

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MODTRUSS, INC.)	
)	
Plaintiff,)	
)	CIVIL CASE NO. 1:16-CV-1317-ELR
v.)	
)	
BATTLEFROG LLC)	
)	
)	JURY TRIAL DEMANDED
)	
Defendant.)	
_____)	

**FIRST AMENDED VERIFIED COMPLAINT FOR
PATENT INFRINGEMENT**

Plaintiff ModTruss, Inc., through its undersigned counsel, (“ModTruss”) files this its First Amended Verified Complaint against Defendant BattleFrog LLC (“BattleFrog”), showing this Honorable Court as follows.

THE PARTIES

1. ModTruss is a corporation, organized and existing under the laws of the Michigan with its principal place of business in 463 Cedar Street, Fond Du Lac, Wisconsin 54935. ModTruss is an innovator regarding construction of temporary structures.

2. Upon information and belief, BattleFrog is a company organized and existing under the laws of Florida. Upon further information and belief,

BattleFrog's principal place of business is located at 8899 NW 18 Terrace, Suite 200, Doral, Florida 33172. BattleFrog may be served through its registered agent for service of process, Carlos Centurion, 899 NW 18 Terrace, Suite 200, Doral, Florida 33172.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the patent subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a), in that it involves claims arising under the laws of the United States and specifically involve 35 U.S.C. § 271 and 35 U.S.C. § 281.

4. This Court has jurisdiction over the trade dress subject matter of this action pursuant to 28 U.S.C. § 1331, in that it involves claims arising under the laws of the United States and specifically involve 15 U.S.C. § 1125(a).

5. This Court has supplemental jurisdiction over ModTruss's state-law claims pursuant to 28 U.S.C. § 1367, in that the state law claims are integrally-related to the federal claims and arise from a common nucleus of operative facts, such that the resolution of all claims herein is in the interests of judicial economy.

6. This Court has personal jurisdiction over the BattleFrog by reason of the business that it has transacted and continue to transact in this judicial district and division. In particular, BattleFrog has made and continues to make, and has used and continues to use temporary structures that infringe U.S. Patent No. 8,418,425, issued on May 13, 2014, and entitled "Tubular beam for the

construction of temporary structures” (the “‘425 Patent”). (A true and correct copy of the ‘425 Patent is attached hereto as Exhibit A.)

7. For example, on or about November 7, 2015 and March 19, 2016, BattleFrog held races in or near Atlanta, Georgia.¹ *See, e.g.*, Weltin Decl., ¶ 8, Exhibit B (BattleFrog Facebook page depicting obstacles using ModTruss’s patented technology). Additionally, BattleFrog will hold another race in or near Atlanta on or about November, 12, 2016.²

8. In addition, this Court has personal jurisdiction over BattleFrog because they it knowingly and actively engaged in acts that has infringed, will infringe, and/or aid and abet in the direct infringement of claims of the ‘425 Patent in this judicial district and division.

9. Venue is proper in this district and division pursuant to 28 U.S.C. § 1391, 28 U.S.C. § 1400, and Local Rule 3.1 B.

¹ <http://battlefrogseries.com/events/past-races> (last visited Apr. 12, 2016).

² <http://battlefrogseries.com/events/past-races> (last visited Apr. 12, 2016).

NATURE OF THE ACTION

10. This is an action for patent infringement, arising out of BattleFrog's infringement of a U.S. patent relating to the art of tubular beams for the construction of temporary structures, which allows a temporary structure to be efficiently constructed. Specifically, this Complaint asserts claims against BattleFrog arising from its infringement of various claims found in the '425 Patent. For example, the photo in Figure 1 depicts a ModTruss product that embodies the technology protected by the '425 Patent. *See* Specification Sheet attached as Exhibit B. Weltin Decl., ¶ 8.



Figure 1

11. This is also an action for trade dress infringement and unfair competition. That is, in connection with ModTruss's temporary structure products, ModTruss has developed a trade dress for products that is essential to its business and to customers' identification of ModTruss as a source of the

³ <http://www.modtruss.com/application/files/9014/5390/7387/12-12-84.pdf> (last visited Apr. 12, 2016).

products.

12. The non-functional aspects of ModTruss's product design constitute protectable trade dress (the "ModTruss Trade Dress"). The ModTruss Trade Dress has established secondary meaning in the marketplace such that purchasers have come to associate it with ModTruss.

13. ModTruss has made a substantial investment in the development and marketing of its products' appearance to create what has become distinctive indicia of its business interests. In fact, in 2015 alone, ModTruss dedicated over \$220,000 on trade shows and advertising.

OPERATIVE FACTS

14. Nearly a decade ago, ModTruss was born of necessity and sought to relieve the frustration of "gaps" left by legacy trussing systems. Assembled from experienced industry experts, ModTruss had simply grown tired of the all too familiar inadequacies common to existing solutions.

15. ModTruss has accomplished its goal by offering custom, safe temporary building solutions without limitation and with infinite applicability.

16. ModTruss has invested heavily in protecting its industry-leading research and development. It prides itself on unveiling new technology to the market first and exclusively. Its modern, modular pieces embody its patented

technology and feature variable engineering specifications to build almost anything, anywhere, and to hold any weight.

17. While ModTruss offers limitless versatility and flexibility utilizing modular components and accessories, all ModTruss offerings exceed its high safety standards.

