

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

Civil Action No.

CLOUD NINE DESIGNS, LLC, a Colorado limited liability company,

Plaintiff,

v.

OLIXO HOLDINGS, LLC, a Utah limited liability company;
STAYMADE PRODUCTS, LLC, a Utah limited liability company;
RUSTIN CRAIG MORRIS; and
NATHAN BRADSHAW,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff Cloud Nine Designs, LLC (“Cloud Nine”), by and through its attorneys, Kutak Rock LLP, and for its Complaint and Jury Demand against Olixo Holdings, LLC (“Olixo”), StayMade Products, LLC (“StayMade”), Rustin Craig Morris (“Morris”), and Nathan Bradshaw (“Bradshaw”) (together “Defendants”), states and alleges as follows:

PARTIES

1. Cloud Nine is a Colorado limited liability company with its principal place of business at 445 Dakota Blvd., Boulder, CO 80304.
2. Upon information and belief, Olixo is a Utah limited liability company with its principal place of business at 3812 Pinehurt Dr., Eagle Mountain, UT 84005.

3. Upon information and belief, StayMade is a Utah limited liability company with its principal place of business at 3812 Pinehurt Dr., Eagle Mountain, UT 84005. At all relevant times, the corporate entity of StayMade has been an alter ego of Olixo.

4. Morris is an individual whose last known residence is at 3812 Pinehurt Dr., Eagle Mountain, UT 84005. At all relevant times, upon information and belief, Morris has owned fifty percent of Olixo and StayMade and is an alter ego of both entities.

5. Bradshaw is an individual whose last known residence is at 184 N. Boston Dr., North Salt Lake, UT 84054. At all relevant times, upon information and belief, Bradshaw has owned fifty percent of Olixo and StayMade and is an alter ego of both entities.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because this action is between citizens of different states and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

7. This Court has personal jurisdiction over Olixo because Olixo consented to the jurisdiction in this Court in a contractual agreement with Cloud Nine. This Court also has personal jurisdiction over Olixo with regard to this matter because Olixo purposefully availed itself of the privilege of conducting activities within the state of Colorado and further because, among other reasons, the nature, quality and quantity of Olixo's contacts with Colorado and the relation of Cloud Nine's causes of action to those contacts, subject Olixo to personal jurisdiction of this Court.

8. StayMade, Morris, and Bradshaw are subject to personal jurisdiction by virtue of the improper lack of segregation of corporate assets between Olixo and StayMade and the

improper influence and control Morris and Bradshaw have over Olixo and its alter ego StayMade that justify this Court disregarding the corporate entities of Olixo and StayMade and exercising personal jurisdiction over Morris and Bradshaw as well.

9. This Court further has personal jurisdiction over StayMade, Morris and Bradshaw as each engaged in the direct or indirect infringement of the patents of Cloud Nine and/or caused harm as a result of this infringement in Colorado.

10. This Court further has personal jurisdiction over Morris and Bradshaw as each's fraudulent and deceptive trade practices have harmed Cloud Nine in the state of Colorado.

11. Venue is proper in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1391 because Olixo does business in this judicial district; because a substantial part of the events giving rise to Cloud Nine's claims occurred in this judicial district; and because Olixo contractually agreed to venue in this Court.

GENERAL ALLEGATIONS

Olixo's Breach of the Patent License Agreement

12. Cloud Nine is a very small business based in Boulder, Colorado that was created around patented bedding technology developed by its sole principal and President, M'Lisa McKee.

13. Cloud Nine's patents teach an attachable bedding design and system that is easier to make up and maintain than traditional bedding, thus making it an ideal choice for children's bedding as well as for bedding in hospitals, nursing homes and other environments where individuals may desire more accessible and low-maintenance bedding options.

14. Ms. McKee developed the patented technology based on her experiences as a mother and is the named inventor on the patents protecting the Cloud Nine technology. These include US Patent Nos. 8,151,386 and USD 677,961 (the “Asserted Patents”).

