

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PALM BEACH DIVISION

PATRICK SMITH, an individual, and ST
MACHINE DIST, LLC, a Florida limited
liability company,

Plaintiff,

v.

EBAY INC., a Delaware corporation,

Defendant.

Case Number:

_____ /

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

COMES NOW the Plaintiff, PATRICK SMITH (“Smith”) AND ST MACHINE DIST., LLC (“STM”), by and through its undersigned counsel, and sues the Defendant, EBAY INC. (“Defendant” or “eBay”), alleges and states as follows:

INTRODUCTION

1. Through this Complaint the Plaintiff is seeing for Injunctive Relief, Compensatory and Punitive Damages, Attorney’s Fees and Costs from Defendant, and alleges in Four Counts:
 - a) The Defendant is offering to sell without authorization a patented product, violating the Patent of the Plaintiff pursuant to 35 U.S.C. § 271.
 - b) The Defendant is selling the patented product under the name of the “ST Machine Pig Spotter”, that is causing confusion and mistake in regards to the connection of the product to the Patent holder, violating 15 U.S.C. §1125.
 - c) The Defend is offering for sale the imported merchandise that is copying the name of the domestic manufacturer, violating 15 U.S.C. § 1124.
 - d) The Defendant is offering for sale merchandise that is deceptive and unconscionable in violation of Florida Deceptive Trade Practices Act Fla.

Stat. § 501.204

SUBJECT MATTER JURISDICTION, VENUE AND PERSONAL JURISDICTION

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 as a federal question; 28 U.S.C. §1338 as an infringement on patents; and 28 U.S.C. §1367 as supplemental jurisdiction.
3. Pursuant to 28 U.S.C. §1391 (b) and (c) venue is proper in this District because: (i) substantial portion of the events giving rise to the claims occurred in this District; and (ii) the Defendant has a registered agent in this District.
4. Upon information and belief, the Defendant eBay Inc. is a Delaware corporation with its principal place of business at 2065 Hamilton Avenue, San Jose, California 95125.
5. Upon information and belief, the Defendant has a registered agent located at NRAI Services, Inc., 1200 South Pine Islands Road, Plantation, FL 33324.
6. Upon information and belief, this Court has personal jurisdiction over eBay by virtue of its doing business within this State and or its commission of tortious acts inside and outside of Florida that have an effect within this State.
7. Plaintiff, Patrick Smith, is a citizen and resident of the state of Florida.
8. Plaintiff, ST Machine Dist., LLC, is a limited liability company organized under the laws of the State of Florida with its principal business in the State of Florida.

FACTUAL BACKGROUND

9. Patrick Smith is the owner by assignment of all right, title, and interest in and to United States Patent No. D576,933 S (the “576 Patent”), including the right to sue for past damages. Accordingly, Smith has standing to bring this action for patent infringement. The 576 Patent was duly and legally issued by the United States Patent and Trademark Office on or about September 16, 2008, is active, and is titled “Motorcycle Mirror.” A true and correct copy of the 576 Patent is attached hereto as Exhibit “1”.
10. eBay, Inc. is one of the world’s largest online marketplaces, with approximately

128 million active users worldwide and more than 500 million items listed for sale.

11. On information and belief, eBay derives revenue from listing and value fees, merchant fees, among other sources like advertising, contractual service fees, to name a few.
12. eBay is organized, exists, and/or operates under laws of various states throughout the United States, including Florida.

VeRO Program

13. eBay created the Verified Rights Owner (“VeRO”) Program so that intellectual property owners could utilize that forum to report and file a complaint directly to eBay in which property owners believe their rights are being infringed upon.
14. If an intellectual property owner wants to report that their work is being infringed upon, eBay requires them to submit a Notice of Claimed Infringement to eBay’s designated agent along with a description of the work being infringed on and how it can be found on the site.
15. eBay states on their website “*eBay has adopted and implements a policy that provides for the termination in appropriate circumstances of the accounts of users who repeatedly infringe copyrights or other intellectual property rights of eBay and/or others.*”
16. The Plaintiff had submitted a complaint to the VeRO program in 2010 and the offending patent infringers were subsequently removed from eBay.
17. The Plaintiff submitted a subsequent request to the VeRO program in January 2014, in regards to new infringers.
18. The subsequent request was not met with any resolution and the Plaintiff submitted an additional request to VeRO.
19. The undersigned counsel had submitted a third request to VeRO on or about March 20, 2014, prior to filing this Complaint.