18. ModTruss attributes its many successes to two standout features, distinguishing it from the rest of the industry.

19. First, ModTruss's products feature a distinctive clover and bolt-hole pattern. The clover not only gives ModTruss its signature look, but also reduces weight without sacrificing strength. Additionally, ModTruss repeats its bolt pattern every three inches on all six sides, making connection points virtually limitless.

20. Second, ModTruss's products can be laminated several times, or stacked, for large load rating weight requirements. If a customer can imagine it, ModTruss's products can support it.

21. Marked by its unwavering commitment to excellence, safety, and ingenuity, ModTruss has earned an industry-wide reputation as the leader in trussing and temporary, custom building solutions. As highlighted below, some of the biggest events in entertainment, staging, and rigging have relied on

ModTruss. ModTruss has never failed to exceed expectations.

THE PATENT-IN-SUIT

22. ModTruss is the owner by assignment of all right, title, and interest in the '425 Patent.

23. The '425 Patent issued from an application filed by Mr. Patrick J. Santini, Chief Executive Officer of ModTruss, in December 2011. On April 16, 2013, the '425 Patent issued.

24. On April 18, 2016, Santini assigned the '425 Patent to ModTruss.

25. The '425 Patent describes a novel apparatus that enables construction of temporary structures using tubular beams. Embodiments of the apparatus can best be seen in Figs. 1 and 2 of the '425 Patent.

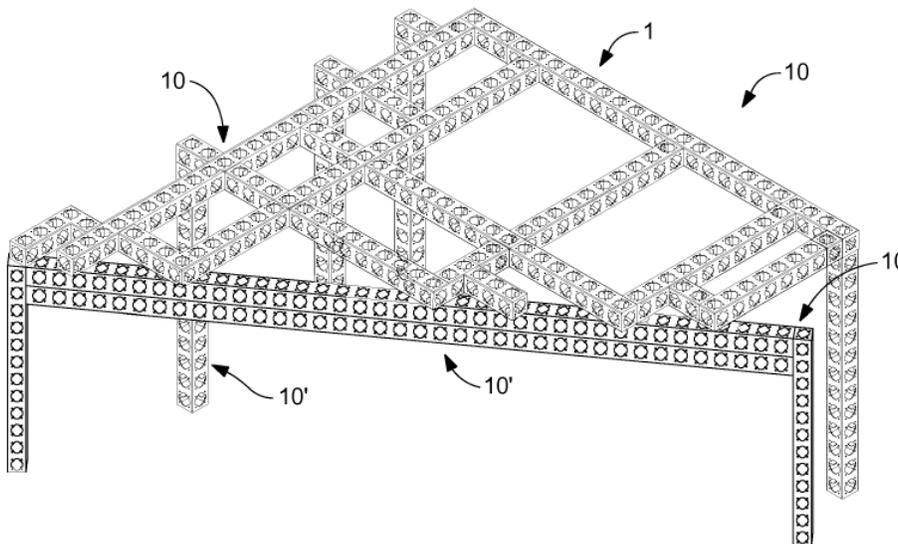


FIG. 1

'425 Patent, Fig. 1.

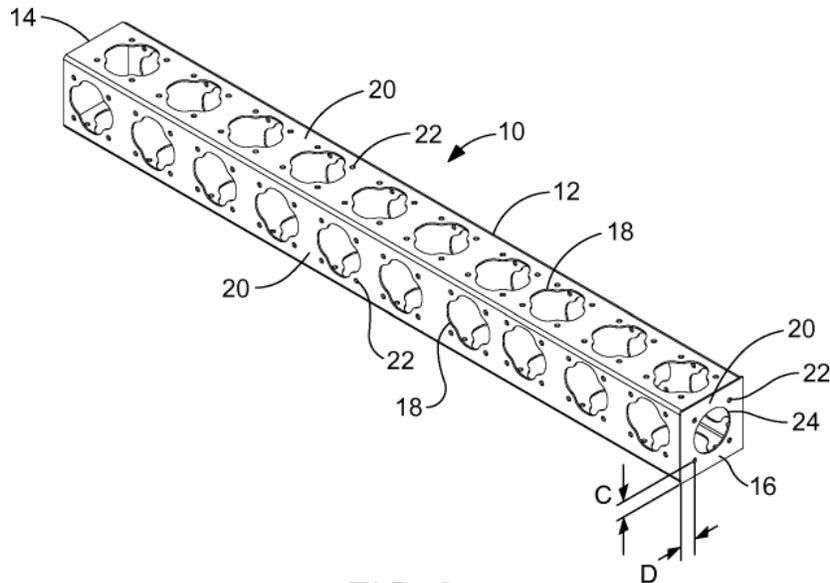


FIG. 2

'425 Patent, Fig. 2.

26. The '425 Patent has three independent claims - Claims 1, 5, and 8.

27. Claim 1 of the '425 Patent provides:

1. A tubular beam for the construction of temporary structures, comprising:

a hollow rectangular tube having a first end, a second end and four substantially planar sides defining a cavity, each side having a first end and a second end defining the first and second ends of the beam, a plurality of tube access openings are formed through at least one of said four sides, a fastener hole pattern is formed around each one of said plurality of tube access openings, said fastener hole pattern includes a plurality of fastener holes; and

a first end plate is attached to said first ends of said sides, a second end plate is attached to said second ends of said sides, a first end access opening is formed through said first end plate and adjacent and in communication with the tube cavity, and a second end access opening is formed through said second end plate and adjacent and in communication with the tube cavity, an end fastener hole pattern

is formed around said first and second end access openings, said end fastener hole pattern includes a plurality of end fastener holes, said end fastener hole pattern is the same as said fastener hole pattern, wherein one of the ends of the tubular beam is attachable to a side of a second tubular beam having the fastener hole pattern and the end fastener hole pattern by securing fasteners to one of said plurality of fastener hole patterns and said end fastener hole pattern.

