

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

POLARIS INDUSTRIES INC.

Plaintiff,

V.

CFMOTO POWERSPORTS, INC.;
CFMOTO AMERICA, INC; JOHN T. &
ANGELA M. O'MARA d/b/a QUAD
CENTRAL MOTORSPORTS; and
LEO'S KAWASAKI SALES SOUTH,
INC.

Defendants.

Court File No. 10-cv-04362 (JNE/JJG)

THIRD AMENDED COMPLAINT

(Jury Trial Demanded)

THIRD AMENDED COMPLAINT

Plaintiff, Polaris Industries Inc., for its Third Amended Complaint against

Defendants states:

THE PARTIES

1. Plaintiff, Polaris Industries Inc., is a Delaware corporation having its principal place of business at 2100 Highway 55, Medina, Minnesota 55340 (“Plaintiff” or “Polaris”). Polaris is a citizen and resident of Minnesota. Polaris is an industry leader in snowmobiles, motorcycles, all-terrain vehicles, and side-by-side off road vehicles.

2. Defendant CFMOTO Powersports, Inc. is a Minnesota corporation, having its principal place of business at 3555 Holly Lane N. #30, Plymouth, MN 55447 (“CFMOTO Powersports”). CFMOTO Powersports is a citizen and resident of Minnesota. CFMOTO Powersports is a dealer and/or distributor of the CF625 Z6, which

upon information and belief is manufactured in whole or part by CFMOTO America, Inc. (“CFMOTO USA”) and/or Zhejiang CFMOTO Power Co., Ltd. (“CFMOTO China”) in China. CFMOTO Powersports is importing, offering for sale and/or selling the CF625 Z6 in this district. Upon information and belief, the CF625 Z6 is now known as the ZFORCE 600 and 600EX.

3. Defendant CFMOTO America, Inc. is, upon information and belief, a New Jersey corporation, having its principal place of business at 3555 Holly Lane N. #70, Plymouth, MN 55447 and a registered address at 817-D Donaldson Street, Highland Park, NJ 08904 (“CFMOTO America”). CFMOTO America is a citizen and resident of Minnesota. CFMOTO America is, upon information and belief, a manufacturer, dealer and/or distributor of the CF625 Z6. CFMOTO America is selling and offering for sale the CF625 Z6 in this district. CFMOTO Powersports and CFMOTO USA may be collectively referred to herein as “CFMOTO.”

4. Defendants John T. & Angela M. O’Mara d/b/a Quad Central Motorsports, are citizens and residents of Minnesota, having a residential address at 1615 166th Ave. NE, Ham Lake, MN 55304 and a business address at 16421 Aberdeen St. NE, Ham Lake, MN 55304 (“Quad Central Motorsports”). Quad Central is offering for sale and/or selling the CFMOTO CF625 Z6 in this district.

5. Defendant Leo’s Kawasaki Sales South, Inc. is a Minnesota corporation, having its principal place of business at 16375 Kenrick Ave., Lakeville, MN 55044 (“Leo’s South”). Leo’s South is a citizen and resident of Minnesota. Leo’s South is offering for sale and/or selling the CFMOTO CF625 Z6 in this district.

JURISDICTION AND VENUE

6. This is a claim of patent infringement arising under the Acts of Congress relating to patents, 35 U.S.C. §§ 271; 282-285. This Court has exclusive jurisdiction over Plaintiff's patent infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338(a). The Court has original jurisdiction over Plaintiff's Lanham Act claim pursuant to 28 U.S.C. §§ 1331 and 1338(a). The Court has pendent and supplemental jurisdiction over Plaintiff's state and common law claims under 28 U.S.C. §§ 1338(b) and 1367 in that such claims are joined with substantial and related claims under the Patent and Trademark Laws of the United States.

7. Personal jurisdiction over Defendants and venue are proper in this district under 28 U.S.C. § 1391. Defendants have marketed, offered for sale, and, upon information and belief, sold their accused products in the District of Minnesota. The Defendants are residents of Minnesota and the events giving rise to Polaris's claims arose in this district.

