

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

BIOSONIX, LLC,)	
)	
Plaintiff,)	Civil Action No. 4:16-cv-00139-RC
)	
v.)	JURY TRIAL DEMANDED
)	
)	
HYDROWAVE, LLC,)	
RHP INDUSTRIES, LLC, and)	
T-H MARINE SUPPLIES, INC.,)	
)	
Defendants.)	

BIOSONIX, LLC’s SECOND AMENDED COMPLAINT

Plaintiff Biosonix, LLC, by and through its undersigned counsel, files this First Amended Complaint against Hydrowave, LLC, RHP Industries, LLC and T-H Marine Supplies, Inc. (collectively “Defendants”) and alleges:

PARTIES

1. Plaintiff Biosonix, LLC (“Biosonix”), is a Delaware limited liability company having a principal place of business at 205 Benton Drive, #10111, Allen, Texas 75013.
2. Upon information and belief, Defendant Hydrowave, LLC (“Hydrowave”) is an entity organized and existing under the laws of the State of Texas with its principal place of business located 9920 Liberty Rd., Aubrey, Texas 76227 or 1440 Halsey Way, Carrollton, Texas 75007, within the jurisdiction of this Court. Hydrowave’s registered agent for service with the Texas Secretary of State is Karen A. Meredith, 251 O’Connor Ridge Blvd., Suite 370, Irving, Texas 75038.

3. Upon information and belief, Defendant RHP Industries, LLC (“RHP”) is an entity organized and existing under the laws of the State of Texas with its principal place of business located at 9920 Liberty Rd., Aubrey, Texas 76227, within the jurisdiction of this Court. RHP’s registered agent for service with the Texas Secretary of State is Robert H. Palmer, 9920 Liberty Rd., Aubrey, Texas 76227.

4. Upon information and belief, Defendant T-H Marine, Inc. (“T-H” or “T-H Marine”) is an entity organized and existing under the laws of the State of Alabama with its principal place of business located at 200 Finney Drive, Huntsville, Alabama 35824. T-H’s registered agent for service with the Alabama Secretary of State is Jeffrey W. Huntley, 200 Finney Drive, Huntsville, Alabama 35824.

JURISDICTION AND VENUE

5. This action arises under the patent laws of the United States, Title 35 of the United States Code. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1338(a).

6. Hydrowave and RHP are subject to this Court’s specific and general personal jurisdiction, due at least to having their principal place of business and conducting substantial business in this state, including at least a portion of the infringement alleged herein and regularly doing or soliciting business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from goods provided to or sold to individuals in Texas and this Judicial District.

7. Upon information and belief, this Court has personal jurisdiction over T-H because Plaintiff’s patent infringement claims against T-H arise from T-H’s acts of infringement in Texas. These acts include selling or offering for sale infringing products in the State of Texas,

placing infringing products into the stream of commerce through an established distribution channel with full awareness that substantial quantities of products have been shipped into the State of Texas and causing Plaintiff harm in this judicial district. Moreover, the Court has personal jurisdiction over T-H because upon information and belief T-H transacts business within Texas, including having at least one retailer located in Texas on a continuous and systematic basis. This Court, therefore, has personal jurisdiction over T-H under the Texas long-arm statute, TEX. CIV. PRAC. & REM CODE §17.042.

8. Venue is proper in this District under 28 U.S.C. §§1391(b), (c) and (d) and §1400(b). Hydrowave and RHP reside and have regular and established places of business in this District and have committed and/or induced acts of patent infringement in this District described above sufficient to subject them to personal jurisdiction in this District if the district were a separate State. Upon information and belief T-H has transacted business in this District, and has committed and/or induced acts of patent infringement in this District described above sufficient to subject it to personal jurisdiction in this District if the district were a separate State.

JOINDER

9. Joinder of Defendants is proper under 35 U.S.C. §299 because the right to relief asserted against Defendants jointly relates to the making, using, selling or offering to sell accused Hydrowave products.

