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ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

HAL HORTON, Plaintiff, vs. JENNIFER TIPTON and SLEEKEZ, LLC, a Wyoming limited liability company, Defendants.	)	No. _____ **COMPLAINT**

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Hal Horton is an individual residing in California.

2. Defendant Jennifer Tipton is a citizen of Montana, residing in Billings, Montana.

3. Defendant SleekEZ, LLC, is a Wyoming limited liability company with principal place of business in Billings, Montana. Defendant SleekEZ, LLC is a Montana citizen by virtue of the citizenship of its sole member, Defendant Tipton.

4. This action arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, and the U.S. Patent statutes, 35 U.S.C. §§ 101, *et seq*. An actual and judiciable controversy exists concerning the rights of and legal relationship between the Plaintiff and Defendants.

5. As a claim arising under the federal patent statutes, this Court has original subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338(a), 1338(b), and 1367.

6. The Court has personal jurisdiction over the Defendants because they reside in the State of Montana, they have subjected themselves to the jurisdiction of this Court in related litigation, and they have continuously and systematically transacted business in Montana.

7. Venue is proper in this District under 28 U.S.C. § 1400(b) because the Defendants reside in this District.

THE PATENT-IN-SUIT AND DEFENDANTS' THREAT OF INFRINGEMENT

8. The patent at issue in this matter is U.S. Patent No. 9,474,250, entitled "Animal Grooming Tool with Wave Pattern Blade Teeth," which was filed on May 29, 2015 (the "Filing Date") and issued on October 25, 2016 (the "'250 Patent"). A copy of the '250 Patent is attached hereto as Exhibit 1.

9. One or more claims of the '250 Patent are invalid.

10. Plaintiff believes he does not presently infringe any valid claim of the '250 Patent and has not infringed any valid and enforceable claim of the '250 Patent in the past.

11. The '250 Patent is unenforceable due to Defendants' inequitable conduct before the United States Patent and Trademark Office.

12. In related litigation between the parties, the Defendants have repeatedly suggested that the Plaintiff is infringing the '250 Patent by selling an animal grooming product under the name "Groom Ninja."

13. Defendant Tipton has personally informed the Plaintiff that she believes that Plaintiff infringes the '250 Patent and that she intends to sue Plaintiff for patent infringement.

14. To avoid having to file this declaratory judgment action, by letter dated May 25, 2017, the Plaintiff has requested that the Defendants confirm that they do not assert that the Plaintiff has infringed the ’250 Patent and to confirm that the ’250 Patent is invalid and unenforceable.

15. Defendants have refused to confirm that the ’250 Patent is invalid, unenforceable, or not infringed by the Plaintiff.

16. The Plaintiff and the Defendants are competitors, selling competing products for grooming horses and other animals.

17. Because the parties are competitors and because the Defendants continue to assert that the Plaintiff infringes the ’250 Patent, the Plaintiff remains under the very real threat that the Defendants will follow through with their threats and will pursue damages and injunctive relief based upon alleged infringement of the ’250 Patent.

18. Accordingly, an actual and substantial judiciable controversy exists among the parties concerning whether any of the Plaintiff’s products has infringed or is infringing any valid and enforceable claim of the ’250 Patent.

COUNT 1 - DECLARATORY JUDGMENT OF INVALIDITY OF THE ’250 PATENT.

19. Plaintiff incorporates all previous paragraphs as though set forth fully herein.

20. Count 1 is an action under 28 U.S.C. § 2201 seeking declaratory judgment that the ’250 Patent is invalid.

21. The ’250 Patent is invalid under 35 U.S.C. § 102 because products embodying all of the elements of all of the claims of the ’250 Patent were on sale, actually sold, used in public, or disclosed in patents or printed publications in the United States more than one year before the Filing Date.

22. The ’250 Patent is invalid under 35 U.S.C. § 103(a) because products were on sale, actually sold, used in public, or disclosed in patents or printed publications in the United States more than one year before the Filing Date, that render the claims of the ’250 obvious, either alone or in combination with other prior art.

23. More than one year before the Filing Date, Defendants offered for sale and actually sold a product under the name “SleekEZ,” which included all of the elements of the claims of the ’250 Patent.

24. More than one year before the Filing Date, Defendants advertised in printed publications, offered for sale, actually sold, and used in public a horse grooming product that included an elongated wooden handle with an oval-shaped cross-section and with a blade running along the length of one of side of the handle and received in a groove in a handle.

