Indiana 46037,

Defendants.

Case No.: 8:13-cv-3575

JURY TRIAL DEMANDED

AMENDED COMPLAINT

Plaintiff Equipt4 LLC, by its undersigned counsel, brings this complaint against Defendants Pick Punch LLC and William Von Luhmann and pleads and alleges as follows:

NATURE OF THE ACTION AND SUBJECT MATTER JURISDICTION

1. This is an action arising under Acts of Congress relating to patents based upon Plaintiff's below enumerated counts of Declaratory Judgment of Patent Noninfringement, Declaratory Judgment of Patent Invalidity, and Patent False Marking, all in relation to U.S. Pat. No. 6,930,231 (the '231 patent). Subject matter jurisdiction over the patent counts is appropriate under one or more of 28 U.S.C. §§ 1331, 1338, 2201 and 2202.

2. This action also arises under Acts of Congress relating to trademarks based upon Plaintiff's below enumerated counts of false advertising, unfair competition and Declaratory Judgment under the Lanham Act. Subject matter jurisdiction over the Lanham Act counts is appropriate under one or more of 28 U.S.C. §§ 1331, 1338, 2201 and 2202 and 15 U.S.C. § 1119 and 1121.

3. This action also arises under state law claims for intentional interference with prospective business relationships, unfair competition and injurious falsehood which are so related to the trademark and patent counts that they form part of the same case or controversy and this Court has supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367.

PARTIES

4. Plaintiff Equipt4 LLC is a Maryland limited liability company located at 12028 Edgepark Court, Potomac, Maryland 20854.

5. Upon information and belief, Defendant Pick Punch LLC ("PPL") is an Indiana limited liability company doing business at 12827 Buff Stone Court, Fishers, Indiana 46037.

6. Upon information and belief, Defendant Luhmann is an individual residing at 12827 Buff Stone Court, Fishers, Indiana 46037 and is Defendant PPL's sole member.

6.1. Defendant Luhmann accepted service of summons (ECF No. 3-1) and the original Complaint (ECF No. 1) on December 3, 2013, at his residence at 12474 Brandamore Lane, Fishers, Indiana 46037.

6.2. Luhmann, acting as Resident Agent for Defendant PPL, accepted service of summons (ECF No. 3) and the original Complaint (ECF No. 1) on behalf of PPL on December 3, 2013.

6.3. Upon information and belief, Defendant Luhmann did not reside at the Buff Stone Court address when the original complaint was filed, nor when Defendant Luhmann answered the original

complaint. Upon information and belief, Defendant PPL was not doing business at the Buff Stone Court address when the original complaint was filed, nor when Defendant PPL answered the original complaint.

PERSONAL JURISDICTION

7. Defendant PPL submitted to the personal jurisdiction of this Court by filing the lawsuit captioned Pick Punch LLC v. Equipt4, LLC, case no. 8:13-cv-02460-RWT.

8. Alternatively or additionally, this Court has personal jurisdiction over defendant PPL pursuant to Maryland Courts & Judicial Proceedings Article § 6-103 in that, upon information and belief, PPL directly or through an agent transacts, contracts to supply goods and manufactured products in Maryland, and regularly does or solicits business and derives substantial revenue from goods and manufactured products used or consumed in Maryland. Defendant PPL also, directly or through an agent and as further enumerated below, caused tortious injury in Maryland.

8.1. Defendants PPL and/or Luhmann operate an interactive website www.pickpunch.com. The website is available and directed to Maryland consumers. Maryland consumers may purchase pick punches and punchable materials via the website for shipment to Maryland. Exhibit 6 is true and correct printout of the website home page.

9. This Court has personal jurisdiction over defendant Luhmann pursuant to Maryland Courts & Judicial Proceedings Article § 6-103 in that, Luhmann did directly or by an agent cause tortious injury, as further enumerated below, in Maryland and Luhmann derives substantial revenue from goods and manufactured products consumed and used in Maryland.

VENUE

10. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(b) and (c) in that a substantial part of the events giving rise to one or more claims occurred in this judicial district.

BACKGROUND

11. Plaintiff Equipt4 markets and sells pick punches for making stringed musical instrument picks out of plastic sheet material. Equipt4 promotes and sells pick punches and plastic sheet material using the trademark PICK-A-PALOOZA.

12. Equipt4 is an Amazon merchant and sells PICK-A-PALOOZA brand pick punches and sheet material on Amazon's website www.amazon.com.

13. On May 21, 2013, Equipt4 received an electronic communication from Defendants via Amazon with the subject line "Inquiry from Amazon customer William Luhmann" as follows:

Dear seller,

We are contacting you to inform that this type product cant be sold to the USA and distributors you sell to need to be aware of this as well to avoid importation. pick Punch llc the original inventor of this type product is patent protected for this type product. We want to avoid legal action against your company and others involved in the moving and sale of this product. we have already successfully dealt with similar companies with other similar devices that violated our patent protection such as Pick Master and Pick Man and want to avoid this with your company and your supply chain. Please also be aware we have trademark protection for "Pick Punch" in any form worldwide including China so please avoid using those words in advertising this product in any form where searches for Pick Punch will discover your product. It is the responsibility of the seller and manufacturer to follow international law and will defend our rights vigorously.