15. On or about April 30, 2013, Olixo and Cloud Nine executed a Patent License Agreement (the “Agreement”). A true and correct copy of the Agreement is attached hereto as **Exhibit 1**.

16. Pursuant to the Agreement, Cloud Nine granted to Olixo an exclusive license for a set term to any products that practiced the Asserted Patents. *See*, Ex. 1 at § 2.1; *see also, id.* at §§ 1.4, 1.5, 10.1.

17. In exchange for Olixo’s exclusive license to sell products that practice the Asserted Patents and, as a result, Cloud Nine foregoing other licensing opportunities during the Term, Olixo made various commitments to Cloud Nine in the Agreement.

18. These commitments included payment of an initial license fee and payment of minimum annual royalties. *See, id.* at §§ 5.1 and 5.2, Ex. B.

19. The Agreement does not set forth any conditions that would permit non-payment of the minimum annual royalty amounts on account of Olixo’s failure to sell the licensed products or any other business difficulties of Olixo.

20. Olixo has breached its obligations under the Agreement by, among other things, failing to make any annual royalty payments to Cloud Nine.

21. Olixo was also obligated to demonstrate technical and commercial diligence by meeting a specific milestone schedules set forth in Exhibit B to the Agreement. *Id.* at Ex. B.

22. Olixo has breached its obligations under the Agreement by, among other things, failing to meet any of the Milestones set forth in Exhibit B.

23. Olixo was also restricted in what it could do with assets built around the rights granted in the Agreement. *Id.* at § 11.9.

24. Olixo has breached its obligations under the Agreement by, among other things, improperly transferring the WWW.STAYMADE.COM website domain built around the patent license to a third party, Beddy's LLC.

The Patent Infringement by StayMade

25. After executing the Agreement with Cloud Nine, on behalf of Olixo, Morris and Bradshaw formed a separate shell entity, StayMade Products LLC. Olixo itself was formed less than a month prior to entering into the Agreement. *See, Exhibits 2 & 3*, Certificates of Registration of the Articles of Incorporation of Olixo Holding LLC and StayMade Products LLC.

26. Upon information and belief, Morris and Bradshaw are the only individuals with ownership interests in StayMade.

27. Upon information and belief, Morris and Bradshaw created the StayMade entity for the purpose of using it as a vehicle to develop and sell products that infringe the claims of the Asserted Patents.

28. StayMade developed and sold products that infringe the claims of the Asserted Patents.

29. Morris and Bradshaw did not request, and Cloud Nine did not grant, StayMade a license to sell products that infringe the claims of the Asserted Patents.

30. Neither Olixo, Morris nor Bradshaw had the right to grant StayMade a sublicense under the Agreement. Ex. 1 at § 2.2.

31. StayMade's use, creation, sale and offer of sale of products that infringe the claims of the Asserted Patents without a valid license constitutes willful patent infringement.

32. Morris and Bradshaw were aware of the Asserted Patents as a result of entering into the Agreement with Cloud Nine on behalf of Olixo.

Fraudulent Transfers Between Olixo and Morris

33. After execution of the Agreement, Olixo received regular payments from StayMade.

34. Upon information and belief, Olixo did not provide adequate consideration to the StayMade entity in exchange for the monies it received.

35. Under the direction and control of Morris and Bradshaw, Olixo transferred assets, including the monies it received from StayMade in the form of "management fees", to Morris.

36. Upon information and belief, Morris did not provide any consideration to Olixo in exchange for the monies he received from Olixo.

37. Olixo's transfers to Morris helped to ensure that Olixo did not retain assets sufficient to meet any of its contractual obligations to Cloud Nine.

38. When Cloud Nine demanded payments that were due to it under the terms of the Agreement, Morris, on behalf of Olixo, informed Cloud Nine that Olixo did not have any assets.