Biosonix Revolutionary Fish Activator

10. Biosonix is a leader in innovation in the fishing industry. Its founder William H. Lewis has roughly forty-five years of experience in the fishing lure industry and spearheaded Biosonix's years of research and development. Lewis and his father Bill Lewis co-founded Bill Lewis Lures. Bill Lewis Lures introduced the Rat-L-Trap line of fishing lures, considered by

many as one of the most important innovations in the history of the fishing lure industry for its groundbreaking research and development of sonic fishing lure technology.

11. Armed with years of experience, Biosonix revolutionized fish activation technology. Its enormous investment of time and money culminated in the development and sale of the Biosonix RF-300 BSX Fish Activator system (“the RF-300”), depicted below.



Biosonix RF-300

12. The RF-300 system includes a submersible speaker connected to an above-water control unit having a user interface with user selectable options. The prerecorded sounds and customized sound sequences, included those of game fish attacking prey, distressed baitfish schools and other underwater sounds that through research have proved to attract game fish.

13. In 2003, Biosonix founder William Henry Lewis and Stuart Randall Flint filed a patent application entitled “System, Method and Apparatus for Attracting and Stimulating Aquatic Animals”. United States Patent Number 7,333,395 (“the ‘395 Patent”) was granted on February 19, 2008. The ‘395 Patent is assigned to Biosonix. A true and correct copy of the ‘395 Patent is attached as Exhibit A.

14. The ‘395 Patent claims, *inter alia*, a system that includes an interface that allows the user through a user interface to select a custom program to attract and stimulate aquatic animals.

15. A custom program may include a variety of different sounds, from different species, events, or activities that are pre-recorded for later selection by the user through the interface.

16. The custom program may include one or more sets of sounds in a specific sequence at a specific volume for each sound in the set. The custom program may also include delay intervals between sound sets.

17. Through its research and development efforts, Biosonix introduced SD expansion cards from which various Signature Sounds and custom sound programs could be downloaded to the RF-300 control unit and played back underwater. The RF-300's packaging is marked with the '395 Patent. Biosonix also licensed U.S. Patent Nos. 5,177,891, 5,282,178, and 5,883,858.

18. At least as early as 2006, prior to founding Hydrowave, professional angler Kevin VanDam ("VanDam") was a paid promoter and consultant of Biosonix. VanDam's capacity as a promoter and consultant of Biosonix included wearing on his person and displaying on his boat the Biosonix logo prominently during competitive fishing tournaments.

19. VanDam experimented with the RF-300 prototype to assist in Biosonix's development of various sound patterns for inclusion on SD expansion cards to be used in conjunction with the RF-300.

20. Biosonix developed a line of sound patterns for marketing to consumers via the SD expansion card. One such sound pattern under development by Biosonix was the Kevin Van Dam Signature Sounds card, depicted below, which includes a sound pattern named "Power" pattern.



Biosonix KVD Custom Card

21. The “Power” pattern is a custom program including a set of sounds of activity of one or more aquatic species, arranged in a particular sequence and at a particular volume for playback. The “Power” Pattern is ideal for use in a variety of fishing conditions.

22. The Biosonix fish activator systems enjoyed tremendous success in the industry. Numerous professional anglers attributed their success in professional fishing competitions to Biosonix. Such professionals include Skeet Reese and Kevin VanDam. Articles in which Reese and VanDam attribute their success to Biosonix are provided as Exhibits B and C.

The Hydrowave H2 Electronic Feeding Stimulator and Expansion Modules

23. Upon information and belief, Hydrowave was founded by Eugene Joseph Eisenmann, Jr., Robert H. Palmer and Kevin VanDam. Upon information and belief, Hydrowave’s primary business purpose is to market and sell H2 Electronic Feeding Stimulators and Expansion Modules (“the H2 System”).

24. Upon information and belief, Robert H. Palmer is the President of RHP, which manufactures the H2 System. One of RHP’s business addresses, 9920 Liberty Road, Aubrey, TX, is listed as the corporate office address for Hydrowave on the product manual that accompanies the H2 System.

