

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION**

CHICO'S FAS, INC.,
A Florida corporation,

Plaintiff,

vs.

Case No.: 2:13-cv-00792-SPC-DNF

1654754 ONTARIO, INC.
d/b/a WINK INTIMATES, a
Canadian corporation, **ANDREA**
CLAIR, a Canadian individual, and
ANASTASIOS KOSKINAS, a
Canadian individual,

JURY TRIAL REQUESTED

INJUNCTIVE RELIEF REQUESTED

Defendants/Counterclaim-Plaintiff.
_____ /

THIRD AMENDED COMPLAINT

Plaintiff Chico's FAS, Inc., through its undersigned counsel, for its Second Amended Complaint against Defendants 1654754 Ontario Inc. d/b/a Wink Intimates, Andrea Clair and Anastasios Koskinas, states:

THE PARTIES

1. Plaintiff Chico's FAS, Inc. ("Chico's") is a Florida corporation with a principal place of business at 11215 Metro Parkway, Ft. Myers, Florida 33966.
2. Upon information and belief, Defendant 1654754 Ontario, Inc. d/b/a Wink Intimates ("Wink") is a Canadian corporation having its principal place of business at 518 Victoria Park Ave., Toronto, Ontario M4E 3T4, Canada.

3. Upon information and belief, Defendant Andrea Clair is a Canadian individual having a residence at 518 Victoria Park Ave., Toronto, Ontario M4E 3T4, Canada.

4. Upon information and belief, Defendant Anastasios Koskinas is a Canadian individual having a residence at 518 Victoria Park Ave., Toronto, Ontario M4E 3T4, Canada.

JURISDICTION AND VENUE

5. This is a claim for declaratory judgment under 28 U.S.C. §§ 2201 and 2202 seeking a final judgment that Plaintiff has not infringed Defendants' United States patents, and that Defendants' United States patents are invalid pursuant to the patent laws of the United States, Title 35 of the United States Code (35 U.S.C. §§ 101 *et seq.*). The Court likewise has subject matter jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1338(a), as it involves substantial claims arising under the patent laws of the United States together with related claims for patent infringement.

6. On September 4, 2013, counsel for Defendant Wink wrote a letter to Chico's alleging that Wink is the owner of U.S. Patent Nos. 8,506,347, 8,182,310 and D622,478 (collectively referred to herein as the "Patents-in-Suit"), and charging Chico's with infringement thereof. A copy of this cease and desist letter is attached hereto as Exhibit A.

7. As set forth in greater detail below, Defendants have asserted that certain products of Chico's, namely its line of OH MY GORGEOUS cami bras, sold under the SOMA INTIMATES brand, infringe the Patents-in-Suit in the United States, including sales of such products within this Division of the Middle District of Florida.

8. The official assignments database maintained at the United States Patent and Trademark Office does not reflect that U.S. Patent No. 8,506,347 has been assigned, and therefore it is owned by Defendants Clair and Koskinas. Upon information and belief, Defendants Clair and Koskinas have licensed U.S. Patent No. 8,506,347 exclusively to Defendant Wink.

9. Defendants have subjected themselves to *in personam* jurisdiction, since they have sent letters threatening legal action for patent infringement to Chico's in this judicial district. Similarly, upon information and belief, Defendants Clair and Koskinas have exclusively licensed rights in their intellectual property to Wink for exploitation in Florida and in this judicial district.

10. Upon information and belief, Defendant Wink operates the website located at domain name <http://winkintimates.com>, a fully-interactive website where consumers in the United States, including in Florida and in this judicial district, can purchase the "9to5 Bra," which Defendants' website claims is sold under the Patents-in-Suit. Additionally, to the extent Wink has sold its "9to5 Bra" under the Patents-in-Suit in Florida and in this judicial district (whether through assignment or under license from Defendants Clair and Koskinas), each Defendant has knowingly and intentionally exploited the Florida market under the Patents-in-Suit.

11. Additionally, Defendants have sufficient minimum contacts with the United States to each subject themselves to jurisdiction in the United States. As set forth in 35 U.S.C. §293, foreign patent owners subject themselves to the jurisdiction of the United States for purposes of any action respecting a U.S. patent or the rights thereunder.