39. To date, Olixo has not filed for bankruptcy protection.

The Corporate Veil Should Be Pierced

40. At all relevant times, there was a unity of interest and ownership between Olixo and StayMade.

41. Olixo and StayMade were both controlled by Morris and Bradshaw and were alter egos of each other and of Morris and Bradshaw.

42. Morris and Bradshaw were engaged in inappropriately transferring assets of value among themselves, StayMade, and Olixo without the exchange of substantive benefit.

43. All meaningful assets ended in the possession of either Morris or Bradshaw and not Olixo or the StayMade entity.

44. Olixo and StayMade have been used as mere instrumentalities for the transaction of Morris's and Bradshaw's own affairs and there is such unity of interest in ownership that the separate personalities of the corporation and the owners no longer exist.

45. The alter ego relationship is supported by, among other things: (i) the comingling of funds and assets and transfer of funds between corporate entities and the owners themselves in the form of, among other things, "management fees," for which no apparent benefit was conferred; (ii) the thinly capitalized nature of Olixo; and (iii) use of StayMade as a "mere shell" to conduct without authorization the performance contracted for by Olixo under the Agreement.

46. Justice requires recognizing the substance of the relationship over the form because the corporate fiction distinguishing between Olixo, StayMade, Morris and Bradshaw is being utilized to perpetuate a fraud or defeat a rightful claim by Cloud Nine.

47. Upon information and belief, (i) Olixo has transferred assets to StayMade, Morris, and/or Bradshaw without reasonably equivalent value received by Olixo and likely for the

purpose of delaying or hindering creditors, including Cloud Nine; and (ii) at all relevant times, Morris, Bradshaw, Olixo and StayMade were closely intertwined.

48. An equitable result is achieved by disregarding the corporate form and holding Morris and Bradshaw personally liable for Olixo's breach of contract as Olixo has been drained of assets and, without piercing the corporate veil, Cloud Nine will be unable to recoup damages and monies owed, including without limitation, by Olixo under the Agreement.

Morris's and Bradshaw's Own Fraudulent Conduct

49. In addition to being liable for the conduct of Olixo and StayMade as alter egos, Morris and Bradshaw also engaged in fraudulent and deceptive trade practices by holding out Cloud Nine's patented technology as their own to solicit funds.

50. The Agreement set forth certain specific requirements with regard to patent marking and marketing of the licensed products. Ex. 1 at § 6.

51. Pursuant to, among other things, entering into the Agreement as the two sole principals of Olixo, Morris and Bradshaw had knowledge that the Licensed Products were only to be offered subject to these specific requirements set forth in Section 6 of the Agreement.

52. Notwithstanding this knowledge, Morris and Bradshaw created online marketing materials, including a Kickstarter campaign and video, in which they held themselves out in such a way that the public would be actually deceived as to whether they were the inventors of the technology embodied in the Licensed Products.

53. These actions constitute not only breach of the Agreement but fraudulent and deceptive trade practices under Colorado law.

54. In the course of, at a minimum, a 2013 nationwide Kickstarter campaign, Morris and Bradshaw and their wives held themselves out as the inventors of the Licensed Products and the patented technology behind the products in such a way that the public would be misled as to the inventorship of the technology. *See*, <https://www.kickstarter.com/projects/1130354715/staymade-the-worlds-most-innovative-childrens-bedd> (screenshot attached as **Exhibit 4**).

55. For example, as part of the Kickstarter campaign, Morris and Bradshaw state:

The Story: Coming Up With the Idea

The StayMade has been a labor of love and is the result of years of hard work. It is a product invented and developed by moms with kids, for moms with kids. Part of the story was told in the Kickstarter video, but really the StayMade was thought up during those moment's of frustration when using normal kids bedding, and thinking that there had to be a better way... Because the idea for the StayMade was so remarkable, we knew it needed to be protected by patents before we could make and release it to the world. A few years later we are happy to report that there have been two utility patents, and one design patent issued to protect the StayMade. The issuing of those patents proves to us that the idea truly is remarkable and unique, and we are so excited to share it with the world!