Von Luhmann

Pick Punct LLC

14. Within minutes, Equipt4 sent a response via Amazon to Defendants, informing Defendants that it would refer the communication to its patent attorney.

15. Defendants replied:

it is a patent I am speaking of. you are thinking trademark which is also protected. the concept of making picks with punches is patent protected in the USA. you can't sell in the USA. you can't import these and you can't sell from the USA either. They need to be pulled immediately and I'm sorry about that but we have to be very strict as it is an ongoing problem. I have our patent attorneys looking into this new manufacturer. if you want I can contact your distributor also to help out the next guy. your manufacturer is also responsible to ensure conformity to international patent law.

16. By the end of the day, Equipt4 concluded that it did not infringe and informed Defendants that it did not infringe and that it would continue to conduct business on Amazon.

17. Also, on May 21, 2013 Defendants, under the pseudonym forenzo5678, published false, defamatory and disparaging statements to Amazon and to Amazon users about the PICK-A-PALOOZA pick punch. The statements were published to the Amazon product page for the PICK-A-PALOOZA pick punch as a purported "product review" and in a manner calculated to be seen and relied upon by persons prepared and intending to purchase a pick punch. The "product review," headlined in boldface type "**Illegal to sell this item in the USA,**" stated:

As a recent seller of a similar product I want to tell you that you can't sell this item in the USA or import it into the USA as it is against US and International Patent law. These type punches can't be sold in the USA without consent from the original Pick Punch LLC corporation which owns the method patent for this type thing. Just a heads up that you might want to stop selling these in the USA and send them back to your factory or have them pay for the return shipping. I would contact your supplier. Pick Punch has full method patent protection and even similar devices can't be sold without licensing. Pick Master, Pick Man and all the other copies have had to deal with legal action. I know first hand. You will have to buy them back and ship these all back to your manufacturer in China or prove disposal.

As of the date of filing of this Amended Complaint, these statements continue to appear in the review section of the PICK-A-PALOOZA pick punch product listing pages appearing on Amazon. Equipt4 has requested Amazon to remove the statements and Amazon has declined to do so. Upon information and belief, Defendants have not requested Amazon to remove the statements and have not made any other effort to have the statements removed. Upon information and belief, an author of an Amazon product review may delete any one or all of their product reviews. Defendants' statements constitute commercial advertising and promotion throughout the United States. Exhibit 1 is a true and correct copy of the statements as published.

18. The statements in the "product review" falsely import that Equipt4 is acting illegally, that Equipt4's products infringe a patent and that PPL owns a patent covering devices such as Equipt4's PICK-A-PALOOZA pick punch. Defendants' statements are unprivileged.

19. On August 22, 2013, defendant PPL filed a lawsuit against Equipt4 in which the complaint ("PPL Complaint") alleges direct infringement, contributory infringement and inducement of infringement of the '231 patent. The lawsuit seeks a preliminary and permanent injunction, treble damages, pre- and post-judgment interest and costs, and attorneys' fees.

20. On August 26, 2013, PPL, through counsel, tendered a letter to Equipt4, together with a copy of the PPL Complaint, stating that it was "refraining from formal service of the Complaint at this time in order to give [Equipt4] a final opportunity to cease selling the Pick-a-Palooza product." After making additional demands that Equipt4 recall and recover products and offer a monetary settlement to PPL, the letter stated that no mistake should be made that PPL "is ready to serve the Complaint and force Equipt4 to defend in order to protect" PPL's alleged valuable rights. PPL stated that it will not withdraw the PPL Complaint until Equipt4 executes PPL's settlement agreement confirming that it has

and will continue to heel to PPL's demands. A true and correct copy of the letter is attached as Exhibit 7 to this Amended Complaint.

20.1. On October 7, 2013, counsel for Equipt4 disclosed to counsel for Defendants the identity and existence of the "Great New Pick Material !!!" and "frets.com" prior art, further discussed below in paragraphs 29.2 and 29.3.

21. Counsel for Equipt4 and counsel for PPL engaged for several weeks in ultimately unfruitful settlement discussions. Subsequent to cessation of such discussions, PPL neither served nor withdrew the PPL Complaint.

22.0. On November 7, 2013, Equipt4 modified its Amazon product listing title as:

Guitar Pick-a-Palooza™ pick punch - Custom Guitar Pick Maker - Make Your Own Guitar Picks - Guitar Pick Jewelry - Guitar Pick Necklace - Guitar Pick Key Chain - Guitar Pick Bracelets and More - Create Cool - Customized - Unique Guitar Picks - DIY Guitar Pick Punch - Smooth Edges - Ready To Use - Guaranteed to be 100% Fun!

22. On or about November 15, 2013, upon information and belief, Defendants, asserting their alleged rights in the term "pick punch," complained to Amazon about Equipt4's PICK-A-PALOOZA pick punch product page's use of the term "pick punch." As a result, Amazon deleted the term from the page and declined Equipt4's request to restore the term.