12. Upon information and belief, Defendant Wink heavily promotes the “9to5 Bra,” sold under the Patents-in-Suit, that have been assigned and/or licensed by Defendants Clair and Koskinas, throughout the United States. For example, as described at <http://winkintimates.com/media-releases>, the “9to5 Bra” has been “featured in” various U.S. publications and news outlets, such as MSNBC®, THE WALL STREET JOURNAL®, YAHOO!®, the HOUSTON CHRONICLE® and others. Similarly, Defendant Wink’s website includes a scanned article from O THE OPRAH MAGAZINE (a publication based in Chicago Illinois) that reviews and promotes the “9to5 Bra.”

13. By virtue of ownership of U.S. patents, as well as the significant promotion of the “9to5 Bra,” which is allegedly sold under the Patents-in-Suit, each Defendant has knowingly and intentionally exploited the United States market under the Patents-in-Suit, and has threatened legal action against Chico’s in Florida and in this judicial district.

14. Venue properly lies within this judicial district and division, pursuant to 28 U.S.C. §§1391(b) and (c).

FACTUAL BACKGROUND

15. Chico’s is a specialty retailer of women’s apparel, accessories and related products, including but not limited to women’s intimate apparel sold under the brand SOMA INTIMATES.

16. Among the products sold under the SOMA INTIMATES brand is the OH MY GORGEOUS collection of camisole bras (hereinafter the “Accused Products”).

17. Upon information and belief, Wink is the owner of U.S. Design Patent No. D622,478, which issued on April 31, 2010 and is entitled “Combination Brassiere and

Tank Top” (hereinafter the “‘478 Design Patent”), a true and correct copy of which is attached hereto as Exhibit B.

18. Upon information and belief, Wink is the owner of U.S. Patent No. 8,182,310, which was issued on May 22, 2012 and is entitled “Combination Brassiere and Tank Top” (hereinafter the “‘310 Patent”), a true and correct copy of which is attached hereto as Exhibit C.

19. Upon information and belief, Andrea Clair and Anastasios Koskinas are the owners of U.S. Patent No. 8,506,347, which was issued on August 13, 2013 and is entitled “Combination Brassiere and Tank Top” (hereinafter the “‘347 Patent”), a true and correct copy of which is attached hereto as Exhibit D.

20. Upon information and belief, Defendants are the owners and/or exclusive licensees of, with the ability to enforce, the ‘478 Design Patent, the ‘310 Patent, and the ‘347 Patent.

21. In a letter sent to Chico’s in this judicial district, Defendants accused Chico’s of infringing the Patents-in-Suit. Defendants’ letter further asserted that Defendants were “prepared to protect [their] intellectual property through all means necessary.” Finally, Defendants’ letter stated that “no further notice will be delivered prior to filing suit.” (See Exhibit A.)

22. Defendants’ letter alleging infringement presents a substantial controversy between the parties, who have adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment as to Chico’s non-infringement and the invalidity of the Patents-in-Suit.

23. Chico's has not infringed, directly or indirectly, any valid claim of the Patents-in-Suit, and cannot therefore be liable for infringement.

COUNT ONE

Declaratory Judgment of Non-Infringement of the Patents-in-Suit

24. Count One is an action under 28 U.S.C. § 2201 seeking a Declaratory Judgment that Chico's does not infringe the Patents-in-Suit.

25. Chico's herein restates and incorporates by reference into this Count the allegations of ¶¶ 1-23, above, inclusive.

26. No product made, used, sold or offered for sale by Chico's infringes any valid claim of the Patents-in-Suit.

27. The conduct of Defendants has presented a substantial controversy between the parties, who have adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment as to Chico's non-infringement of the Patents-in-Suit.

28. Wherefore, Chico's is entitled to a Declaratory Judgment that it does not directly or indirectly infringe any valid claim of the Patents-in-Suit, whether under a theory of literal infringement or infringement under the doctrine of equivalents.

29. This case is exceptional under 35 U.S.C. § 285.

WHEREFORE, Chico's asks this Court to enter judgment against Defendants:

- a) Finding the Patents-in-Suit not infringed by any products of Chico's;
- b) Prohibiting Defendants from making further claims of litigation against Chico's for patent infringement;

- c) Finding this case is exceptional under 35 U.S.C. §285, awarding Chico's its attorneys' fees and costs; and
- d) Such and other relief as the Court deems appropriate.