25. The blade in the Defendants' SleekEZ product that was advertised, offered for sale, actually sold, and used in public more than one year before the Filing Date included a common "wave" configuration, with teeth that undulate toward and away from the blade groove in wave form along the length of the blade.

26. The blade in the Defendants' SleekEZ product that was advertised, offered for sale, actually sold, and used in public more than one year before the Filing Date that are 1/16th of an inch or less and which were spaced in the range of 20-24 teeth per inch.

27. The handle of the Defendants' SleekEZ product that was advertised, offered for sale, actually sold, and used in public more than one year before the Filing Date had a length in the range of 2-12 inches.

28. To the extent that the SleekEZ product sold more than one year before the Filing Date varied in any respect from any of the claims of the '250 Patent, such variations are insubstantial and the particular claim elements of each of the claims of the '250 Patent would be obvious to someone having ordinary skill in the art in light of the SleekEZ product that was sold, alone or in combination with other prior art.

29. Further, other individuals and companies not party to this litigation advertised, offered for sale, actually sold, and used in public more than one year

before the Filing Date products that either included all elements of the claims of the ’250 Patent or that rendered obvious all elements of the claims of the ’250 Patent, either alone or in combination with other prior art.

30. As a result, the claims of the ’250 Patent are invalid under 35 U.S.C. §§ 102(b) and 103(a).

COUNT 2 – DECLARATORY JUDGMENT OF UNENFORCEABILITY OF THE ’250 PATENT.

31. Plaintiff incorporates all previous paragraphs as though set forth fully herein.

32. Count 2 is an action under 28 U.S.C. § 2201 seeking declaratory judgment that the ’250 Patent is unenforceable due to Defendants’ inequitable conduct before the United States Patent and Trademark Office (the “Patent Office”) during prosecution of the application that issued as the ’250 Patent.

33. As the alleged sole inventor of the ’250 Patent, Defendant Tipton and her patent attorney each owed a duty of candor to the Patent Office.

34. Under 37 CFR 1.56, this duty of candor included an obligation that required Defendants to disclose to the Patent Office information that is material to patentability, when their patent application was filed and pending before the Patent Office.

35. Information material to patentability of the invention claimed by the ’250 Patent includes prior art, including products that were advertised, sold, and used publicly that disclose elements claimed by the ’250 Patent.

36. Defendants knew or reasonably should have known about their duty of candor to the Patent Office. As the purported inventor of the ’250 Patent, Defendant Tipton’s duty was non-delegable. *See* 37 CFR 1.56(d).

37. Defendants’ own advertisements, offers of sale, actual sales, and public use of the SleekEZ product more than one year before the Filing Date are material to the patentability of the invention claimed by the ’250 Patent because these advertisements, offers of sale, actual sales, and public uses are prior art that anticipate and/or render obvious at least one claim of the ’250 Patent.

38. Defendant Tipton breached her duty of candor to the Patent Office by failing to disclose to the Patent Office her own advertisements, offers of sale, actual sales, and public uses.

39. Other products manufactured by other individuals and companies were advertised, offered for sale, actually sold, and used in public more than one year before the Filing Date, including a product known as the “Magic Stick.”

40. The Magic Stick and other products are prior art that are material to the patentability of the invention claimed by the ’250 Patent.

41. Before filing her patent application and while that application was pending, Defendant Tipton had personal knowledge of material, third-party prior art, including the Magic Stick.

42. Defendants breached their duty of candor to the Patent Office by failing to disclose to the Patent Office information about prior art that was material to patentability of the invention claimed by the ’250.

43. Defendants knew or should have known that their own advertisements, offers of sale, actual sales, and public use of the SleekEZ product more than one year before the Filing Date would have prevented the ’250 Patent from issuing.

44. Defendants knew or should have known that others’ advertisements, offers of sale, actual sales, and public use of products, including the Magic Stick product, more than one year before the Filing Date would have prevented the ’250 Patent to issue.

45. The most reasonable inference for the Defendants’ non-disclosure to the Patent Office of this material prior art is that the Defendants intended to deceive the Patent Office because they wanted the ’250 Patent to issue, as it did following Defendants’ non-disclosure.