22.1. Upon information and belief, Defendants PPL and/or Luhmann made a request to Amazon to remove the term "pick punch" from an Equipt4 Amazon product page. Upon information and belief, Defendants PPL and/or Luhmann communicated the fact of trademark registration no. 3,959,995 for PICK PUNCH to Amazon in support of the request.

22.2. PPL filed a Notice of Dismissal of the PPL Complaint on January 8, 2014.

THE '231 PATENT

23. The '231 Patent is entitled "Method of Producing Guitar Picks from Identification Cards." The patent has only method claims. No apparatus, machine, compound or article of manufacture is claimed. A copy of the '231 Patent is attached as Exhibit 2.

24. The '231 Patent has two independent claims and eleven total claims. Independent claim 1 recites a "method of producing guitar picks comprising: (a) providing an identification card; (b) providing a punch; and (c) punching out a guitar pick from said identification card using said punch." Independent claim 6 recites:

- [a] method of producing a guitar pick with a hologram upon one side comprising:
 - (a) providing an identification card further comprising a hologram;
 - (b) providing a punch with a die-cutting assembly;
 - (c) positioning said identification card so that the hologram is aligned with said die cutting assembly of said punch;
 - (d) punching a guitar pick out of said identification card, wherein said guitar pick comprises said hologram.

25. The dependent claims variously require that the identification card be "composed of plastic," be a credit card or be a driver's license.

26. Three dependent claims require the punch to have certain structure: handles coupled about a pivot to provide "mechanical advantage" and a holding portion/section and a die portion/section. The '231 patent provides a single illustration of a pick punch having handles, a pivot, a holding portion/section and a die portion/section:

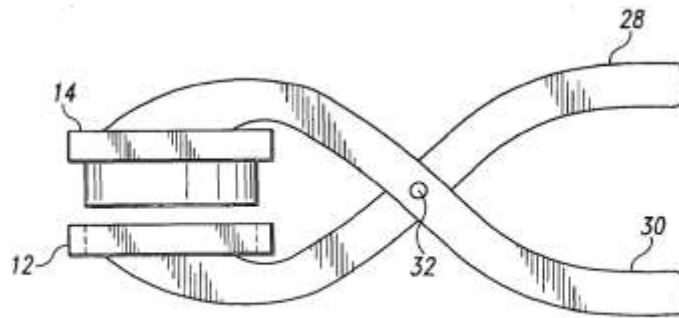


Fig. 6

27. Defendant Luhmann is the sole named inventor of the '231 patent. The application upon which the '231 patent was granted was filed November 25, 2003. No earlier priority benefit is claimed. Defendant PPL claims in the PPL Complaint to own the '231 patent.

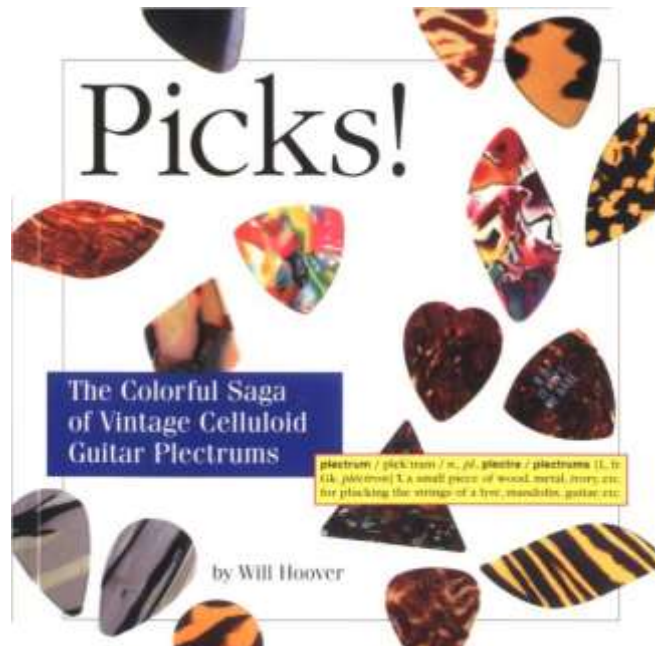
PRIOR ART TO THE '231 PATENT

28. Despite defendant Luhmann's promotion of himself and defendant PPL as the inventor of the guitar pick punch, pick punches have been around for generations. For example, Will Hoover's book, *Picks!: the colorful saga of vintage celluloid guitar plectrums*, Miller Freeman Books, San Francisco (1995), discloses that famed pick manufacturer Luigi D'Andrea began punching guitar picks from celluloid (generally considered the first thermoplastic) sheets in 1922 (the "D'Andrea's method"). Hoover includes a photo of one of D'Andrea's pick punches:



Hoover, p. 20. A true and correct copy of Hoover excerpts is attached as Exhibit 3. Hoover describes the above pick punch as “The Holy Grail of Guitar Picks—an original D’Andrea mallet die from the 1920s.” Ex. 3 at 21.