25. Defendants market, promote, manufacture and/or sell “the H2 System” through various online and local and national brick-and-mortar retailers.

26. The H2 System purports to attract and stimulate aquatic animals through playing of various prerecorded sets of sound underwater through a submersible speaker.

27. The H2 System for attracting and stimulating aquatic animals includes at least a submersible device comprising a transducer element disposed within a watertight housing.

The Hydrowave H2 speaker mounts on the underside of the trolling motor's lower unit, fitting all models of trolling motors (zip ties included), also offered is a optional transom mount for use with auto deploy trolling motors or if you have no trolling motor at all (transom mount available through HydroWave). The speaker is multi-directional so it doesn't matter which way the trolling motor is pointed or if the unit is mounted on the transom of the boat. When mounting on the trolling motor the speaker snugs up smoothly against the unit for a perfect, hydrodynamic fit. Operates on a 12-volt power supply.

[<http://www.hydrowave.com/p-1-h2-system-package.aspx>].

HydroWave H2 System & Features

Contents Include:	
◆	HydroWave Unit - Display, Keypad and Internal Speaker
◆	6' Power Cord with Inline Fuse
◆	8" Ties Wraps (Qty 6)
◆	Omni-Directional Underwater Speaker with 14' cord (Qty 1)
◆	HydroWave Unit Mounting Bracket
◆	Mounting Bracket Screws & Washers (Qty 2)
◆	Laminated Field Use Card
◆	Velcro Unit Mounting Strips (Qty 2)
◆	18" Heavy Duty Zip Ties (Qty 2)
◆	User Guide including Warranty Card

HydroWave Parts Diagram

Not Pictured:
6' Power Cable
8" Tie Wraps
Speaker Mounting Clamps
Field Use Card

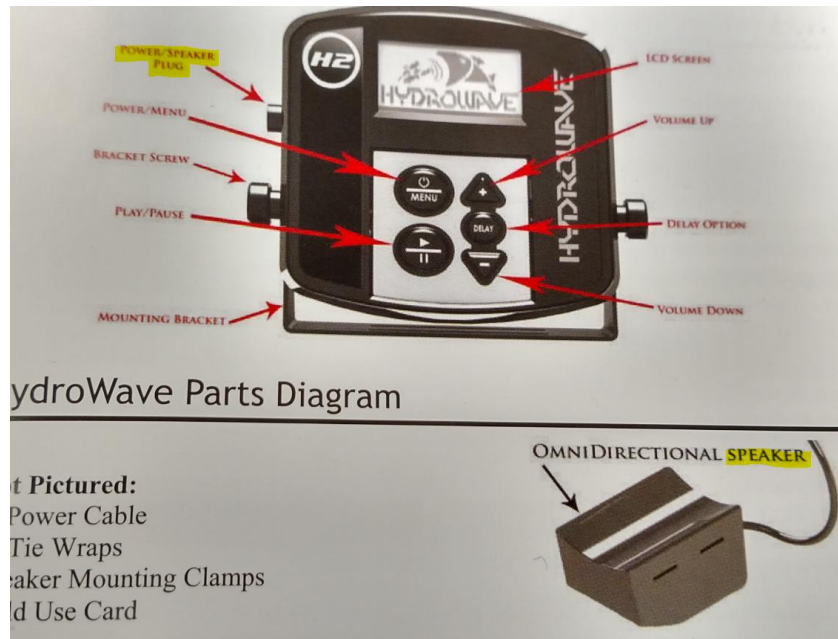


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[Hydrowave H2 Product Manual, p. 4-5 (emphasis added)].

28. The H2 System includes a control unit that is maintained above water having various user controls. Through these controls, a user may select a custom sound program including one or more sets of digitally pre-recorded sounds in a specified sequence and at a specified volume for broadcast over the underwater speaker.

29. The H2 System's programmable control unit is operably linked to the submersible device.



[Hydrowave H2 Product Manual, p. 5 (emphasis added)].