FACTS

8. Polaris is a leading designer, manufacturer and marketer of recreational vehicles such as snowmobiles, motorcycles and off road vehicles, such as all-terrain vehicles and side-by-side all-terrain vehicles. The first Polaris snowmobile was built more than 50 years ago. Since that time, Polaris has continued to innovate. Polaris subsequently successfully launched off road vehicles, watercraft and the Victory line of road bikes.

9. Polaris led the industry with the introduction of its RANGER® side-by-side off road vehicle. The RANGER® was such a success that many other recreation vehicle manufactures also began offering side-by-side off road vehicles.

10. Polaris again jumped ahead of the industry in 2007 with the introduction of its RANGER RZR®. The RANGER RZR® is the industry's only trail capable side-by-side. Since its introduction, the RANGER RZR® has consistently featured a distinctive, sporty design that has become Polaris's protectable trade dress, recognizable to consumers as coming from Polaris. The distinctive, sporty design includes a front quarter panel having a generally horizontal upper portion inclining away from the machine front, and a lower portion that first curves away from the front wheel and then back toward the front wheel, as shown below. The distinctive design also includes a rear quarter panel that is generally horizontal over the rear wheel and inclining toward the machine rear, ending approximately inline with the rear tire, and having a front portion that is angled away from the driver and has a section that protrudes above the generally horizontal portion of the panel, as shown below. The distinctive design also includes a roll cage that begins attached to the front quarter panel and/or hood, angles away from the machine front, angles a second time to a high point and then returns to the machine in line with the angle of the rear quarter panel, as shown below.



The distinctive, sporty design also includes front headlights that are angled toward the center of the machine and bars extending vertically downward giving the impression of eyes and fangs, as shown below. The Ranger RZR also includes two-part bucket seats having an integrated head rest (partially shown below).



The distinctive, sporty design also includes rear brake lights that are angled toward the center of the machine and a notch in the molding between the rear lights that give the impression of eyes, as shown below.



11. The unique styling and distinctive features of the RANGER RZR® made it an instant success. In 2007, the year the RANGER RZR® was introduced, it won at least two awards: SxS Sport of the Year and the prestigious Best of the Best by Field & Stream. In 2008, it was named the Side by Side Action's Sport SxS of the year. In 2009, it was named Performance SxS of the Year by ATV Illustrated. In 2010, it received three awards including Best Sport UTV by All-Terrain Vehicle.

12. Polaris has invested millions of dollars advertising and marketing the RANGER RZR® through television, print, online, and press events. The RANGER RZR® is one of Polaris's most popular and best selling products.

13. The media coverage was instant and positive. One media source, in early 2007, hailed the RANGER RZR® design as “truly innovative,” “is going to have a deep and lasting impact on the side-by-side market,” and “a ground-breaking product for 2007.”

14. Defendants CFMOTO quickly copied the RANGER RZR® and began selling the knock-offs from China. Polaris became aware of a CFMOTO Z5 model and sent a cease-and-desist letter in February 2009. It appeared to Polaris that CFMOTO headed the warning and stopped the infringing sales.

15. However, in late 2009, Polaris became aware of the CFMOTO Z6 knock-offs being sold by CFMOTO. The industry commented that the CFMOTO “Z6 bears a striking resemblance to the very hot Polaris RZR.” As can be seen in the photo below, like the RANGER RZR®, CFMOTO’s Z6 includes a front quarter panel having a generally horizontal upper portion, and a lower portion that first curves away from the front wheel and then back toward the front wheel. The CFMOTO Z6 design also includes a rear quarter panel that is generally horizontal over the rear wheel, ending approximately inline with the rear tire, and having a front portion that is angled away from the driver and has a section that protrudes above the generally horizontal portion of the panel. The CFMOTO Z6 also includes a roll cage that begins attached to the front quarter panel and/or hood, angles away from the machine front, angles a second time to a high point and then returns to the machine in line with the angle of the rear quarter panel, as shown below.



The CFMOTO Z6 also includes front headlights that are angled toward the center of the machine and bars extending vertically downward giving the impression of eyes and fangs, as shown below. The CFMOTO also includes two-part bucket seats having an integrated head rest (shown below).