29. As can be appreciated from the cover and various pages of Hoover, guitar picks punched from plastic sheet material well prior to the priority date of the ’231 Patent were available in all manner of shapes and aesthetic quality:



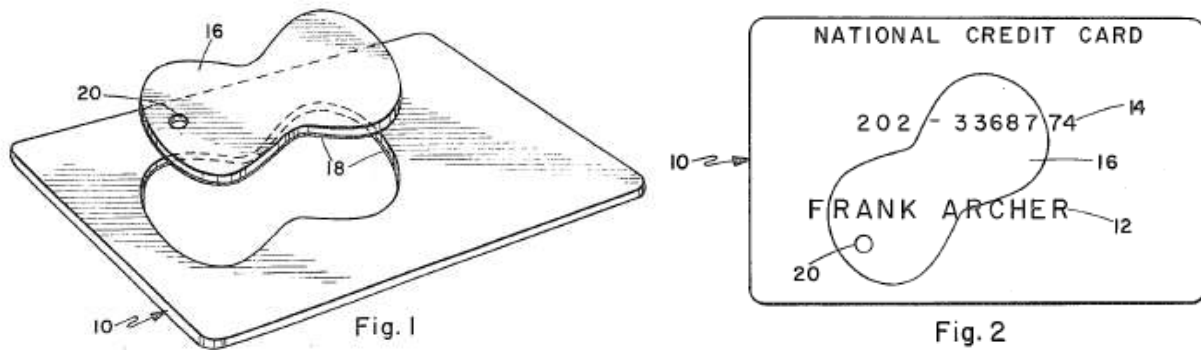
29.1. Hoover discloses, on page 7, that guitar picks may be made from credit cards and may include a hologram:



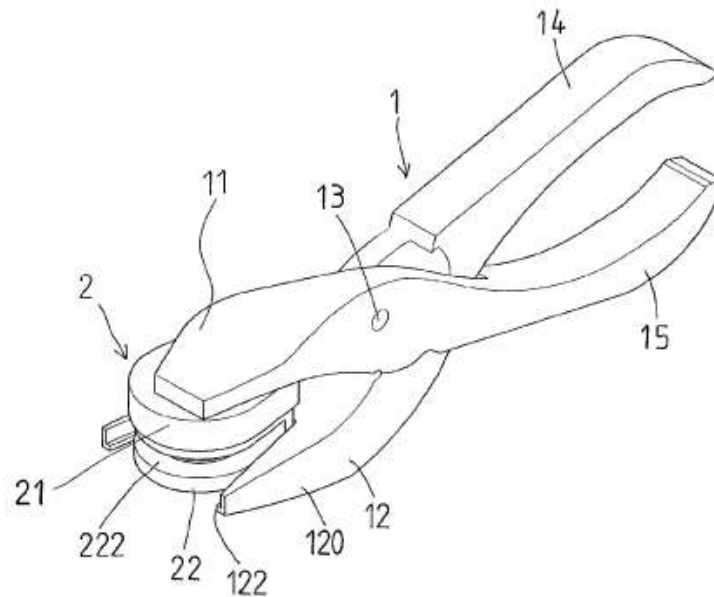
29.2. Exhibit 8 is a true and correct copy of a Usenet posting made September 28, 2001 as obtained from the Google archive available at groups.google.com, having the subject line “Great New Pick Material !!!” (hereinafter, the “Great New Pick Material !!!” prior art). Exhibit 8 discloses providing a punch with a die, providing a drivers license or credit card, and punching a guitar pick from the drivers license or credit card.

29.3. Exhibit 9 is a true and correct copy of the web page <http://www.frets.com/FRETSPages/Fun/PickMachine/pickmachine.html>, originally created March 23, 1998 as captured by the Internet Wayback Machine on February 3, 2000 as available at www.archive.org (hereinafter, the “frets.com” prior art). Exhibit 9 discloses providing a punch with a die, providing a credit card with a hologram, and punching a guitar pick from the credit card.

30. U.S. Pat. No. 3,650,210, issued March 21, 1972, attached as Exhibit 4, discloses methods of punching arbitrary shapes from credit cards:



31. U.S. Pat. Pub. No. 2002/0124420, published September 12, 2002, attached as Exhibit 5, discloses methods of punching sheet materials with a punch having handles attached about a pivot and having die and holder sections:



GENERICITY OF “PICK PUNCH”

32. The designation “pick punch” is generic when associated with tools for punching picks. “Pick punch” is the apt name of the tool itself and inherently has such meaning in ordinary language. The independently generic terms “pick” and “punch” retain their meaning in common usage when joined together in the term “pick punch.” Competitors of PPL use the term “pick punch” to identify the product they are selling. Consumers of pick punches also identify the product as a pick punch.

33. Alternatively, the term “pick punch” when associated with pick punches is merely descriptive and has not acquired and is not capable of acquiring distinction and/or serving as a source identifier. A pick punch describes the tool itself using the generic terms “pick” and “punch.” Competitors of PPL use the term “pick punch” to describe the product they sell. Consumers of pick punches also describe the product as a pick punch and do not understand “Pick Punch” to be an indicator of the source of the product.