'425 Patent, Claim 1.

28. Claim 5 of the '425 Patent provides:

5. A tubular beam for the construction of temporary structures, comprising:

a hollow rectangular tube having a first end, a second end and four substantially planar sides defining a cavity, each side having a first end and a second end defining the first and second ends of the beam, a plurality of tube access openings are formed through each one of said four sides, a fastener hole pattern is formed around each one of said plurality of tube access openings, said fastener hole pattern includes a plurality of fastener holes; and

a first end plate is attached to said first ends of said sides and a second end plate is attached to said second ends of said sides, a first end access opening is formed through said first end plate and adjacent and in communication with the tube cavity, and a second end access opening is formed through said second end plate and adjacent and in communication with the tube cavity, an end fastener hole pattern is formed around said first and second end access openings, said end fastener hole pattern includes a plurality of end fastener holes, said end fastener hole pattern is the same as said fastener hole pattern, wherein one of the ends of the tubular beam is attachable to a side of a second tubular beam having the fastener hole pattern and end fastener hole pattern by securing fasteners to

one of said plurality of fastener hole patterns and said end fastener hole pattern.

'425 Patent, Claim 5.

29. Claim 8 of the '425 Patent provides:

8. A tubular beam for the construction of temporary structures, comprising:

a hollow rectangular tube having a first end, a second end and four substantially planar sides defining a cavity, each side having a first end and a second end defining the first and second ends of the beam, a plurality of tube access openings are formed through each one of said four sides, a fastener hole pattern is formed around each one of said plurality of tube access openings, said fastener hole pattern includes a plurality of fastener holes;

a first end plate is attached to said first ends of said sides, a second end plate is attached to said second end of said sides, a first end access opening is formed through said first ends plate and adjacent with and in communication with the tube cavity, and a second end access opening is formed through said second end plate and adjacent with and in communication with the tube cavity, an end fastener hole pattern is formed around said first and second end access openings, said end fastener hole pattern includes a plurality of end holes, said end fastener hole pattern is the same as said fastener hole pattern, wherein one of the ends of the tubular beam is attachable to a side of a second tubular beam having the fastener hole pattern and the end fastener hole pattern by securing fasteners to one of said plurality of fastener hole patterns and said end fastener hole pattern; and

a distance between said plurality of fastener holes and one of said edges of said rectangular tube is equal to a distance between said plurality of end holes and one of said edges of said first and second plates.

'425 Patent, Claim 8.

THE MODTRUSS TRADE DRESS

30. ModTruss's Trade Dress is ubiquitous as seen from its many events. The ModTruss Trade Dress includes the overall appearance, shape, color, and cut out patterns of its products. The ModTruss Trade Dress is shown in Figures 2 – 7.

31. For example, due to its reliability, reputation, and quality of its products, Super Bowl 2016 organizers trusted ModTruss and its products to create three venues. The organizers demanded such exacting standards to prevent failure or catastrophe in front of over 110,000,000 viewers.⁴

32. Figures 2 and 3 depict an octagon stage only needing two unique pieces outside of ModTruss's off-the-shelf products.⁵



Figure 2



Figure 3

⁴<http://money.cnn.com/2016/02/08/media/super-bowl-50-ratings/> (last visited Apr. 12, 2016).

⁵<http://www.modtruss.com/gallery/event-images/super-bowl-2016> (last visited Apr. 12, 2016).

33. Significantly, ModTruss created the Super Bowl City Entrance way.⁶



Figure 4



Figure 5

34. Finally, ModTruss built a 30x40 Peaked Roof Structure with a 20x20 Platform mounted two stories on top of the structure.⁷



Figure 6



Figure 7

⁶<http://www.modtruss.com/gallery/event-images/super-bowl-2016> (last visited Apr. 12, 2016).

⁷<http://www.modtruss.com/gallery/event-images/super-bowl-2016> (last visited Apr. 12, 2016).

BATTLEFROG

35. Upon information and belief, BattleFrog operates an obstacle race series that features outdoor fitness events.⁸ Upon further information and belief, BattleFrog installs and breaks down its obstacles for each event.

BATTLEFROG ACCESSES MODTRUSS'S PATENTED INVENTION

36. Mr. Todd Schwartz ("Schwartz") designs obstacle courses for companies such as BattleFrog utilizing ModTruss's patented technology. Santini Affidavit, ¶ 4. Upon information and belief, BattleFrog manufactures or has another manufacture its obstacles.

37. Schwartz offers obstacle course consulting services on his website.⁹ Santini Affidavit, ¶ 5.

38. In one such consultation, Schwartz visited ModTruss offering his services to design obstacles using ModTruss's products. Santini Affidavit, ¶ 6.

39. Schwartz took pictures and information concerning ModTruss's products to incorporate in his design. Santini Affidavit, ¶ 7.

40. Schwartz possesses intimate details about ModTruss's patented technology. Santini Affidavit, ¶ 8. That is, ModTruss explained the contours of

⁸ <http://battlefrogseries.com/about/about-battlefrog> (last visited Apr. 16, 2016).