Patent and Business Model

20. The Plaintiff Smith had developed a revolutionary mounting bracket for after

market non OEM motorcycle mirrors.

21. Prior the revolutionary development, motorcycle retail stores would have to stock multiple mirrors for each make and model of motorcycle that would properly fit each motorcycle's unique handle bars.
22. The Plaintiff Smith spent approximately \$175,000 in developing the patented mirrors. This is included the multiple prototype developments, the product testing, the creations of the molds, manufacturing relationships, establishing downstream distribution channels, marketing and Patent registration.
23. The Plaintiff Smith manufactures the mirrors in North Carolina and distributes them to retail motorcycle stores as well as direct on-line sales.
24. The Plaintiff Smith has lost approximately \$300,000 of sales since eBay has refused to remove the infringing sales from its on-line marketplace.
25. All conditions precedent to bringing this action have occurred or have been waived.

COUNT I

Infringement on United States Patent No. D576,933 S

26. Plaintiffs realleges and incorporates paragraphs 1 – 25 as if stated herein.
27. eBay has allowed and continues to allow infringement of the 576 Patent in violation of 35 U.S.C. § 271(b).
28. Several different sellers on eBay, all based out of China, are listing "ST Machine Pig Spotters" for sale in bulk amounts (bulk meaning more than one available).
29. The product being sold by these sellers are an exact replica of the 576 Patent design owned by Smith and selling them as being produced by ST Machine.
30. The mirrors being listed for sale on eBay are being reproduced and manufactured in China without the consent of the Plaintiff Smith nor ST Machine to do so, in turn being sold for profit on eBay.
31. On or about September 26, 2013, the Plaintiff Smith had notified eBay's VeRO program of the violations.
32. eBay had decided not to remove the infringing merchandise, willfully and intentionally allowing the continued patent infringements.
33. On or about March 20, 2014, the Plaintiffs followed eBay's procedure for

registering and sending a Notice of Claim (“Claim”) through VeRO. Please see attached as Exhibit “2”.

34. The Claim submitted to eBay via email, as indicated on their website, included printouts of all the sellers listing (approximately six sellers) along with a true and correct copy of the Patent.
35. On or about March 21, 2014, eBay’s VeRO team sent an email in response to the Notice of Claim stating that they have not processed the report because they require an injunction or other court order on US Patent claims. Please see attached as Exhibit “3”.
36. eBay is willfully and intentionally disregarding the Plaintiff’s claim and allowing for patented work to continue to be infringed upon in their marketplace, of which they have complete dominion and control.
37. On information and belief, eBay will continue to allow this willful and deliberate infringement of the Patent by sellers unless and until it is enjoined by this Court.
38. Smith and STM has been and continues to be damaged by eBay’s allowance of infringement of the Patent.

WHEREFORE, the Plaintiff is seeking (i) injunctive relief from eBay to continue to list for sale on their marketplace items that infringe upon the patent of the Plaintiff, (ii) three times compensatory damages to compensate of the infringement, totaling \$900,000, or in the alternative a reasonable royalty; (iii) punitive damages against eBay for the continued infringement of the Plaintiff’s patent, (iv) attorney’s fees and costs incurred by the Plaintiff, and (v) any other relief this Court deems just and proper.