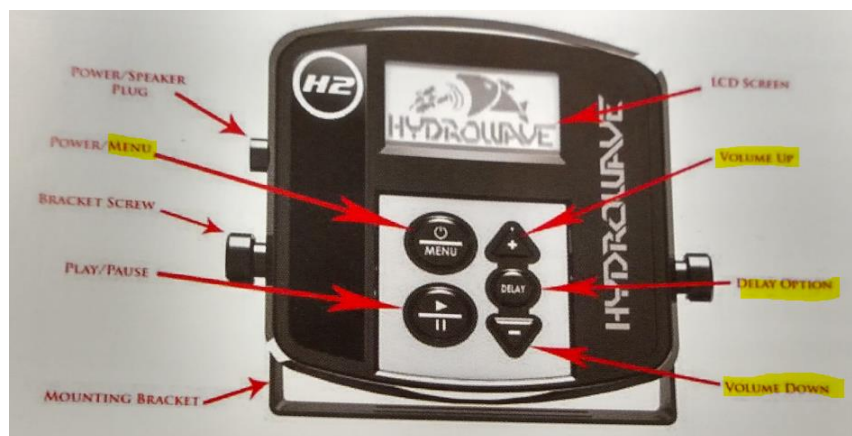
30. As the H2 System includes software, upon information and belief the system has a processor. Various sounds are stored in memory of the H2 System or Hydrowave Expansion Cards, which is a memory device for storing a plurality of sets of digitally prerecorded sounds.

All of the sounds and sound loops come programmed into the unit's software. There is no loading of programs and/or sounds required. Operation is truly a pick and play procedure.

Now featuring 16 original and new sound patterns for added versatility, the new H2 also now offers five pre-programmed delay options ranging from 15 to 120 seconds. A new, larger 2.5" LCD screen makes operation even easier, and the H2 also features a new, sleek look. Even easier to use and install, the new Hydrowave H2 also features an easy access expansion port for additional sounds and a combined speaker, power cable plug-in.

[<http://www.hydrowave.com/p-1-h2-system-package.aspx>].

31. The H2 System's control unit includes an input device having a user interface with multiple user-selectable options.



[Hydrowave H2 Product Manual, p. 5 (emphasis added)]. The selected custom programs are broadcast through the underwater speaker according to the selection by the user.

32. The H2 System's user interface includes a plurality of user-selectable options including one or more sets of sounds, sequence and volume for user selection of a custom program including one or more of the sets of digitally prerecorded sounds in a specified sequence and at a specified volume. The user may also select options including a volume level and a delay interval.

33. The H2 System's input device is operably connected to the processor for transmitting the user-selected custom program including one or more of the sets of digitally prerecorded sounds to be played according to the user-selected custom program via the submersible speaker according to the user-selected program.

34. The H2's System's speaker is responsive to control signals received from the H2 System's programmable control unit to execute the user-selected custom program of one or more sets of digitally prerecorded sounds in a specified sequence and at a specified volume in response to control signals received from the H2 programmable unit.

35. The H2 System sound patterns may be stored either within internal storage of the control unit or on an expansion module. An expansion module is a separate memory device that is attachable to the H2 System's control unit.

36. Defendants offer a variety of expansion modules for attracting different types of fish. The H2 System allows the user to select for playback and further customize the prerecorded sound patterns at different volume levels or with a selected delay between sounds patterns.

37. Upon information and belief, Hydrowave has licensed one or more of U.S. Patent Nos. 5,177,891, 5,282,178, and 5,883,858. These are the patents licensed by Biosonix.

38. Defendants offer to sell and sell Hydrowave H2 systems, including expansion modules such as the "KVD" (Kevin VanDam) Signature Series Expansion Module, depicted below.