⁹ <http://toddschwartz.com/services/> (last visited Apr. 12, 2016).

its patent technology so that he could incorporate it into obstacles. Santini Affidavit, ¶ 9.

41. Schwartz contacted BattleFrog to design obstacles for its obstacle race series. Breloski Decl., ¶ 5, Exhibit O (E-mail from Mr. Todd Schwartz to BattleFrog); Santini Affidavit, ¶ 10.

42. Schwartz presented obstacles to BattleFrog. *See* Breloski Decl., ¶ 3, Exhibit C (Large Bridge Obstacle design from Schwartz for BattleFrog) & ¶ 5, Exhibit O (E-mail from Mr. Todd Schwartz to BattleFrog); Santini Affidavit, ¶ 11.

43. One of the tags¹⁰ for this presentation is “modtruss.” This means that anyone searching the Internet for “modtruss” would find Schwartz’s BattleFrog presentation. *See* Breloski Decl., ¶ 3, Exhibit C (Large Bridge Obstacle design from Schwartz for BattleFrog); Santini Affidavit, ¶ 12.

¹⁰ A “tag is a non-hierarchical keyword or term assigned to a piece of information (such as an Internet bookmark, digital image, or computer file). This kind of metadata helps describe an item and allows it to be found again by browsing or searching.” [https://en.wikipedia.org/wiki/Tag_\(metadata\)](https://en.wikipedia.org/wiki/Tag_(metadata)) (last visited Apr. 18, 2016).

44. Many of his obstacles embody technology of the '425 Patent.¹¹ See Figure 8 below.



Figure 8

45. Additionally, many of his obstacles, as a whole, appear to utilize ModTruss's Trade Dress. See Weltin Decl., ¶ 8, Exhibits D – F (additional obstacles offered by Schwartz).

THE INFRINGING OBSTACLES

46. On or about March 19, 2016, BattleFrog held an obstacle race event in or around Atlanta.¹² The course offered over 8000 m or nearly 5 miles.¹³

47. The event was called BattleFrog Atlanta 2016, and BattleFrog held the event at Lake Lanier Islands Park.¹⁴ Photos from the event were taken on

¹¹ <http://toddschwartz.com/wp-content/uploads/2015/10/52.png> (last visited Apr. 12, 2016).

¹² <http://battlefrogseries.com/events/past-races> (last visited Apr. 12, 2016).

¹³ <http://battlefrogseries.com/events/past-races> (last visited Apr. 12, 2016).

¹⁴ <https://www.facebook.com/media/set/?set=a.1190623164289177.1073741926.725829097435255&type=3> (last visited Apr. 12, 2016).

March 20, 2016.¹⁵ These photos are publicly available on its Facebook page.¹⁶



48. Battlefrog's obstacle course, from the BattleFrog Atlanta 2016 event, included many obstacles utilizing ModTruss's patented technology ("Accused Obstacles").

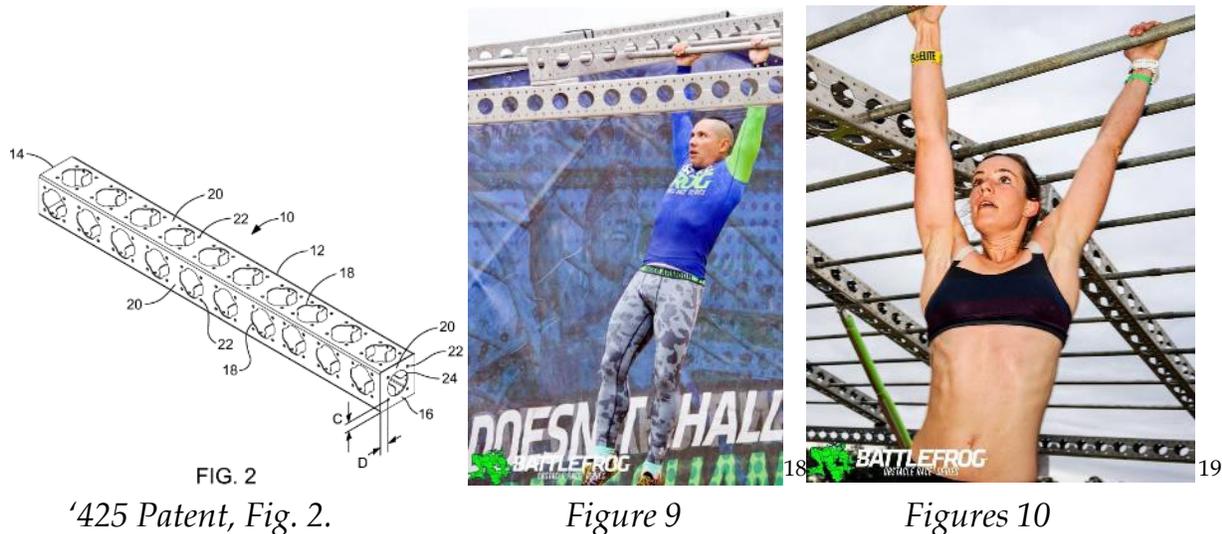
49. The Accused Obstacles contain each limitation set forth in at least Claims 1, 5, and 8 of the '425 Patent. (A chart showing how the Accused Obstacles incorporate each limitation of independent claims 1, 5 and 8 of the '425

¹⁵ <https://www.facebook.com/media/set/?set=a.1190623164289177.1073741926.725829097435255&type=3> (last visited Apr. 12, 2016).