COUNT TWO

Declaratory Judgment of Invalidity of the Patents-in-Suit

30. Count Two is an action under 28 U.S.C. § 2201 seeking a Declaratory Judgment that the Patents-in-Suit are invalid.

31. Chico's herein restates and incorporates by reference into this Count the allegations of ¶¶ 1-23, above, inclusive.

32. Upon information and belief, one or more claims of the Patents-in-Suit is invalid for violation of one or more provisions of 35 U.S.C. §§ 102, 103, 112 and/or 171.

33. Upon information and belief, the '478 Design Patent is primarily functional rather than ornamental, and therefore also invalid.

34. The conduct of Defendants presents a substantial controversy between the parties, who have adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment as to the invalidity of the Patents-in-Suit.

35. Wherefore, Chico's is entitled to a Declaratory Judgment that the Patents-in-Suit are invalid.

36. This case is exceptional under 35 U.S.C. § 285.

WHEREFORE, Chico's asks this Court to enter judgment against Defendants:

- e) Finding the Patents-in-Suit invalid;
- f) Prohibiting Defendants from making further claims of litigation against Chico's for patent infringement;

g) Finding this case is exceptional under 35 U.S.C. §285, awarding Chico's its attorneys' fees and costs; and

h) Such and other relief as the Court deems appropriate.

COUNT THREE

Declaratory Judgment of Unenforceability of the Patents-in-Suit

37. Count Three is an action under 28 U.S.C. § 2201 seeking a Declaratory Judgment that the Patents-in-Suit are unenforceable.

38. Chico's herein restates and incorporates by reference into this Count the allegations of ¶¶ 1-23, above, inclusive.

39. Upon information and belief, the Patents-in-Suit are unenforceable due to inequitable conduct.

40. The Patents-in-Suit only name Ms. Andrea Clair and Mr. Koskinas as inventors.

41. Throughout the prosecution of the Patents-in-Suit, Ms. Clair and Mr. Koskinas repeatedly represented to the U.S. Patent and Trademark Office that they were the only inventors of the Patents-in-Suit.

42. Ms. Beverly Johnson was an inventor of the Patents-in-Suit.

43. Upon information and belief, Ms. Clair and Mr. Koskinas knew that Ms. Beverly Johnson was an inventor of the Patents-in-Suit.

44. Upon information and belief, Ms. Clair and Mr. Koskinas intentionally withheld the information that Ms. Johnson as an inventor of the Patents-in-Suit with the intent to deceive the U.S. Patent and Trademark Office.

45. Upon further information and belief, Mr. Koskinas was not an inventor of the Patents-in-Suit.

46. Upon information and belief, Ms. Clair and Mr. Koskinas knew that Mr. Koskinas was not an inventor of the Patents-in-Suit.

47. Upon information and belief, Ms. Clair and Mr. Koskinas made the material misrepresentation that Mr. Koskinas was an inventor of the Patents-in-Suit with the intent to deceive the U.S. Patent and Trademark Office.

48. The conduct of Defendants presents a substantial controversy between the parties, who have adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment as to the invalidity of the Patents-in-Suit.

49. Wherefore, Chico's is entitled to a Declaratory Judgment that the Patents-in-Suit are unenforceable due to inequitable conduct.

50. This case is exceptional under 35 U.S.C. § 285.

WHEREFORE, Chico's asks this Court to enter judgment against Defendants:

- a) Finding the Patents-in-Suit unenforceable due to inequitable conduct;
- b) Prohibiting Defendants from making further claims of litigation against Chico's for patent infringement;
- c) Finding this case is exceptional under 35 U.S.C. §285, awarding Chico's its attorneys' fees and costs; and
- d) Such and other relief as the Court deems appropriate.

JURY DEMAND

Chico's demands a jury trial on all issues so triable.

Respectfully submitted February 10, 2015.

s/Ryan T. Santurri

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2015, I electronically filed the following using the Management/Electronic Case Filing ("CM/ECF") system which will send a Notice of Electronic Filing to the following CM/ECF participants:

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