COUNT II

False Designation of Origins, False Descriptions and Dilution

39. Plaintiffs realleges and incorporates paragraphs 1 – 25 as if stated herein.
40. eBay has allowed and continues to allow merchants on its marketplace to utilize the term “Pig Spotters from ST Machine” in clear violation of 15 U.S.C. §1125.
41. The general public is likely to be confused that ST Machine is in fact not manufacturing the mirrors and holds no affiliation with the imported mirrors.

42. Furthermore, the continued marketing of the counterfeit merchandise continues to dilute the ST Machine Pig Spotters.
43. ST Machine Pig Spotters is a widely recognized name within the motorcycle aftermarket mirrors market. The reason for this recognition is the ability of the mirrors to be attached to any motorcycle, rather than custom ordered for each make and model of motorcycle. This has enabled Smith to enjoy recognition for his product within the industry. By virtue of Smith's revolutionary design and subsequent patent, Smith was able to have a successful business associated with the patented mirrors.
44. eBay has continued to profit from the counterfeit actions and has refused to remove the confusing counterfeit items from their marketplace, causing irreparable harm to Smith and the patented device. This was a willful and intentional violation as eBay knew of the counterfeit merchandise by virtue of the VeRO program and its response to the Plaintiffs repeated request to address this situation.

WHEREFORE, the Plaintiff is seeking (i) Defendants profits from the sale of the items and damages in the amount of \$300,000, and the costs of this action; (ii) punitive damages against eBay for the continued use of the counterfeit mark of the Plaintiff's, (iii) attorney's fees and costs incurred by the Plaintiff, (iv) all of the Defendant's profits gained from the sale of the counterfeit mirrors; and (iv) any other relief this Court deems just and proper. The Plaintiffs are reserving their rights to seek statutory damages pursuant to 15 U.S.C. §1117 at the present time.

COUNT III

Importation of Goods Bearing Domestic Manufacturer Name

45. Plaintiffs realleges and incorporates paragraphs 1 – 25 as if stated herein.
46. eBay has willfully allowed the continuation of merchandise to be imported and sold domestically that eBay knows is counterfeit and the merchandise bears the name of ST Machines, a domestic manufacturer of the patented mirrors.
47. eBay's actions are in violation of 15 U.S.C. §1124.

WHEREFORE, the Plaintiff is seeking (i) injunctive relief from eBay to continue to list for sale on their marketplace items that infringe upon the patent of the Plaintiff pursuant to 15 USC § 1116; (ii) compensatory and punitive damages against eBay for the continued use of the counterfeit mark of the Plaintiff's; (iii) attorney's fees and costs incurred by the Plaintiff, (iv) all of the Defendant's profits gained from the sale of the counterfeit mirrors; and (iv) any other relief this Court deems just and proper.

COUNT IV

Florida Deceptive Trade Practices

48. Plaintiffs realleges and incorporates paragraphs 1 – 25 as if stated herein.
49. The Defendant's actions as alleged above are unconscionable acts or practices and unfair or deceptive acts within the meaning of Florida Statute §501.204.
50. The Plaintiffs have been damaged by the Defendant's unconscionable, unfair or deceptive acts or practices.

WHEREFORE, the Plaintiff is seeking (i) injunctive relief from this Court to prevent eBay to continue to list for sale on its marketplace items that are deceptive or unfair trade acts or practices; (ii) compensatory and punitive damages against eBay for the deceptive or unfair acts or practices of \$10,000 for each violation; (iii) attorney's fees and costs incurred by the Plaintiff pursuant to Fla. Stat. §501.2105; (iv) and any other relief this Court deems just and proper.

Verification

Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.



Patrick Smith, Plaintiff

Dated: June 27, 2014

Respectfully Submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to all parties on the attached service list via CM/ECF, U.S. Mail, and/or electronic mail, on June 27, 2014.

/s/ Jonathan Yoni Markhoff
Jonathan Yoni Markhoff

Service Via Email

NRAI Services Inc
1200 South Pine Island Rd
Plantation, FL 33324

Service Via US Mail
Certified Mail

eBay CEO
John Donahoe
2065 Hamilton Avenue
San Jose, CA 95125

Certified Mail