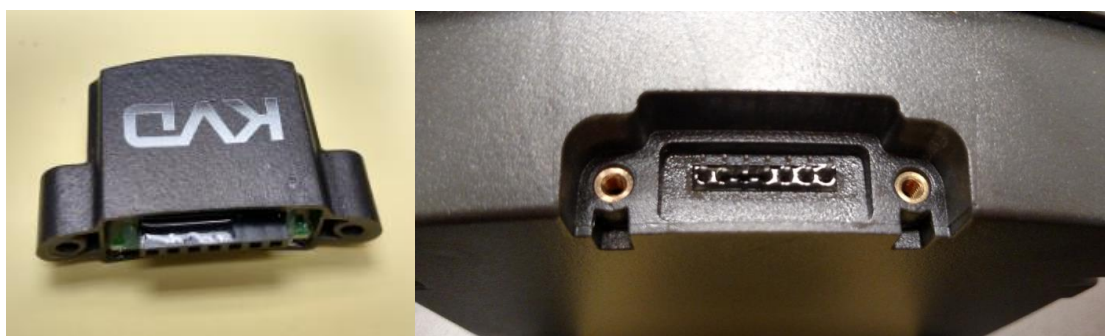


Hydrowave KVD Signature Series Expansion Module

39. Upon information and belief, Defendants have manufactured, offered for sale, imported and/or sold Expansion Modules, including the KVD Signature Series, Striper Thump, Bait Fish, Bream, Crawfish, and Herring Expansion Modules.

40. The Hydrowave Expansion Modules are a material part of the inventions of the '395 Patent at least because each includes at least sets of digitally prerecorded sounds that are played underwater through the claimed submersible device.

41. The Hydrowave Expansion Modules are specially adapted for use with the H2 System at least because they include a special interface for connection to the expansion port of the H2 System. As shown below, the H2 System's expansion port (right) is manufactured to receive Hydrowave Expansion Modules (left).



Hydrowave Expansion Module

H2 System Expansion Port

42. Upon information and belief, the H2 System's expansion port is not configured to serve as an interface for any device other than Hydrowave Expansion Modules. Upon information and belief, Hydrowave Expansion Modules are not configured to be connected to any device other than the H2 System for playing of sets of sounds through the submersible device. As shown below, Hydrowave Expansion Modules are adapted specifically for use with and installation on the H2 System. The body of the Hydrowave Expansion Module is shaped to fit into the expansion port of the H2 system, as shown. The Hydrowave Expansion Modules also include screws to secure the Expansion Modules to the H2 System by inserting the screws into corresponding threaded recessed holes of the H2 System.



Hydrowave Expansion Module Installed in H2 System Expansion Port

43. Moreover, there is no use for Hydrowave Expansion Modules other than for playback through and in combination with the H2 System to attract fish. The combination of the H2 System and Hydrowave Expansion Modules when used in their intended and customary manner directly infringes the '395 Patent.

44. Accordingly, Hydrowave Expansion Modules are specially adapted for use in an infringing manner in combination with the Hydrowave H2 System and have no apparent non-infringing use.

45. Users of the H2 System with a Hydrowave Expansion Module installed in the expected and customary manner directly infringe at least claims 4 and/or 13 of the '395 Patent.

46. According to the Hydrowave product description, "Kevin personally lays out his most productive loops on his KVD Signature Series Expansion Module". The Hydrowave KVD expansion module includes six custom programs, including the "Power Pattern".

47. Upon information and belief, Defendants have had knowledge of the '395 Patent by virtue of member of Hydrowave, Kevin VanDam, serving as a paid consultant for Plaintiff on or around the issue date of the '395 Patent and/or while the application that issued as the '395 Patent was pending.

48. While VanDam was associated with Plaintiff, Plaintiff developed and sold Biosonix Fish Activator Systems.

49. Upon information and belief, during VanDam's association with Plaintiff, VanDam was familiar with Plaintiff's Fish Activator System, upon which the H2 System is based, and also had knowledge of Plaintiff's efforts to patent the technology underlying Plaintiff's Fish Activator System and ultimate award of the '395 Patent.

50. In addition, two of Hydrowave's other owners, Robert H. Palmer and Eugene Joseph Eisenmann, Jr., filed patent application number 13/027,031 on February 24, 2011 ("the '031 Application") with the USPTO titled "Apparatus and Methods for Attracting Aquatic Animals".

