

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

THE KYGEN COMPANY, LLC, a Colorado
limited liability company,

Plaintiff

vs.

DOSKOCIL MANUFACTURING COMPANY,
INC., d/b/a PETMATE, a Texas corporation,

Defendant

Case No.

**COMPLAINT FOR DECLARATORY
JUDGMENT OF U.S. PATENT NOS.
6,076,829 AND D666,686; AND NON-
INFRINGEMENT OF U.S.
TRADEMARK REGISTRATION NO.
3,082,546**

DEMAND FOR JURY TRIAL

Plaintiff, The Kyjen Company, LLC, by and through its counsel, seeks a declaratory judgment against Dorskocil Manufacturing Company, Inc., d/b/a Petmate and alleges as follows:

PARTIES

1. Plaintiff The Kyjen Company, LLC (“Plaintiff” or “Kyjen”) is a limited liability company organized and existing under the laws of the state of Colorado and having a principal place of business at 15514 Hinsdale Circle, Centennial, Colorado 80112.

2. Upon information and belief, Defendant Dorskocil Manufacturing Company, Inc. d/b/a Petmate (“Defendant” or “Dorskocil”) is a corporation organized and existing under the laws of the state of Texas and having a principle place of business at 2300 East Randol Mill Road, Arlington, Texas 76011.

JURISDICTION AND VENUE

3. This is a civil action for declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202 for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears.

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1338(a) (action arising under an Act of Congress relating to patents) and 28 U.S.C. § 1331 (federal

question).

5. This Court has personal jurisdiction over Doscocil in that it has performed acts in Colorado subjecting itself to the laws of this District, including, but not limited to, sending threatening letters of infringement and upon information and belief, transacting business in this District by distributing products underlying this lawsuit through retail stores in Colorado.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c), and 28 U.S.C. § 1400(a), in that a substantial part of the events or omissions giving rise to the claim occurred in this District, Kyjen has its principle place of business in this District and upon information and belief, that Doscocil can otherwise be found in this District by virtue of the acts identified above.

BACKGROUND FACTS

7. Kyjen is a manufacturer and distributor of pet products and accessories, including but not limited to pet ball throwing devices. Kyjen currently manufactures and sells a pet ball throwing device under the trademark “Launch-A-Ball”®.

8. Defendant purports to be the owner, through assignment, of U.S. Patent No. 6,076,829 (the “’829 Patent”). The ‘829 Patent was issued on June 20, 2000 and is entitled Ball Throwing Apparatus. A copy of the ‘829 Patent is attached as Exhibit 1.

9. Defendant purports to be the owner of U.S. Patent No. D666,686 (the “’686 Patent”). The ‘686 Patent, a design patent, was issued on September 4, 2012 and is entitled Ball Throwing Aid. A copy of the ‘686 Patent is attached as Exhibit 2.

10. Defendant purports to be the owner of U.S. Trademark Registration No. 3,082,546 (the “’546 Registration”). The ‘546 Registration was issued on April 18, 2006 and the ‘546 Registration indicates “The mark consists of the configuration of a ball throwing toy with rounded cup.” A copy of the ‘546 Registration is attached as Exhibit 3.

11. By a letter dated January 21, 2015 addressed to “The Kyjen Company, Inc.” at Kyjen’s corporate address, Doscocil, through its’ counsel, forwarded a courtesy copy of a Complaint filed in the United States District Court for the Western District of Pennsylvania by

Doskocil against “The Kyjen Company, Inc.”, captioned *Doskocil Manufacturing Company, Inc. d/b/a Petmate vs. The Kyjen Company, Inc.*, Civil Action No. 2:15-cv-00088-MRH (the “Petmate Complaint”). The Petmate Complaint alleged, among other things, Kyjen’s infringement of the ‘829 Patent by its sales of the “Launch-A-Ball”® product and a pet ball throwing device sold by Kyjen under the trademark “Flik-It”®.

12. By a letter dated March 12, 2015, Kyjen, through its counsel, responded to the infringement allegations presented in the Petmate Complaint with a letter which, among other things, denied infringement of the ‘829 Patent by both the “Launch-A-Ball”® and “Flik-It”® products.