¹⁶ <https://www.facebook.com/media/set/?set=a.1190623164289177.1073741926.725829097435255&type=3> (last visited Apr. 12, 2016).

¹⁷ <https://www.facebook.com/BattleFrogSeries/?fref=nf> (last visited Apr. 12, 2016).

Patent is attached hereto as Exhibit G).



50. BattleFrog advertises its Accused Obstacles on its website²⁰ as well as its Facebook²¹ page and other social media outlets. See Figures 9 and 10 (attached as Exhibits H and I to Breloski Decl., ¶ 4); see also Breloski Decl., ¶ 4, Exhibit J (BattleFrog’s Facebook photos from BattleFrog Atlanta 2016).

51. The claim chart of Exhibit G contains other BattleFrog Facebook photos from the Atlanta event. ModTruss was unable to take its own

¹⁸ <https://www.facebook.com/BattleFrogSeries/photos/a.1190623164289177.1073741926.725829097435255/1190634240954736/?type=3&theater> (last visited Apr 12, 2016).

¹⁹ <https://www.facebook.com/BattleFrogSeries/photos/a.1190623164289177.1073741926.725829097435255/1190630187621808/?type=3&theater> (last visited Apr 12, 2016).

²⁰ <http://battlefrogseries.com/> (last visited Apr 16, 2016).

²¹ <https://www.facebook.com/BattleFrogSeries> (last visited Apr 16, 2016).

photographs due to the nature of the obstacle course and it being over 8000 meters.²²

52. BattleFrog does not have a license or other authorization to practice the claims set forth in the '425 Patent.

53. ModTruss does not have an adequate remedy at law to fully compensate ModTruss for BattleFrog's infringement of the '425 Patent.

54. Additionally, the Accused Obstacles infringe the non-functional look of ModTruss's Trade Dress.

ACTUAL CONFUSION

55. BattleFrog's use of ModTruss's Trade Dress has led to actual confusion among consumers.

56. One of those consumers, Mr. Jeff Jay ("Jay"), sent an inquiry to ModTruss stating that he saw ModTruss's products at BattleFrog. *See* Weltin Decl., ¶ 3.

57. Jay is the owner of HKPK Las Vegas.²³ HKPK is an abbreviation for Hardkore Parkour. Parkour, pronounced *par core*, is "the sport of moving along a route, typically in a city, trying to get around or through various obstacles in

²² <http://battlefrogseries.com/events/past-races> (last visited Apr. 12, 2016).

²³ <http://hkpklv.com/staff/jeff-jay-2/> (last visited Apr. 16, 2016).

the quickest and most efficient manner possible, as by jumping, climbing, or running.”²⁴

58. Like BattleFrog’s obstacle races, parkour athletes traverse obstacles with the major difference being that parkour athletes often use existing buildings, fences, and features, while BattleFrog’s athletes use portable, assembled obstacles. See Figure 11.



Figure 11

59. Jay has seen and is familiar with ModTruss’s products embodying its patented technology and assembled trade dress. Weltin Decl., ¶ 4.

60. On or about March 25, 2016, Jay contacted ModTruss concerning its products. Weltin Decl., ¶ 5. Jay inquired about the ModTruss products he saw

²⁴ <http://www.dictionary.com/browse/parkour?s=t> (last visited Apr. 16, 2016).

²⁵ <http://www.wfpf.com/athletes/kyle-epic-mendoza/> (last visited Apr. 16, 2016).

at BattleFrog-Talk. Weltin Decl., ¶ 6.

61. Jay was actually confused about the products he inquired about to ModTruss. Weltin Decl., ¶ 7. That is, the products that Jay actually saw at BattleFrog-Talk were not ModTruss's. Weltin Decl., ¶ 7. And, ModTruss has never licensed or allowed BattleFrog to use the ModTruss Trade Dress. Weltin Decl., ¶ 7.

MODTRUSS'S PAST RESOLUTION EFFORTS

62. ModTruss has directly communicated with BattleFrog in an attempt to resolve this matter; however, BattleFrog has failed to remedy its actions.

63. On March 25, 2016, ModTruss sent a final, legal cease and desist letter to BattleFrog. *See* Exhibit K. ModTruss requested a reply from BattleFrog no later than April 8, 2016 – two weeks later.

64. BattleFrog failed to respond to ModTruss's letter. Instead, BattleFrog's co-founder, Michael J. McAllister, waited a week after the date ModTruss requested a response and sent a reply e-mail to ModTruss's counsel. *See* Exhibit L (e-mail from Michael J. McAllister to James Kayden, dated Apr. 14, 2016).

65. In his letter, Mr. McAllister stated, “[w]e are looking into the claims in your correspondence and require additional time to substantively respond.”

Exhibit L (e-mail from Michael J. McAllister to James Kayden, dated Apr. 14, 2016).

66. BattleFrog delayed hiring counsel to review ModTruss's infringement claims. *See* Exhibit M (letter from Ashima A. Dayal, counsel for BattleFrog, to James Kayden, counsel for ModTruss).

67. In the letter, BattleFrog's counsel echo's Mr. McAllister's delay response – “[w]e are in the process of reviewing the facts asserted in your letter and will provide a substantive response shortly.” Exhibit M (letter from Ashima A. Dayal, counsel for BattleFrog, to James Kayden, counsel for ModTruss).