51. During prosecution of the '031 Application, an Information Disclosure Statement (IDS) was filed with the USPTO by patent applicants Palmer and Eisenmann that included Plaintiff's '395 Patent as well as Biosonix Fish Activator System literature, including the RF-300 User Guide.

52. The '031 Application issued as U.S. Patent No. 8,792,306 ("the '306 Patent").

53. Upon information and belief, close in time to his disassociation with Plaintiff, VanDam along with Palmer and Eisenmann founded Hydrowave.

54. According to Hydrowave's website, "The Hydrowave (www.hydrowave.com) is a new generation of the former Biosonix electronic 'feeding stimulator' that produces underwater sounds imitating excited baitfish and feeding bass through a speaker attached to the trolling motor." [www.hydrowave.com/t-news-bassmaster-magazine-hydrowave-rings-the-dinner-bell.aspx].

55. On or around December 1, 2015, T-H Marine acquired the assets of Hydrowave and upon information and belief did so with knowledge of at least the information concerning

Biosonix's patented products discussed on Hydrowave's website, the '395 Patent, Biosonix's RF-300 System, and Kevin Van Dam serving as a paid consultant of Biosonix.

56. T-H Marine relocated Hydrowave operations from Texas to Alabama and hired Hydrowave's employees.

57. Upon information and belief two Hydrowave founding members Eisenmann and Van Dam are currently consultants of T-H Marine.

58. According to the Assignment Records of the USPTO (provided as Exhibit D), the '306 Patent was assigned from Hydrowave to T-H Marine on or about November 30, 2015.

59. Upon information and belief, Hydrowave offers no products other than the various H2 Systems, Hydrowave Expansion Modules and various H2 System accessory items, and T-H Marine is the successor of Hydrowave.

COUNT I

INFRINGEMENT OF U.S. PATENT NO. 7,333,395

60. Plaintiff incorporates paragraphs 1 through 46 as if fully set forth herein.

61. Plaintiff is the owner by assignment of United States Patent No. 7,333,395 ("the '395 Patent") titled "System, Method and Apparatus for Attracting Aquatic Animals". The '395 Patent issued on February 19, 2008.

62. Defendants Hydrowave, RHP and T-H have been and/or are now infringing at least claims 4 and 13 of the '395 Patent in Texas, in this Judicial District and elsewhere in the United States under 35 U.S.C. §271(a), by, among other things, directly or through intermediaries making, using, importing, providing, supplying, distributing, selling and/or offering for sale products and systems, including without limitation the Hydrowave H2 Electronic Feeding Stimulator and Expansion Modules.

63. Defendants are directly infringing, either literally or under the doctrine of equivalents, pursuant to 35 U.S.C. §271(a) by, among other things, directly or through intermediaries making, using importing, providing supplying, distributing, selling and/or offering for sale the Hydrowave H2 Electronic Feeding Stimulator and Expansion Modules.

64. In addition, or in the alternative, Defendants are or have been indirectly infringing one or more claims of the '395 Patent by inducing third parties, including without limitation manufacturers, resellers, developers, customers and end users of the H2 System to directly infringe the '395 Patent in violation of 35 U.S.C. §271(b), with specific knowledge of the '395 patent and with specific intent to encourage infringement, knowingly inducing consumers to use articles and methods that Defendants know or should know infringe one or more claims of the '395 patent.

65. Defendants have had knowledge of the '395 Patent at least through Hydrowave basing its products on Biosonix's products; Hydrowave member Kevin VanDam's prior relationship with Plaintiff; Hydrowave member Eisenmann's and Hydrowave member and RHP President Palmer's disclosure of the '395 Patent and RF-300 literature to the USPTO; and at least by virtue of T-H Marine's acquisition of Hydrowave, the assignment of the '306 Patent to T-H Marine, and T-H Marine's hiring of Eisenmann and Van Dam.