13. On May 20, 2015 Doskocil filed a Notice of Voluntary Dismissal of the Petmate Complaint under Fed. R. Civ. P 41(a)(1)(A)(i), which was entered by the Court on the same day.

14. After the voluntary dismissal, Doskocil, through counsel that is identified as “new counsel” and different than counsel of record in the Petmate Complaint, sent a further threatening letter dated June 3, 2015 to counsel for Kyjen re-alleging and re-stating Kyjen’s infringement of the ‘829 Patent by its sales of the “Launch-A-Ball”® product, and further alleging for the first time that such “Launch-A-Ball”® product also infringes the ‘686 Patent and the purported mark shown in the ‘546 Registration which were not asserted in the Petmate Complaint. As such, an actual, immediate, real and judiciable case or controversy exists between Kyjen and Doskocil regarding the allegations of infringement and Kyjen is in reasonable apprehension of a further infringement suit.

15. No product of Kyjen infringes any valid claim of the ‘829 Patent.

16. No product of Kyjen infringes any valid claim of the ‘686 Patent.

17. No product of Kyjen infringes the ‘546 Registration.

18. Continued claims of infringement by Doskocil are harmful to the reputation and sales of Kyjen’s products and will cause irreparable harm to Kyjen.

19. Accordingly, Kyjen is entitled to and therefore seeks a declaratory judgment that neither the “Launch-A-Ball”® product nor the “Flik-It”® product infringes any valid claim of

the '829 Patent, that such products do not infringe any valid claim of the '686 Patent and that such products do not infringe any mark as shown in the '546 Registration.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment of Non-Infringement of the '829 Patent)

20. Kyjen hereby incorporates by reference each and every allegation set forth in Paragraphs 1 through 19 of this Complaint.

21. Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices do not infringe the '829 Patent, directly or indirectly, either literally or under the doctrine of equivalents.

22. Kyjen seeks a declaration that the '829 Patent is not infringed by Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices.

23. A judicial declaration is necessary and appropriate at this time in order that Kyjen may ascertain its rights and duties with respect to the '829 Patent.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment of Non-Infringement of the '686 Patent)

24. Kyjen hereby incorporates by reference each and every allegation set forth in Paragraphs 1 through 23 of this Complaint.

25. Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices do not infringe the '686 Patent.

26. Kyjen seeks a declaration that the '686 Patent is not infringed by Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices.

27. A judicial declaration is necessary and appropriate at this time in order that Kyjen may ascertain its rights and duties with respect to the '686 Patent.

THIRD CLAIM FOR RELIEF

(Declaratory Judgment of Non-Infringement of the mark shown in the '546 Registration)

28. Kyjen hereby incorporates by reference each and every allegation set forth in Paragraphs 1 through 27 of this Complaint.

29. Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices do not infringe the any mark as shown in the '546 Registration.

30. Kyjen seeks a declaration that the mark shown in the '546 Registration is not infringed by Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices.

31. A judicial declaration is necessary and appropriate at this time in order that Kyjen may ascertain its rights and duties with respect to the '546 Registration.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

A. That the Court declare that Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices do not infringe the '829 Patent directly or indirectly, literally or under the doctrine of equivalents, if made, used, offered for sale, or sold in the United States or imported into the United States;

B. That the Court declare that Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices do not infringe the '686 Patent if made, used, offered for sale, or sold in the United States or imported into the United States;

C. That the Court deem this case to be "exceptional" within the meaning of 35 U.S.C. § 285 entitling Kyjen to an award of its reasonable attorneys' fees and expenses in this action;

D. That the Court declare that Kyjen's "Launch-A-Ball"® and "Flik-It"® pet ball throwing devices do not infringe any product configuration trademark or trade dress of a ball throwing device, including the mark as shown in the '546 Registration.

E. For a judicial determination that Kyjen's products do not infringe or dilute Dosckocil's product configuration mark at common law or as shown in the '546 Registration.

F. For an Order enjoining Doskocil and its agents and attorneys from further asserting trademark rights in the product configuration mark as shown in the '546 Registration against Kyjen and its customers.

G. For Kyjen to recover its costs and attorney's fees in bringing this action in

accordance with appropriate provisions of the Lanham Act, Title 15, United States Code.

H. That the Court grant such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a jury trial on all claims for relief.

Dated: June 17, 2015

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