68. BattleFrog's delays have hindered settlement discussions. In fact, to date, BattleFrog has failed to offer any resolution and still advertises its Accused Obstacles.

EXTRAORDINARY CIRCUMSTANCES

69. As ModTruss products are ubiquitous, BattleFrog knew or should have known about ModTruss's patents and trade dress through the Internet, marketing channels, trade shows, and television.

70. Upon information and belief, BattleFrog had actual knowledge of ModTruss's patent and trade dress from Schwartz's presentation.

71. As seen in the attached claim charts, the '425 Patent describes and

claims physical structures that, when compared to other products, infringement analysis is straightforward.

72. Even the most cursory comparison between the claims of the '425 Patent and BattleFrog's Accused Obstacles reveal BattleFrog's infringement.

73. Nonetheless, BattleFrog continued to employ its Accused Obstacles in direct contravention of ModTruss's patented technology.

74. ModTruss invests several hundreds of thousands of research and development dollars in ensuring the safety of its beams. Weltin Decl., ¶ 9. Later, during manufacturing, its beams undergo a rigorous structural inspection. Weltin Decl., ¶ 9. Every beam includes a serial number signaling that the beam has met ModTruss's exacting requirements. Weltin Decl., ¶ 9. Using ModTruss patented technology that does not meet ModTruss exacting requirements has severe consequences.

75. For example, Mr. Christopher Stephens ("Stephens") is a triathlete, marathoner, and contributor to *Obstacle Racing Media*, who wrote an article about severe consequences, titled "Safety Concerns at BattleFrog Series Races."²⁶ (Full article attached as Exhibit N). His article cited two hazardous race conditions

²⁶ <http://obstacleracingmedia.com/ocr-news/safety-concerns-battlefrog-series-races/> (last visited Apr. 16, 2016).

BattleFrog allowed.²⁷

76. Concerning BattleFrog, Stephens cautioned, “[i]n August, at the race outside Pittsburgh, the second obstacle was a standard A-frame. Since it was only the second obstacle, the crowd of elite runners in the first wave had not yet spread out, and when most of the racers were on top of the A-frame, it buckled under their weight and collapsed.”

77. Further, several racers informed Stephens that they were “injured when this [A-frame] obstacle collapsed, including one who suffered a concussion and another who broke his ankle.”²⁸

78. Others discussed “how dangerous [the race] was.”²⁹

79. Stephens ends his article with a final warning to BattleFrog – “If BattleFrog wants to move up to the next level, it needs to spend more money on safety personnel.”³⁰

²⁷ <http://obstacleracingmedia.com/ocr-news/safety-concerns-battlefrog-series-races/> (last visited Apr. 16, 2016).

²⁸ <http://obstacleracingmedia.com/ocr-news/safety-concerns-battlefrog-series-races/> (last visited Apr. 16, 2016).

²⁹ <http://obstacleracingmedia.com/ocr-news/safety-concerns-battlefrog-series-races/> (last visited Apr. 20, 2016).

³⁰ <http://obstacleracingmedia.com/ocr-news/safety-concerns-battlefrog-series-races/> (last visited Apr. 16, 2016).

80. BattleFrog's collapsed obstacle demonstrates safety issues it has with its obstacles. BattleFrog's Accused Obstacle infringes the '425 Patent and has an overall appearance that infringes ModTruss's Trade Dress. If left unattended, BattleFrog will tarnish ModTruss's brand.

81. With the upcoming ESPN footage of BattleFrog's course, damage to ModTruss is both serious and imminent. *See* Weltin Decl., ¶ 10, Exhibit P (Exclusive: First Look at BattleFrog's ESPN Course | Mud Run, Obstacle Course Race & Ninja Warrior Guide). ESPN will air footage of the BattleFrog Atlanta 2016 race in July of this year. Weltin Decl., ¶ 10, Exhibit P. According to ESPN, its shows have garnered over 100 million views. Breloski Decl., ¶ 6, Exhibit Q. ESPN is the most-watched cable network in prime time among households and viewers. Breloski Decl., ¶ 6, Exhibit Q.

82. Furthering the damage, BattleFrog's Executive Producer, Michael McAllister, has expanded coverage from ESPN, "the biggest stage in the world" for BattleFrog's sport, to social media. Breloski Decl., ¶ 6, Exhibit Q. Such expansion increases viewership, and if like previous BattleFrog events, McAllister states that viewers "[can't] stop watching." Breloski Decl., ¶ 6, Exhibit Q. In the event of another BattleFrog obstacle failure, millions of viewers won't stop watching, thereby destroying ModTruss's safety reputation. Breloski Decl.,

¶ 6, Exhibit Q.

83. All conditions precedent to the assertion of the claims set forth in this Complaint have been satisfied or waived.

COUNT I
BATTLEFROG'S WILLFUL INFRINGEMENT OF THE '425 PATENT

84. ModTruss incorporates by reference as if fully set forth herein the averments contained within Paragraphs 1-83, above.

85. By reason of some or all of the foregoing, BattleFrog has willfully infringed at least claim 1 of the '425 Patent.

86. ModTruss has suffered damages as the direct and proximate result of BattleFrog's infringement of the '425 Patent.

87. ModTruss, under 35 U.S.C. § 284, may recover damages adequate to compensate for the infringement of BattleFrog.

88. ModTruss has been, and continues to be, damaged and irreparably harmed by the infringement of BattleFrog, which will continue unless this Court enjoins the BattleFrog.