34. Defendant Luhmann filed an intent-to-use application (no. 77641018) for federal registration on the principal register of the alleged trademark “Pick Punch” in December of 2009 for “[h]and tools, namely, punches.” The PTO issued an office action requiring disclaimer of “punch” and the application became abandoned after Luhmann failed to timely respond within the statutory response period of six months. Luhmann petitioned for revival, alleging that he had not received the office action. After the PTO granted the revival, Luhmann disclaimed “punch.” The PTO published the application and issued a Notice of Allowance. Luhmann supplied the PTO a specimen of use showing the alleged trademark on the packaging of a pick punch. The PTO issued another Office Action refusing registration on the basis that “Pick Punch” was merely descriptive of the product. After the application was amended for registration on the supplemental register, the PTO registered Pick Punch, “PUNCH” disclaimed, on the supplemental register (reg. no. 3,959, 995).

34.1. “Pick” in supplemental reg. no. 3,959,995 refers to a plectrum. “Pick” in supplemental reg. no. 3,959,995 refers to a device for plucking the strings of a musical instrument such as a guitar.

34.2. “Punch” in supplemental reg. no. 3,959,995 refers to a device for making a hole in an object. “Punch” in supplemental reg. no. 3,959,995 refers to a device for cutting out shaped pieces of sheet material.

PPL’S PICK PUNCH AND FALSE MARKING AND FALSE ADVERTISING

35. PPL marks each of its pick punches with “PATENT 6930231” and each of its pick punch packages with “U.S. Patent No. 6,930,231” or similar marking importing that the device is a patented article.



The above are true and accurate representations of the marked portion of PPL’s pick punch and the marked portion of the PPL pick punch packaging.

36. At least until August 20, 2013, PPL’s website at www.pickpunch.com advertised that “[t]he Pick Punch is patent and trademark protected.” Presently, the PPL website advertises various punches and sheet material on its main page, including the statements “US Patent protection 6930231 approved in 2005. ‘Pick Punch® is a registered trademark of William Von Luhmann that is used under license by Pick Punch LLC.’” See Exhibit 6, a true and correct copy of the web page www.pickpunch.com, at 4. None of the items advertised in Exhibit 6 are covered by U.S. pat. no. 6,930,231. www.pickpunch.com constitutes advertising and commercial promotion available throughout the United States.

37. PPL imports in other advertising and promotion done in the United States, such as a blog available at pickpunch.blogspot.com and magazine and website product announcements (e.g., North Magazine, www.igift.com), that its PPL pick punches are patented.

38. PPL's pick punches are not patented articles. PPL's pick punches are not covered by the '231 patent. None of the '231 patent's claims claim a machine or article of manufacture.

39. Upon information and belief, PPL's patent marking and advertising importing patent protection for PPL pick punches are done in bad faith and for the purpose of deceiving the public.

40. Equipt4 and PPL directly compete in the sale of pick punches and plastic sheet material from which to punch picks.

41. Equipt4 is injured at least by loss of sales to buyers who, relying on PPL's false marking and advertising falsely importing patent protection, defer buying from Equipt4 in that said buyers are misled that Equipt4's pick punches infringe a patent and the buyer's use of Equipt4's pick punches would give rise to the buyer's liability to a patent infringement claim.

42. PPL's false marking and advertising falsely importing patent protection are violations of 35 U.S.C. § 292 and Equipt4 has suffered competitive injury as a result.

42.1. Defendants' marking and advertising are made despite their actual knowledge of invalidating prior art, including the "Great New Pick Material !!!" and "frets.com" prior art.

43. PPL's advertising claims that PPL's pick punches are patent protected and/or patent protection is approved are made in bad faith and are literally false or false and misleading.

COUNT I - DECLARATORY JUDGMENT OF NONINFRINGEMENT
OF PAT. NO. 6,930,231

44. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

45. PPL purports to be the owner of all right, title and interest in the '231 patent.

46. PPL accuses Equipt4, its pick punch manufacturer and, by way of indirect infringement allegations against Equipt4, Equipt4's customers of infringing the '231 patent. PPL demanded that Equipt4 cease sales and recall sold items.

47. PPL filed a lawsuit against Equipt4 alleging, *inter alia*, infringement of the '231 patent.

48. Equipt4 denies that it has infringed any valid and enforceable claim of the '231 patent.

49. Defendants have created a cloud over Equipt4's PICK-A-PALOOZA business and Equipt4's ability to buy, market and sell its products.

50. Equipt4 does not infringe any valid and enforceable claim of the '231 patent. Equipt4 does not use or practice any of the claimed methods of the '231 patent at least because Equipt4 does not practice a step of providing an identification card. Equipt4 does not induce others to infringe the '231 patent at least because Equipt4 does not induce others to practice a step of providing an identification card and Equipt4 does not intend others to infringe the '231 patent. Equipt4 does not contributorily infringe the '231 patent at least because it does not sell, offer to sell or import any material or apparatus that is not a staple article or commodity of commerce suitable for substantial noninfringing use. Equipt4's PICK-A-PALOOZA pick punch is suitable for substantial noninfringing uses of punching picks from any plastic sheet material that is not an identification card such as PICK-A-PALOOZA design strips from Equipt4 and any of the more than one dozen types of plastic sheets available from PPL. Moreover, Equipt4's PICK-A-PALOOZA pick punch may be used to punch picks for stringed instruments other than guitars and may be used to punch materials for jewelry and art work.