See, id.

56. Morris, Bradshaw and their wives are the only individuals identified on the Kickstarter website under the section "Meet the Team." *Id.*

57. Morris and Bradshaw failed to disclose as part of, at a minimum, the Kickstarter Campaign, the Cloud Nine Patent numbers, Cloud Nine, or the fact that the products being advertised were being offered under a license from Cloud Nine. *Id.*

58. The fraudulent conduct of Morris and Bradshaw has harmed Cloud Nine by, among other things, misleading the public as to the inventorship of the Asserted Patents and clouding Cloud Nine's ownership rights to its intellectual property in the public eye.

FIRST CLAIM FOR RELIEF

(Breach of Contract – Olixo and Morris and Bradshaw as alter egos)

59. Cloud Nine incorporates by reference the allegations contained in paragraphs 1 through 58 as if fully set forth herein.

60. The Agreement is a valid, binding, and enforceable agreement between Cloud Nine and Olixo.

61. Cloud Nine performed all conditions precedent to its rights to enforce the terms of the Agreement.

62. Olixo breached the terms of the Agreement, including without limitation, by failing to make the royalty payments or to meet the Commercial Diligence Milestones set forth in Exhibit B, to restrict the sale of assets as required by Section 11.9, or to comply with the patent and marketing requirements of Section 6.

63. As a result of Olixo's breaches of the Agreement, Cloud Nine is entitled to compensation for damages it has suffered in an amount to be determined at trial as well as reimbursement for all attorneys' fees and costs and collection expenses to the full extent provided for in the Agreement.

SECOND CLAIM FOR RELIEF

(Patent Infringement – StayMade and Morris and Bradshaw as alter egos)

64. Cloud Nine incorporates by reference the allegations contained in paragraphs 1 through 63 as if fully set forth herein.

65. Cloud Nine is the owner, by assignment, of all right, title and interest in and to the Asserted Patents.

66. StayMade has directly infringed the Asserted Patents under 35 U.S.C. § 271(a) by making, using, offering for sale, selling, and/or importing a product that embodies the Asserted Patents without a valid license from Cloud Nine. *See*, Ex. 4.

67. Upon information and belief, StayMade's infringement was willful as its principals were on notice of the Asserted Patents and that StayMade did not possess a valid license to the Asserted Patents and did not change the operation of any StayMade products.

68. By entering into the Agreement with Cloud Nine as principals of Olixo, Morris and Bradshaw had knowledge of the Asserted Patents and Cloud Nine's ownership rights in the Asserted Patents.

69. By entering into the Agreement with Cloud Nine, Morris and Bradshaw also had knowledge that neither they nor Olixo had the right to sublicense any rights to the Asserted Patents to another entity.

70. Despite this knowledge, Morris and Bradshaw intentionally formed StayMade, which they hold out as a separate and distinct legal entity from Olixo, and willfully and actively caused StayMade to make, use, sell and offer to sell products that infringe the Asserted Patents.

71. At least one product made and offered for sale and/or sold by StayMade directly infringes at least claim 1 of each of the Asserted Patents and one or more claims depending therefrom.

THIRD CLAIM FOR RELIEF

(Fraudulent Conveyance, C.R.S. § 38-8-105 – StayMade, Olixo and Morris)

72. Cloud Nine incorporates by reference the allegations contained in paragraphs 1 through 71 as if fully set forth herein.

73. From at least May 2013 to at least January 2014, StayMade transferred bi-monthly “management fees” in the amount of \$2,000.00 to Olixo and Morris withdrew the monies from the Olixo account.

74. Upon information and belief, neither StayMade nor Olixo received a benefit of reasonably equivalent value as a result of payment of these fees to Morris during this time period.