89. The infringement of the '425 Patent by BattleFrog has been, and continues to be, deliberate, willful and knowing.

90. The Court should declare this an exceptional case under 35 U.S.C. § 285, entitling ModTruss to recover treble damages and attorneys' fees.

COUNT II
TRADE DRESS INFRINGEMENT
UNDER LANHAM ACT (§ 1125(a))

91. ModTruss re-alleges paragraphs 1 through 90 of this Complaint as if set forth in full herein.

92. ModTruss is the current, active, and exclusive owner of the ModTruss Trade Dress, a valid and legally protected trade dress.

93. BattleFrog has used and is continuing to use ModTruss's Trade Dress, in commerce without consent, and BattleFrog's use is likely to deceive, cause confusion, or result in mistake as to the affiliation, connection, or association of BattleFrog with ModTruss and as to the availability of ModTruss's authentic products through BattleFrog.

94. ModTruss's Trade Dress features non-functional aspects to the appearance of its trade dress.

95. BattleFrog's unauthorized use the ModTruss Trade Dress has infringed upon ModTruss's Trade Dress, in violation of 15 U.S.C. § 1125(a)(3).

96. As a result of BattleFrog's conduct, ModTruss has suffered damages that include but are not limited to lost sales of its products, trade dress infringement, and damage to ModTruss's existing and potential business relations, together with costs of this action.

97. Additionally, pursuant to 15 U.S.C. § 1117(a), ModTruss is entitled to an award of attorneys' fees since BattleFrog's acts are willful, intentional, and egregious, making this an exceptional case.

COUNT III
UNFAIR COMPETITION
IN VIOLATION OF LANHAM ACT (15 U.S.C. § 1125(A)(1)(A))

98. ModTruss re-alleges paragraphs 1 through 97 of this Complaint as if set forth in full herein.

99. BattleFrog has without authorization, on or in connection with the promotion and sale of its products in interstate commerce, made or contributed to the making of representations which are likely to cause confusion, or to cause mistake, or to deceive purchasers and potential purchasers into believing that ModTruss's products are available for purchase from BattleFrog.

100. BattleFrog's acts constitute unfair competition and are misleading representations of facts.

101. BattleFrog's acts of unfair competition and misrepresentations have led to, among other things, initial interest confusion and actual confusion.

102. BattleFrog's acts of unfair competition and misrepresentations have deceived and, unless restrained, will continue to deceive the public, including consumers and retailers, and have injured and unless constrained will continue

to injure ModTruss and the public, including consumers and retailers, causing damages to ModTruss in an amount to be determined at trial and other irreparable injury to the goodwill and reputation of ModTruss and its products.

103. BattleFrog's acts of unfair competition are willful, intentional and egregious and make this an exceptional case within the meaning of 15. U.S.C. § 1117(a), entitling ModTruss to attorney's fees.

104. ModTruss has no adequate remedy at law to compensate it for all the damages the BattleFrog's wrongful acts have and will cause.

COUNT IV
(UNJUST ENRICHMENT)

105. ModTruss re-alleges paragraphs 1 through 104 of this Complaint as if set forth in full herein.

106. BattleFrog has benefited from the use of ModTruss's name, reputation, and goodwill without compensating ModTruss.

107. BattleFrog's conduct, directly or through an agent or affiliate, constitutes unjust enrichment to BattleFrog.

108. By virtue of BattleFrog's unjust enrichment, ModTruss has suffered money damages.

COUNT V
GEORGIA STATUTORY UNFAIR COMPETITION
(O.C.G.A § 23-2-55)

109. ModTruss re-alleges paragraphs 1 through 108 of this Complaint as if set forth in full herein.

110. Upon information and belief, BattleFrog's unauthorized use of the ModTruss's Trade Dress has been with the intention of deceiving and misleading the public, and thereby attempting to encroach upon the business of ModTruss in violation of O.C.G.A § 23-2-55.

111. BattleFrog's unauthorized use of the ModTruss's Trade Dress has caused, and unless restrained by this Court, will continue to cause immediate and irreparable injury to ModTruss because a substantial number of past, present and potential customers have been and are likely to be confused, deceived and misled as to the true source, origin, sponsorship, approval, authorization, association, affiliation and characteristics of the Accused Obstacles. ModTruss has no adequate remedy at law for such injury.

112. Unless enjoined by this Court, BattleFrog will continue said deceptive trade practices, thereby deceiving the public and causing ModTruss immediate and irreparable injury for which it has no adequate remedy at law.

COUNT VI
GEORGIA COMMON LAW UNFAIR COMPETITION

113. ModTruss re-alleges paragraphs 1 through 112 of this Complaint as if set forth in full herein.

114. BattleFrog's unauthorized use of ModTruss's Trade Dress has been for the calculated purpose of passing off BattleFrog's Accused Obstacles as those of ModTruss, trading upon ModTruss's goodwill and reputation, and deceiving the public as to the true nature and characteristics of BattleFrog's Accused Obstacles, all to BattleFrog's profit and to ModTruss's damage.

115. BattleFrog's aforesaid acts constitute unfair competition under the common law of the State of Georgia and have caused, and unless restrained by this Court will continue to cause, immediate, and irreparable injury to ModTruss's goodwill and reputation, for which it has no adequate remedy at law.