50.1. Defendants falsely advertise that Equipt4's PICK-A-PALOOZA pick punch infringes the '231 patent. Defendants' false statements harm Equipt4 at least in the form of lost sales, loss of market share, loss of sales of related products, damage to reputation and goodwill.

51. Accordingly, there exists an immediate and justiciable controversy between Equipt4 and PPL about whether Equipt4 infringes the '231 patent.

52. Accordingly, Equipt4 seeks and is entitled to a declaration that it does not infringe any valid and enforceable claim of the '231 patent.

COUNT II - DECLARATORY JUDGMENT OF INVALIDITY
OF PAT. NO. 6,930,231

53. Equipt4 incorporates paragraphs 1 through 49 above as if set forth herein.

54. An actual, substantial, and continuing justiciable controversy exists between Equipt4 and PPL regarding the validity of the '231 patent and all of its claims.

55. Equipt4 contends that the '231 patent is invalid for failure to comply with Title 35 of the U.S. Code, including, but not limited to, 35 U.S.C. §§ 102, 103 and/or 112. Methods, such as D'Andrea's, of creating guitar picks by punching them from plastic sheet material having aesthetic qualities are old and well known in the United States, used decades prior to the priority date of the '231 patent and render the claims of the '231 patent anticipated and/or obvious. The purported aesthetic qualities of identification cards, credit cards, and drivers licenses are nonfunctional printed matter and have no new or unobvious functional relationship with the old and well known methods of punching guitar picks from plastic sheet material. As such, the '231 patent's claim limitations of "identification card," "credit card" and "driver's license" are given no patentable weight. Additionally, the claims of the '231 patent are obvious in view of D'Andrea's method combined with U.S. Pat. No. 3,650,210, "Method of Making Theft-proof Credit Card," which discloses using a punch to punch arbitrary shaped segments from credit cards. At least claims 3, 10 and 11 are additionally invalid because they omit essential matter, *viz.*, the cooperative relationships of the recited apparatus features to the carrying out of the method steps, rendering the claims unenabled and indefinite under 35 U.S.C. § 112 first and second

paragraphs. Claims 3, 10 and 11 are additionally invalid because they are obvious in view of prior art methods such as D'Andrea's combined with method disclosed in U.S. Pat. Pub. No. 2002/0124420, "Hand Operated Punching Assembly" for punching sheet material with a particular hand tool.

55.1. The "Great New Pick Material !!!" and "frets.com" prior art are invalidating prior art under one or more of 35 U.S.C. §§ 102(a), 102(b), 102(f), 102(g)(2) and 103(a).

55.2. Defendants falsely advertise that Equipt4's PICK-A-PALOOZA pick punch infringes the '231 patent and imply in bad faith that the '231 patent is valid over the prior art. Defendants advertise that Defendant Luhmann is the inventor of the pick punch. Defendants' false statements harm Equipt4 at least in the form of lost sales, loss of market share, loss of sales of related products, damage to reputation and goodwill.

56. PPL disputes Equipt4's invalidity contentions.

57. Equipt4 seeks and is entitled to a declaration that the '231 patent is invalid under 35 U.S.C. §§ 102, 103 and/or 112.

COUNT III - FALSE PATENT MARKING OF PPL PICK PUNCHES

58. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

59. PPL marks its pick punches and its pick punch packages with "Patent" and patent number 6,930,231. The marking imports that PPL's pick punches are patented articles.

60. PPL's advertisements of its pick punches include assertions that there is U.S. patent protection. PPL advertisements of its pick punches include assertions that Luhmann is the inventor of the Pick Punch tool. PPL's advertisements are in a manner importing that the pick punches are patented articles.

61. PPL's pick punches are not patented articles and the patent number used in the marking does not refer to a patent, the validity of which can be asserted in good faith.

62. PPL's patent marking and advertising importing patent protection for PPL pick punches (a) are, upon information and belief, for the purpose of deceiving the public and (b) violate 35 U.S.C. § 292. PPL has actual knowledge of prior art invalidating the '231 patent.

63. Equipt4 has suffered competitive injury as a result of PPL's violation of 35 U.S.C. § 292 at least in the form of lost sales, loss of market share, loss of sales of related products, damage to reputation and goodwill in an amount difficult to ascertain.

COUNT IV - FALSE ADVERTISING UNDER THE LANHAM ACT

64. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

65. PPL has and is engaged in unfair deceptive trade practices through false advertising and commercial promotion through advertising that its pick punches are patented articles or are the subject of approved patent protection, that the '231 patent is not invalid and that other pick punches are patent infringements.

66. The advertising statements and representations made by PPL and described herein are literally false or are false and misleading statements regarding PPL's products and competitors' products.