66. With prior knowledge of the '395 Patent, and by way of this Complaint, Defendants intend for their manufacturers, resellers, developers, customers and end users to make, use or sell the H2 System in its normal and customary manner and know, or is willfully blind, that by doing so these parties will and do directly infringe one or more of the '395 Patent claims.

67. In addition, or in the alternative, in violation of 35 U.S.C. §271(c), Defendants are or have been indirectly infringing one or more claims of the '395 Patent by contributing to the

direct infringement of the '395 Patent by third parties using the H2 System and Expansion Modules in the normal and customary manner, including without limitation manufacturers, resellers, developers, customers and end users of the H2 System, that has and will directly infringe the '395 Patent.

68. Defendants make, configure and sell and offer to sell the H2 System with distinct and separate components, including various Expansion Modules, that are especially made or especially adapted to practice the inventions claimed in the '395 Patent. Defendants' making, configuration, sales and offers to sell were done with knowledge of the '395 Patent and knowledge that the combination for which the Expansion Modules were especially made infringes the '395 Patent.

69. These components are a material part of the invention, have no substantial non-infringing use, and are not a staple article or commodities of commerce because they are specifically designed to practice the inventions claimed in the '395 Patent.

70. A reasonable inference may be drawn from the facts set forth above that Defendants' infringement of the '395 Patent is intentional and willful. Two Hydrowave founding members Eisenmann and Van Dam are currently consultants of T-H Marine. Defendants had knowledge of the '395 Patent at least since February 24, 2011 through at least Hydrowave's founding members' knowledge of Biosonix's patented products and the '395 Patent and T-H Marine's acquisition of Hydrowave, the assignment of the '306 Patent to T-H Marine, and T-H Marine retaining of Eisenmann and Van Dam as consultants.

71. Defendants' past and continued infringement of the '395 Patent has damaged and will continue to damage Plaintiff.

72. As a result of Defendant's acts of patent infringement, Plaintiff has suffered actual and consequential damages; however, Plaintiff does not yet know the full extent of the infringement and its extent cannot be ascertained except through discovery and special accounting. To the fullest extent permitted by law, Plaintiff seeks recovery of damages at least for reasonable royalties, unjust enrichment and benefits received by Defendant as a result of the infringement.

73. Plaintiff further seeks any other damages to which it is entitled under law or in equity, including enhanced damages pursuant to 35 U.S.C. §284.

74. Plaintiff is entitled to recover reasonable and necessary attorneys' fees under 35 U.S.C. §285 or applicable law.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Local Rule CV-38, Plaintiff demands a trial by jury of this action.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Honorable Court enter preliminary and final orders and judgments against Defendants as are necessary to provide Plaintiff with the following relief:

(a) A judgment that Defendants have infringed and/or are infringing one or more claims of the '395 Patent;

(b) A judgment that Defendants infringement of the '395 Patent was willful and that the continued infringement of the '395 Patent is willful;

(c) Award Biosonix damages, including enhanced damages, in an amount adequate to compensate Plaintiff for Defendants' infringement of the '395 Patent, but in no event less than a reasonable royalty, pursuant to 35 U.S.C. §284;

- (d) Enter an order finding that this case is an exceptional case, and award Plaintiff its attorney's fees pursuant to 35 U.S.C. §285
- (e) Award pre-judgment and post-judgment interest as allowed by law;
- (f) Enter an injunction enjoining Defendants and all others in active concert with Defendants from further infringing the '395 Patent;
- (g) In lieu of an injunction, award a mandatory future royalty payable on each future product sold by Defendants that is found to infringe the '395 Patent, an on all future products that are not colorably different from products found to infringe;
- (h) Order an accounting of damages;
- (i) Award Plaintiff its costs of suit; and
- (j) Award all other further relief in law or in equity as the Court may deem just and proper.

Dated: August 29, 2016

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically with the Clerk of the Court for the U.S. District Court for the Eastern District of Texas on August 29, 2016 via the CM/ECF system and all counsel of record who are deemed to have consented to electronic service will be served via e-mail through the CM/ECF system as follows:

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