The CFMOTO Z6 also includes rear brake lights that are angled toward the center of the machine and a notch in the molding between the rear lights that give the impression of eyes, as shown below.



Polaris sent CFMOTO a second cease-and-desist letter in December 2009.

16. Despite Polaris's two cease-and-desist letters notifying CFMOTO of Polaris's patents and patent applications, CFMOTO is now selling, offering for sale, and importing into the United States (including in this district) the CFMOTO CF625 Z6, which infringes both Polaris's patent and Polaris's trade dress. Polaris has not authorized CFMOTO under any of its patents, patent applications or trade dress.

17. Defendants Quad Central Motorsports and Leo's South both offer for sale the infringing CFMOTO CF625 Z6 in Minnesota. Polaris has not authorized Quad Central Motorsports or Leo's South under any of its patents, patent applications or trade dress.

CLAIM I
PATENT INFRINGEMENT U.S. PATENT NO. 7,819,220

18. Polaris repeats the allegations of paragraphs 1-17 of this Complaint.

19. On October 26, 2010, United States Patent No. 7,819,220 entitled Side-by-Side ATV was duly and legally issued to Polaris as assignee of the inventors. Polaris is the owner of the entire right, title and interest in and to United States Patent No. 7,819,220 and has been and still is the owner thereof. United States Patent No. 7,819,220 is attached as Exhibit A.

20. Defendants have each made, used, sold, offered for sale, or imported side-by-side all terrain vehicles, including the CF625 Z6, which infringe United States Patent No. 7,819,220. Upon information and belief, the CF625 Z6 is now also known as the ZFORCE 600 and 600EX.

21. Plaintiff has complied with the notice provision of the patent statutes by placing a notice of U.S. Patent No. 7,819,220 on its side-by-side all terrain vehicles and has given Defendants written notice of the infringement.

22. Upon information and belief, Defendants have had actual knowledge of United States Patent No. 7,819,220, since at least the date of the notice letter to Defendants and their infringement of this patent has been and continues to be willful and deliberate.

23. Polaris has been damaged by Defendants' infringement of United States Patent No. 7,819,220 and will continue to be damaged in the future unless Defendants are permanently enjoined from infringing said patent.

24. Polaris has also suffered monetary damages caused by Defendants' infringement in an amount to be proven at trial.

CLAIM II
FEDERAL UNFAIR COMPETITION – LANHAM ACT

25. Polaris repeats the allegations of paragraphs 1-24 of this Complaint.

26. Polaris spends considerable sums of money advertising and publicly promoting the RANGER RZR®. Polaris's RANGER RZR® has been the subject of numerous media stories and awards. Consumers recognize the RANGER RZR® as coming from a single source: Polaris. As a result of Polaris's extensive advertising and sales of its distinctively shaped and designed RANGER RZR® since 2007, the media coverage and awards, and Polaris's uninterrupted use of its distinctive design, Polaris is the exclusive owner of the trade dress on the RANGER RZR®.

27. The trade dress for the RANGER RZR® includes, but is not limited to, its distinctive, sporty configuration of a front quarter panel having a generally horizontal upper portion inclining away from the machine front, and a lower portion that first curves away from the front wheel and then back toward the front wheel. The distinctive design also includes a rear quarter panel that is generally horizontal over the rear wheel and inclining toward the machine rear, ending approximately inline with the rear tire, and having a front portion that is angled away from the driver and has a section that protrudes above the generally horizontal portion of the panel. The distinctive design also includes a roll cage that begins attached to the front quarter panel and/or hood, angles away from the machine front, angles a second time to a high point and then returns to the machine in

line with the angle of the rear quarter panel. The distinctive design also includes front headlights that are angled toward the center of the machine and bars extending vertically downward giving the impression of eyes and fangs. The Ranger RZR also includes two-part bucket seats having an integrated head rest. The Polaris trade dress also includes rear brake lights that are angled toward the center of the machine and a notch in the molding between the rear lights that give the impression of eyes. The trade dress is non-functional and has acquired secondary meaning as evidenced by extensive advertising and sales, numerous awards, and non-party statements recognizing CFMOTO's Z6 as bearing "a striking resemblance to the very hot Polaris RZR."