75. Morris is an insider of both StayMade and Olixo.

76. The monies transferred in the form of “management fees” were essential assets of StayMade and Olixo.

77. The conveyance of “management fees” were not disclosed to Cloud Nine or provided for under the Agreement.

78. Upon information and belief, StayMade and Olixo became insolvent at the same time or shortly after the “management fees” transfers were made.

79. Olixo’s contractual debt to Cloud Nine in the form of annual minimum royalty payments came due shortly after the “management fees” transfers were made. The transfers of the assets from StayMade and Olixo to Morris in the form of, at a minimum, “management fees” violate the laws against fraudulent conveyance and fraudulent transfer set forth in C.R.S. § 38-8-101, et seq. as the transfers were made with actual intent to hinder, delay, or defraud Cloud Nine, a creditor of Olixo.

80. Cloud Nine has been damaged in an amount to be determined at trial as a result of this fraudulent conveyance and transfer between StayMade, Olixo and Morris.

FOURTH CLAIM FOR RELIEF

(Deceptive Trade Practices, C.R.S. § 6-1-105 – Morris and Bradshaw)

81. Cloud Nine incorporates by reference the allegations contained in paragraphs 1 through 80 as if fully set forth herein.

82. Morris and Bradshaw engaged in a deceptive trade practices within the scope of the Colorado Consumer Protection Act (CCPA), § 6-1-101, et seq. by knowingly passing off the goods, services, or property of Cloud Nine as their own and/or by knowingly making false representations as to (i) the source, sponsorship, approval, or certification of the Licensed Products and (ii) affiliation, connection or association with ownership of the Asserted Patents.

83. The deceptive trade practices occurred in the course of Morris's and Bradshaw's business, vocation, or occupation.

84. Morris's and Bradshaw's deceptive trade practices have significantly impacted the public as actual or potential consumers of products of Cloud Nine.

85. Consumers are directly affected by Morris's and Bradshaw's deceptive trade practices and such affected consumers generally lack relative sophistication and bargaining power.

86. Morris's and Bradshaw's deceptive trade practices have caused Cloud Nine injury in an amount to be determined at trial as it has caused confusion in the market as to, among other things, the inventorship of the Licensed Products.

FIFTH CLAIM FOR RELIEF

(Equitable Ownership Liability - Morris and Bradshaw)

87. Cloud Nine incorporates by reference the allegations contained in paragraphs 1 through 86 as if fully set forth herein.

88. Upon information and belief, there is a unity of interest and ownership between Olixo, StayMade, Morris and Bradshaw.

89. Morris and Bradshaw are the governing and dominating personalities of Olixo and StayMade and the equitable owners with sufficient unity of interest and ownership in Olixo and StayMade to satisfy piercing the corporate veil of Olixo and StayMade.

90. Morris and Bradshaw have controlled or influenced Olixo and StayMade such that the Court should disregard the separate corporate entities of Olixo and StayMade and hold Morris and Bradshaw, jointly and severally, liable for the claims against Olixo and StayMade set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Cloud Nine Designs, LLC prays that judgment be entered in its favor and against Defendant Olixo Holdings, LLC, StayMade Products, LLC, Rustin Craig Morris, and Nathan Bradshaw on each and every claim asserted herein, and that it be awarded the following relief:

- a. Monetary damages, including special damages, in an amount to be calculated at trial;
- b. Statutory damages, as applicable;
- c. Avoidance of fraudulent transfers to the extent necessary to satisfy Cloud Nine's claims;
- d. Pre-judgment interest;
- e. Post-judgment interest; and
- f. Litigation costs and expenses, including reasonable attorneys' fees and collection expenses; and

g. Any such further preliminary or permanent relief, including equitable relief, as this Court deems just and proper under the circumstances.

JURY DEMAND

Plaintiff Cloud Nine Designs, LLC demands a jury trial on all issues so triable.

Respectfully submitted this 15th day of April, 2015.

KUTAK ROCK LLP

s/ Chad T. Nitta

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