46. Defendants’ non-disclosure of material prior art to the Patent Office, including information related to her own sales of the SleekEZ and related to the

Magic Stick product, constitute fraud on the Patent Office. The ’250 Patent is unenforceable due to the Defendants’ inequitable conduct. Any divisional, continuation, continuation-in-part, reissue, foreign equivalent, and other related applications are also unenforceable due to the Defendants’ inequitable conduct under the doctrine of infectious invalidity.

COUNT 3 – DECLARATORY JUDGMENT OF THE PLAINTIFF’S NON-INFRINGEMENT OF THE ’250 PATENT.

47. Plaintiff incorporates all previous paragraphs as though set forth fully herein.

48. Count 3 is an action under 28 U.S.C. § 2201 seeking declaratory judgment that the ’250 Patent is not infringed by the Plaintiff’s “Groom Ninja” products (the “Accused Products”).

49. To the extent that the ’250 Patent is valid and enforceable, the Accused Products do not infringe the ’250 Patent.

50. The Accused Products do not include all of the elements of any of the valid and enforceable claims of the ’250, as those claims are properly construed.

51. The Plaintiff is entitled judgment declaring that the Accused Products do not infringe the ’250 Patent.

COUNT 4 – FALSE MARKING – 35 U.S.C. § 292

52. Plaintiff incorporates all previous paragraphs as though set forth fully herein.

53. Before obtaining the ’250 Patent or any other patent, the Defendants represented that their SleekEZ product was subject to patent protection. The Defendants did this through advertising and product marking. By way of example, the Defendants’ advertising on December 9, 2014, represented “SleekEZ’s patented one-of-a-kind blade.” Defendants’ January 11, 2016 advertising described a “patented blade.” Defendant’s advertising on January 12, 2016, described a “patented blade.” Defendants’ advertising on January 16, 2016, touted a “patented tooth pattern.” Defendants’ advertising on April 4, 2016, declared that “NOTHING works better than our patented pattern to remove dead hair, dirt and dander GUARANTEED!” Defendants’ advertising on August 3, 2016, described a “patented tool.”

54. Responding directly to a consumer inquiry, on January 30, 2016, the Defendants described the SleekEZ as a “patented tool.”

55. These statements were absolutely false and were done with the intent to deceive consumers by leading them to believe that the product was patented, when in fact it was not.

56. These statements were also made with the intent to discourage competitors from making and selling competing products by deceiving them to believe that the Defendants' product was patented when in fact it was not.

57. Further, before ever filing the application for the '250 Patent, the Defendants represented that they were seeking patent protection by marking their product as "Patent Pending." Again, this statement was absolutely false and was made with the intent to deceive consumers and competitors by leading them to believe that the product would imminently receive patent protection, when in fact Defendants were pursuing no such protection.

58. As a result of Defendants' false patent marking, the Plaintiff has suffered a competitive injury, in the form of lower sales of his competing product.

59. Plaintiff is entitled to damages from Defendants in an amount to be proven at trial, not less than $500 for each and every SleekEZ product sold during the time periods when Defendants falsely marked their products, packaging, or advertising.

COUNT 5 – UNFAIR TRADE PRACTICES – 15 U.S.C. § 1125(A)

60. Plaintiff incorporates all previous paragraphs as though set forth fully herein.

61. Defendants' statements and advertisements claiming that its SleekEZ product was "patented" or had a "patent pending" were false when Defendants made them.

62. The Defendants' statements were made with the bad faith intention of deceiving consumers by leading them to believe that the SleekEZ product was subject to patent protection, when in truth it was not.

63. The Defendants' statements were made in connection with advertising the SleekEZ product for sale in interstate commerce, and the likely consequence of these statements was to influence purchasing decisions by consumers.

64. As a competitor, Plaintiff has been injured by Defendants' conduct and has suffered damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays that the Court enter the following relief:

A. Declaratory judgment that the '250 Patent is invalid;

B. Declaratory judgment that the '250 Patent is unenforceable;

C. Declaratory judgment that any divisional, continuation, continuation-in-part, reissue, foreign equivalent, and other applications related to the '250 Patent are unenforceable;

D. Declaratory judgment that the Plaintiff's Accused Product does not infringe any claim of the '250 Patent;

E. Damages in an amount to be determined at trial;

F. Attorney fees and costs of suit; and

G. Such other and further relief that the Court deems just.

Dated this 28th day of August, 2017.

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