28. Defendants have been selling and advertising side-by-side all terrain vehicles, including the CFMOTO Z6, that have a shape and look confusingly similar to the protectable aspects of the appearance of Polaris's RANGER RZR®, without Polaris's consent. Specifically, the CFMOTO's Z6 includes a front quarter panel having a generally horizontal upper portion, and a lower portion that first curves away from the front wheel and then back toward the front wheel. The CFMOTO Z6 design also includes a rear quarter panel that is generally horizontal over the rear wheel, ending approximately inline with the rear tire, and having a front portion that is angled away from the driver and has a section that protrudes above the generally horizontal portion of the panel. The CFMOTO Z6 also includes a roll cage that begins attached to the front quarter panel and/or hood, angles away from the machine front, angles a second time to a high point and then returns to the machine in line with the angle of the rear quarter panel, as shown below. The CFMOTO Z6 also includes front headlights that are angled toward

the center of the machine and bars extending vertically downward giving the impression of eyes and fangs. The CFMOTO also includes two-part bucket seats have an integrated head rest. The CFMOTO Z6 also includes rear brake lights that are angled toward the center of the machine and a notch in the molding between the rear lights that give the impression of eyes.

29. Defendants sales and advertising of the CFMOTO Z6 will cause confusion, deception and mistake and have infringed upon the trade dress rights of Polaris by selling, advertising and distributing side-by-side all terrain vehicles, including the CFMOTO Z6, whose design and look is confusingly similar to the protectable trade dress of Polaris's RANGER RZR®, which is unfair competition in violation of the Lanham Act, 15 U.S.C. §1125(a).

30. As a direct and proximate result of the likely consumer confusion, mistake, or deception, Polaris has suffered and will continue to suffer damage in an amount to be proven at trial, including but not limited to all of Defendants' profits from sales of the infringing products and all damages sustained by Polaris as a result of Defendants' infringements.

31. As a direct and proximate result of the likely consumer confusion, mistake, or deception, Polaris has suffered and will continue to suffer irreparable harm if the conduct of Defendants are not enjoined.

32. Pursuant to 15 U.S.C. § 1117, Plaintiff is entitled to recover the costs of this action. The intentional nature of Defendants' unlawful acts renders this an "exceptional case," entitling Polaris to an award of attorneys' fees under 15 U.S.C. § 1117(a).

CLAIM III
DECEPTIVE TRADE PRACTICES – MINN. STAT. 325D.44

33. Polaris repeats the allegations of paragraphs 1-32 of this Complaint.

34. Defendants' CFMOTO Powersports, CFMOTO America, Quad Central Motorsports, and Leo's South, individually and collectively, have engaged in deceptive trade practices when, in the course of their business beginning in 2009 and continuing through today, they advertised, offered for sale and sold in the United States and this district a side-by-side all terrain vehicle design, including the Z6, that is confusingly similar to Polaris's RANGER RZR® design and its protectable trade dress and is likely to cause confusion, mistake, or deception as to affiliation, connection, association or the source of origin of the goods and services offered by Defendants. This is because customers and potential customers are likely to believe that the infringing goods offered by Defendants, including the CFMOTO Z6, are provided by, sponsored by, approved by, licensed by, affiliated or associated with, or in some other way legitimately connected to Polaris. Defendant has engaged in deceptive trade practices in violation of Minn. Stat. § 325D.44, including Minn. Stat. § 325D.44(1-3, 13).

35. As a direct and proximate result of the likely confusion, mistake, or deception, the public has suffered and will continue to suffer irreparable harm if the conduct of Defendants are not enjoined.

36. As a direct and proximate result of the likely confusion, mistake, or deception, Polaris has suffered and will continue to suffer irreparable harm if the conduct of Defendants are not enjoined.