COUNT VII
GEORGIA COMMON LAW UNJUST ENRICHMENT

116. ModTruss re-alleges paragraphs 1 through 115 of this Complaint as if set forth in full herein.

117. BattleFrog's unauthorized use of the ModTruss's Trade Dress in connection with the advertising, promoting, and sale of the BattleFrog's goods

and services, from which BattleFrog has derived substantial profits, has unjustly enriched BattleFrog by enabling them to unfairly appropriate the benefit of ModTruss's extensive use, promotion, and development of the ModTruss Trade Dress and the goodwill associated therewith.

118. BattleFrog has earned revenues and profits to which it is not legally entitled, and ModTruss continues to be irreparably injured by the aforesaid acts of BattleFrog, which acts have greatly and unjustly enriched BattleFrog at ModTruss's expense, for which injury ModTruss has no adequate remedy at law.

COUNT VIII
GEORGIA COMMON LAW MISAPPROPRIATION AND CONVERSION

119. ModTruss re-alleges paragraphs 1 through 118 of this Complaint as if set forth in full herein.

120. BattleFrog, through the unauthorized use of ModTruss's Trade Dress, has misappropriated the ModTruss Trade Dress, and has unlawfully converted to their own use and exploited ModTruss's property and commercial likeness, thereby reaping for themselves the benefits of ModTruss's prior use, promotion, and development of ModTruss's Trade Dress, and the goodwill symbolized thereby.

COUNT IX
BATTLEFROG'S INFRINGEMENT OF THE '425 PATENT

121. ModTruss incorporates by reference as if fully set forth herein the averments contained within Paragraphs 1-120, above.

122. By reason of some or all of the foregoing, BattleFrog has infringed at least claim 1 of the '425 Patent.

123. ModTruss has suffered damages as the direct and proximate result of BattleFrog's infringement of the '425 Patent.

124. ModTruss, under 35 U.S.C. § 284, may recover damages adequate to compensate for the infringement of BattleFrog.

125. ModTruss has been, and continues to be, damaged and irreparably harmed by the infringement of BattleFrog, which will continue unless this Court enjoins the BattleFrog.

126. The infringement of the '425 Patent by BattleFrog has been, and continues to be, deliberate, willful and knowing.

127. The Court should declare this an exceptional case under 35 U.S.C. § 285, entitling ModTruss to recover treble damages and attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, ModTruss prays that this Court:

(1) Enter a Temporary Restraining Order and a Preliminary Injunction in favor of ModTruss and against BattleFrog, maintaining the *status quo ante* and prohibiting BattleFrog's conduct

- a. infringing the '425 Patent during the pendency of this action;
- b. using in any manner ModTruss's Trade Dress, or any product configuration confusingly similar to or that is a colorable imitation of the ModTruss Trade Dress;
- c. doing any act or thing that is calculated or likely to cause confusion or mistake in the minds of members of the public or prospective customers of ModTruss as to the source of the products or services offered for sale, distributed, or sold, or that is likely to deceive members of the public, or prospective customers, into believing that there is some connection, affiliation, or sponsorship between ModTruss and BattleFrog; or advertising, marketing, or offering to sell ModTruss's Products in any source, including any internet search engine provider, or in any manner on BattleFrog's website, Facebook page, or other social media outlet;

d. advertising, marketing, or showing the Accused Obstacles on any ESPN television program.

(2) Enter an order requiring BattleFrog to immediately remove, or cause to be removed, all photos of the Accused Obstacles that purport to or imply that BattleFrog uses obstacles that embody ModTruss's patented technology or Trade Dress;

(3) Enter judgment and order as part of the injunction BattleFrog be directed to file with this Court and serve on ModTruss within thirty days after issuance of the injunction, a report in writing under oath, setting forth in detail the manner and form in which BattleFrog has complied with the injunction;

(4) That as a further part of the injunction BattleFrog be required to deliver up and destroy all of the Accused Obstacles, all things bearing ModTruss's Trade Dress in any manner, or product configuration that is confusingly similar to or a colorable imitation of the ModTruss Trade Dress;

(5) That as a further part of the injunction film, photography, video, and any marketing displaying the Accused Obstacles be prohibited from broadcast on television, cable, or any other medium, such as ESPN;

(6) Enter judgment in favor of ModTruss and against BattleFrog for all counts;

(7) Award damages to ModTruss in an amount to be proven at trial

for infringement of the '425 Patent, pursuant to 35 U.S.C. § 284, including pre-judgment and post-judgment interest;

(8) Enter judgment in the amount of ModTruss's Trade Dress infringement damages, BattleFrog's profits, ModTruss's reasonable attorney fees, and costs of suit;

(9) Grant ModTruss prejudgment interest and costs;

(10) Enter judgment for enhanced damages under 15 U.S.C. § 1117 and punitive damages under state law as appropriate;

(11) Enter a permanent injunction in favor of ModTruss and against BattleFrog prohibiting BattleFrog's conduct infringing the '425 Patent;

(12) Have this case be tried before a jury; and

(13) Award ModTruss such other and further relief as the Court deems just and proper, premises considered.

-----*Signature Page Follows*-----

JURY TRIAL DEMANDED

ModTruss hereby demands a trial by jury under Federal Rule of Civil Procedure 39 for all issues triable by jury.

Respectfully submitted, this June 3, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.1D, the undersigned counsel certify that the foregoing has been prepared in Book Antiqua 13 point, one of the four fonts and points approved by the Court in LR 5.1C.

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