67. Said statements and representations are likely to confuse and deceive consumers and to unfairly influence purchasing decisions in PPL's favor because they misrepresent the true nature, characteristics and qualities of PPL's products and competitors' products.

68. PPL's advertising statements and representations are material and are likely to influence the decisions of consumers.

69. PPL's advertising statements and representations are and were made in interstate commerce.

70. PPL's advertising statements and representations are and were made in bad faith.

71. By PPL's unlawful acts and activities complained of herein, unlawful at least pursuant to § 43(a) of the Lanham Act, Equipt4 has incurred, and will likely continue to incur, substantial injury in the form of lost sales, loss of market share and damage to reputation and goodwill in an amount difficult to ascertain.

72. Equipt4 has no adequate remedy at law, and has suffered, and will continue to suffer, irreparable injury.

COUNT V - DECLARATORY JUDGMENT REGARDING ALLEGED PPL TRADEMARK

73. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

74. Defendants claim that "pick punch" is a trademark of Defendant Luhmann licensed to Defendant PPL.

75. Defendants have asserted against Equipt4 that Equipt4 may not use the term "pick punch" in any manner in the promotion of Equipt4's PICK-A-PALOOZA pick punch product based on Defendants' alleged rights in "pick punch."

76. Defendants have caused Amazon to remove the term "pick punch" from Equipt4's PICK-A-PALOOZA pick punch marketing materials based on Defendants' alleged rights in "pick punch."

77. Equipt4 disputes that Defendants have any trademark rights in "pick punch."

78. Equipt4 contends that "pick punch" as applied to pick punches is generic or merely descriptive.

79. Accordingly, there exists an immediate and justiciable controversy between Equipt4 and Defendants about whether Defendants or any person can attain trademark rights in “pick punch” as applied to pick punches; whether Defendants may prevent Equipt4 from using the term “pick punch” to identify and describe Equipt4’s products; and whether Equipt4 may use the term “pick punch” to identify and describe Equipt4’s products on Amazon or on any other forum.

80. Equipt4 is, therefore, entitled to and seeks a declaration that “pick punch” as applied to pick punches is not capable of distinguishing sources of such goods and, therefore, trademark rights cannot be attained.

81. Equipt4 is, therefore, entitled to and seeks a declaration that Defendants have no trademark claim or interest in “pick punch” as applied to pick punches.

82. Equipt4 is, therefore, entitled to and seeks injunctive relief against Defendants to prevent them from asserting and claiming trademark rights in “pick punch” as applied to pick punches.

83. Equipt4 is, therefore, entitled to and seeks cancellation of registration no. 3,959,995 from the supplemental register at the U.S. Patent and Trademark Office pursuant to 35 U.S.C. § 1119.

84. Equipt4 has no adequate remedy at law.

COUNT VI - TORTIOUS INTERFERENCE WITH
PROSPECTIVE CONTRACTUAL RELATIONS

85. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

86. Equipt4 had and has prospective economic and contractual relationships with amazon.com users prepared and intending to purchase Equipt4’s PICK-A-PALOOZA pick punch and Equipt4’s related products.

87. Defendants are and were aware of these prospective relationships.

88. Defendants intentionally and improperly interfered and are interfering in these relationships through their acts of transmitting and/or causing to be posted on the Amazon PICK-A-PALOOZA pick punch product page a false, disparaging and defamatory “product review” alleging patent infringement and illegal activity, thereby damaging Equipt4 at least through lost sales, loss of market share, and damage to reputation and goodwill in an amount difficult to ascertain.

89. Defendants’ motives were improper at least because Defendants intended to harm Equipt4 and its sales on Amazon and benefit from diverted sales. Defendants used improper means including publishing false and defamatory statements and using a pseudonym to hide identity and bias.

90. Defendants’ acts were without right or justifiable cause and were calculated and intended to interfere with Equipt4’s relationships with persons prepared and intending to purchase Equipt4’s pick punch and related products on Amazon and prevent formation of such relationships, thereby damaging Equipt4.

91. Equipt4 has no adequate remedy at law, and has suffered, and will continue to suffer, irreparable injury.

COUNT VII - INJURIOUS FALSEHOOD

92. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

93. Defendants published statements that Equipt4 is acting illegally and that its PICK-A-PALOOZA pick punch is a patent infringement.

94. Defendants made these statements knowing them to be false.

95. Defendants’ false statements disparaged the quality of the PICK-A-PALOOZA pick punch and induced others not to deal with Equipt4.

96. Defendants acted with malice and intent to harm Equipt4 when making these false statements.

97. As a result of the malicious and deliberate actions of Defendants, Equipt4 has suffered economic loss, including the impairment of the vendibility of Equipt4's PICK-A-PALOOZA pick punch, lost sales, loss of market share, loss of sales of related products, and damage to reputation and goodwill in an amount difficult to ascertain.

98. As a result of the malicious and deliberate actions of Defendants, Equipt4 lost sales of its PICK-A-PALOOZA pick punch to one or more of amazon.com customers identified as "David Rain 'random reader'," "Kevin Burns 'Master Burns'," "Diego Ante," "Nitasha," and others who were prepared to and intended to purchase a PICK-A-PALOOZA pick punch on Amazon but read the statement and did not.