37. Pursuant to Minn. Stat. §§ 8.31 and 325D.45, Polaris is entitled to recover its costs and attorneys' fees.

CLAIM IV
UNLAWFUL TRADE PRACTICES ACT – MINN. STAT. § 325D.09

38. Polaris repeats the allegations of paragraphs 1-37 of this Complaint.

39. Defendants' CFMOTO Powersports, CFMOTO America, Quad Central Motorsports, and Leo's South, individually and collectively, have engaged in unlawful trade practices when, in the course of their business beginning in 2009 and continuing through today, they advertised, offered for sale and sold in the United States and this district a side-by-side all terrain vehicle design, including the Z6, that is confusingly similar to Polaris's RANGER RZR® design and its protectable trade dress and is likely to cause confusion, mistake, or deception as to affiliation, connection, association or the source of origin of the goods and services offered by Defendants. This is because customers and potential customers are likely to believe that the infringing goods offered by Defendants, including the CFMOTO Z6, are provided by, sponsored by, approved by, licensed by, affiliated or associated with, or in some other way legitimately connected to Polaris. Defendant has engaged in unlawful trade practices in violation of Minn. Stat. § 325D.09 *et seq.*

40. As a direct and proximate result of the likely confusion, mistake, or deception, Polaris has suffered and will continue to suffer irreparable harm if the conduct of Defendants is not enjoined.

41. Pursuant to Minn. Stat. § 325D.15 and § 8.31, subd. 3a, Polaris is entitled to recover its costs, disbursements, and reasonable attorneys' fees.

CLAIM V
COMMON LAW UNFAIR COMPETITION

42. Plaintiff repeats the allegations of paragraphs 1-41 of this Complaint.

43. Defendants' conduct constitutes unfair competition in violation of the rights of Polaris through Defendants' unauthorized use of Polaris' trade dress in competition with Polaris as alleged herein above.

44. Defendant's acts were taken in willful, deliberate and/or intentional disregard of Polaris's rights.

45. As a direct and proximate result of the likely consumer confusion, mistake, or deception, Polaris has suffered and will continue to suffer damage in an amount to be proven at trial, including but not limited to all of Defendants' profits from sales of the infringing products and all damages sustained by Polaris as a result of Defendants' infringements.

46. As a direct and proximate result of the unfair competition of Defendants, Polaris has suffered and will continue to suffer irreparable harm if the conduct of Defendants is not enjoined.

CLAIM VI
(as to CFMOTO POWERSPORTS, INC. and CFMOTO AMERICA, INC.)
PATENT INFRINGEMENT OF U.S. PATENT NO. 8,382,125

47. Polaris repeats the allegations of paragraphs 1-46 of this Complaint.

48. On February 26, 2013, United States Patent No. 8,382,125 entitled "Side-by-Side ATV" was duly and legally issued to Polaris as assignee of the inventors. Polaris

is the owner of the entire right, title and interest in and to United States Patent No.

8,382,125 and has been and still is the owner thereof. United States Patent No. 8,382,125 is attached as Exhibit B.

49. Defendants have each made, used, sold, offered for sale, or imported side-by-side all terrain vehicles, and still are, including the CF625 Z6, which infringe United States Patent No. 8,382,125. Upon information and belief, the CF625 Z6 is now also known as the ZFORCE 600 and 600EX.

50. Plaintiff has complied with the notice provision of the patent statutes by giving Defendants written notice on November 14, 2013, or at least by this amended complaint.

51. Upon information and belief, Defendants have had actual knowledge of United States Patent No. 8,382,125, from about the date of the patent issuance, February 26, 2013, because Defendants were monitoring the prosecution of the application that became U.S. Patent No. 8,382,125, and their infringement of this patent has been and continues to be willful and deliberate.

52. Polaris has been damaged by Defendants' infringement of United States Patent No. 8,382,125 and will continue to be damaged in the future unless Defendants are permanently enjoined from infringing said patent.

53. Polaris has also suffered monetary damages caused by Defendants' infringement in an amount to be proven at trial.

CLAIM VII
(as to CFMOTO POWERSPORTS, INC. and CFMOTO AMERICA, INC.)
PATENT INFRINGEMENT OF U.S. PATENT NO. 8,596,405

54. Polaris repeats the allegations of paragraphs 1-53 of this Complaint.

55. On December 3, 2013, United States Patent No. 8,596,405 entitled “Side-by-Side ATV” was duly and legally issued to Polaris as assignee of the inventors. Polaris is the owner of the entire right, title and interest in and to United States Patent No. 8,596,405 and has been and still is the owner thereof. United States Patent No. 8,596,405 is attached as Exhibit C.