COUNT VIII - DEFAMATION

99. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

100. Defendants published statements to Amazon and to amazon.com users that Equipt4 is acting illegally by selling and importing its PICK-A-PALOOZA pick punch.

101. Selling and importing pick punches is not illegal and Equipt4 was not and is not acting illegally.

102. Defendants made these statements knowing them to be false.

103. Defendants' false statements constitute defamation per se and expose Equipt4 to public scorn, hatred, contempt and/or ridicule, harm Equipt4's reputation and induce others not to deal with Equipt4.

104. Defendants acted with malice and intent to harm Equipt4 when making these false statements.

105. As a result of the malicious and deliberate actions of Defendants, Equipt4 has suffered economic loss, including lost sales, loss of market share, loss of sales of related products, and damage to reputation and goodwill in an amount difficult to ascertain.

COUNT IX - UNJUST ENRICHMENT

106. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

107. Equipt4 created a product listing page on which to list and advertise its PICK-A-PALOOZA pick punch. Equipt4's product listing page includes a feedback and product review feature. The feedback and product review feature constitutes a benefit to a competitor who would post positive comments about his own products and negative comments about the subject product.

108. Defendants knew of the benefit, using the feedback and product review feature to publish statements to Amazon and to amazon.com users that Equipt4 is acting illegally by selling and importing its PICK-A-PALOOZA pick punch and importing that Equipt4's PICK-A-PALOOZA pick punch is illegal and infringes a patent.

109. Defendants' use of the feedback and product review feature diverted sales from Equipt4 to Defendants, unjustly enriching Defendants. The circumstances of Defendants' use of the benefit make it inequitable for Defendants to retain of the value of the benefit.

110. Defendants have been unjustly enriched at the expense of Equipt4.

111. As a result, Equipt4 is entitled to restitution for Defendants' unjust enrichment.

COUNT X - TORTIOUS INTERFERENCE WITH
BUSINESS RELATIONSHIP

112. Paragraphs 1 through 43 of the instant complaint are incorporated in their entirety herein.

113. Equipt4 had and has an economic and contractual relationship with Amazon.

114. Defendants are aware of this relationship.

115. Defendants intentionally and improperly interfered and are interfering in this relationship through their acts of asserting purported trademark rights in “pick punch” and causing Amazon to modify Equipt4’s product listings and to limit Equipt4’s ability to control and modify its product listings.

116. Equipt4’s inability to control and modify its product listings damages Equipt4 at least because it cannot adjust its marketing to keyword trends and it therefore loses sales.

117. Defendants’ acts were done with unlawful purpose at least because Defendants intended to harm Equipt4 and its sales on Amazon and benefit from sales not realized by Equipt4 and Defendants had no justifiable cause, using improper means including publishing false and defamatory statements and using a pseudonym to hide identity and bias.

118. Defendants’ acts cause missed sales opportunities, thereby damaging Equipt4.

119. Equipt4 has no adequate remedy at law, and has suffered, and will continue to suffer, irreparable injury.

WHEREFORE Plaintiff Equipt4 prays for Judgment against Defendants PPL and Luhmann and prays the Court to:

- A. Declare invalidity of the ’231 patent;
- B. Declare that Equipt4 does not infringe the ’231 patent;

- C. Declare that the “product review” is false, disparaging and defamatory and enter an Injunction ordering Defendants to withdraw it;
- D. Enter an order declaring the “product review” to be unlawful and requesting Amazon to remove it;
- E. Declare that “pick punch” is not a trademark of Defendants;
- F. Declare that “pick punch” is not protectable as a trademark for pick punches;
- G. Enter an order to the U.S. Patent and Trademark Office directing the office to cancel trademark supplemental register no. 3,959,995;
- H. Enter an Injunction enjoining Defendants from asserting “pick punch” as a trademark;
- I. Enter an Injunction enjoining Defendants from communicating with suppliers, customers and service providers of Equipt4 alleging infringement of the ’231 patent or “pick punch” as a trademark;
- J. Enter an order declaring Defendants’ assertion of trademark rights in “pick punch” as unsupported by law and requesting Amazon to give no weight to Defendants’ assertions;
- K. Enter an order declaring this an exceptional case pursuant to 35 U.S.C. § 285 and/or 15 U.S.C. § 1117;
- L. Award Equipt4 fair and proper compensatory, enhanced, exemplary and/or punitive damages and treble damages where permitted by law in amounts to be determined at trial;
- M. Award Equipt4 Defendants’ profits where permitted by law;
- N. Award Equipt4 costs of the action;
- O. Award Equipt4 pre-judgment and post-judgment interest and costs;
- P. Award Equipt4 reasonable attorneys fees;

Q. Grant such other and further legal, statutory and equitable relief as the Court shall deem just and proper.

JURY DEMAND

Plaintiff Equipt4 hereby demands a trial by jury on all issues triable to a jury as a matter of right.

DATED this 13th day of January, 2014.

Respectfully Submitted,

/S/

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