56. Defendants have each made, used, sold, offered for sale, or imported side-by-side all terrain vehicles, and still are, including the CF625 Z6, which infringe United States Patent No. 8,596,405. Upon information and belief, the CF625 Z6 is now also known as the ZFORCE 600.

57. Plaintiff has complied with the notice provision of the patent statutes by giving Defendants written notice on November 14, 2013, or at least by this amended complaint.

58. Upon information and belief, Defendants have had actual knowledge of United States Patent No. 8,596,405, from about the date of the patent issuance, December 3, 2013, because Defendants were monitoring the prosecution of the application that became U.S. Patent No. 8,596,405, and their infringement of this patent has been and continues to be willful and deliberate.

59. Polaris has been damaged by Defendants' infringement of United States Patent No. 8,596,405 and will continue to be damaged in the future unless Defendants are permanently enjoined from infringing said patent.

60. Polaris has also suffered monetary damages caused by Defendants' infringement in an amount to be proven at trial.

JURY DEMAND

Polaris respectfully requests a jury trial for this matter.

WHEREFORE, the Plaintiff, Polaris Industries Inc., prays that the Court enter an order and judgment:

A. that each Defendant has infringed United States Patent Nos. 7,819,220; 8,382,125; and/or 8,596,405.

B. preliminarily and permanently enjoining and restraining the Defendants, their directors, members, officers, agents, servants, employees, subsidiaries, affiliates, and all persons in active concert or participation with, through, or under them, at first during the pendency of this action and thereafter perpetually:

1. from infringing United States Patent Nos. 7,819,220; 8,382,125; and 8,596,405;
2. from committing any acts of unfair competition, including but not limited to importing, selling and advertising an off road design confusing similar to Polaris's RANGER RZR®, and from implying a false designation of origin or a false description or representation of products;

3. from committing any acts of unfair competition by passing off or inducing or enabling others to sell or pass off goods/services that are not Polaris's goods or services as those of Polaris;
4. from using in any manner packaging, labels, signs, literature, display cards, or other packaging, advertising, web sites or promotional materials, or other materials related to the Defendants' goods or services, bearing any design, or any other mark, word, or name confusingly similar to Polaris's RANGER RZR® design;
5. from making any statements on promotional materials or advertising for Defendants' goods that are false or misleading;
6. from using any designation that is likely to disparage, tarnish or dilute the distinctive quality of Polaris's marks or products; and
7. from committing any acts of deceptive or unlawful trade practices calculated to cause members of the trade or purchasing public to believe that Defendants' goods or services are the goods or services of Polaris or are sponsored by or associated with, or related to, or connected with, or in some way endorsed or promoted by Polaris under the supervision or control of Polaris.

C. that each Defendant deliver up to Polaris any and all products, images, containers, signs, packaging materials, printing plates, and advertising or promotional materials and any materials used in the preparation thereof, which in any way unlawfully use or make reference to Polaris, its images, or products.

D. that each Defendant, within thirty (30) days after service of notice of entry of judgment or issuance of an injunction pursuant thereto, file with the Court and serve upon Polaris's counsel a written report under oath setting forth details of the manner in which each Defendant has complied with the Court's order.

E. that each Defendant account and pay over to Polaris statutory damages or other damages sustained by Polaris, Defendants' profits (each of them), Polaris's attorneys' fees and costs, and ordering that the amount of damages awarded Polaris be enhanced by an amount not inconsistent with the law.

F. awarding Polaris damages under 35 U.S.C. §§ 154 and 284, including treble damages for willful infringement.

G. awarding Polaris its attorneys fees as provided by 35 U.S.C. § 285.

H. awarding Plaintiff such other relief as the Court may deem just and proper.

Polaris Industries Inc.

Date: January 9, 2014

By Counsel

s/Anthony R. Zeuli

Anthony R. Zeuli, Reg. No. 274884

Thomas J. Leach, Reg. No. 311844

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