

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTH EAST DIVISION**

<p>Ernie Brookins,                      Plaintiff,            v.  Caterpillar Inc.,                      Defendant.</p>	<p style="text-align: center;">Civil No.</p>  <p style="text-align: center;">COMPLAINT IN CIVIL ACTION and JURY DEMAND</p>
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Plaintiff Ernie Brookins for his Complaint against Defendant Caterpillar Inc., hereby states and alleges as follows:

**JURISDICTION**

1. Plaintiff Ernie Brookins is a resident of Cass County, North Dakota.
2. Defendant Caterpillar Inc. is a business incorporated in the State of Delaware, with its principal office at 100 Northeast Adams, Peoria, IL 61630. Defendant Caterpillar Inc., hereinafter referred to as "Caterpillar" sells its products in the state of North Dakota through its dealers/distributors. Caterpillar Inc. can be served with process through its registered agent CT Corporation Systems at 314 East Thayer Ave., Bismarck, North Dakota 58501-4018.
3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, as the Plaintiff raises claims for patent infringement against the Defendant under 35 U.S.C. § 271.

**FACTS**

4. Plaintiff Ernie Brookins is the inventor and owner of United States Patent #8,298,107. A patent application #13/040,491 for such was filed on March 4, 2011, and on October 30, 2012, United States Patent No. 8,298,107 (hereinafter described as the ‘107 patent) was duly and legally issued for a “Retrofit Kit For An Allison Transmission”. A true and correct copy of the ‘107 patent is attached hereto as Plaintiff’s Exhibit P1 and incorporated herein.

5. On September 9, 2008, Brookins Hybrid Drive Systems LLC acquired through written assignment all right, title, and interest to all current and future patents issued to Plaintiff Brookins.

6. On August 1, 2016, by a majority vote of the Governors of Brookins Hybrid Drive Systems LLC, the Patent Assignment Agreement was terminated, and all rights to the ‘107 Patent were therefore returned to Brookins. Thus, Plaintiff Brookins is the owner of the ‘107 patent with the exclusive right to enforce the patent against infringers, including his right to prosecute this action.

7. Plaintiff Brookins, as inventor, holds power of attorney pro se over the ‘107 patent at the USPTO.

8. Brookins’ wife, Gail Brookins (hereinafter known as “Gail”), has been involved in the creation of the patented design, and has also worked closely with patent attorneys on the drafting of various provisional and patent applications, including that for the ‘107 patent.

9. Gail Brookins worked closely with the patent attorney during the prosecution of the ‘107 patent application; and was able to provide a great amount of help to the attorney due to her understanding of mechanics and hydraulics, as well as of the patenting process.

10. For a period of several years, beginning in July, 2008, Plaintiff Ernie Brookins and

his wife Gail Brookins exchanged a number of telephone calls, letters, and emails with several EPA employees, including Chester France, Director of the EPA Assessment and Standards Division, and David Haugen, Director of the Advanced Technology Division, National Vehicle and Fuel Emissions Laboratory, Ann Arbor, Michigan.

11. As a matter of fact, Director Chester France of EPA was helpful in Plaintiff Brookins receiving the '107 patent. Upon request from Brookins, Chester France provided a letter to Plaintiff Brookins detailing EPA's expert definitions of "multiple speed" and "variable speed" as used in reference to an automotive transmission; which Plaintiff Brookins' patent attorney provided to the patent examiner in response to an office action. This definition helped the examiner to more fully understand the invention to be for a variable speed (continuous variable speed/CVT), and thus the '107 patent was issued. A true and correct copy of the France letter from the '107 office file at the USPTO is attached hereto as Exhibit P2 and incorporated herein.

12. On March 5, 2013, a patent application was filed with the U.S. Patent Office, listing Mr. Russell Ross Henderson, Jr., Havana, Illinois as one of the inventors, and Caterpillar Inc., Peoria, Illinois as Assignee. On Dec. 30, 2014, patent #8,920,276 (hereinafter described as the '276 patent) titled "Controller for varying gear ratios in transmission system" was issued from that application. It is a patent for controlling the gear ratio of a transmission at a variable speed; a CVT. A true and correct copy of the issued '276 patent is attached herein as Exhibit P3 and incorporated herein.

13. As part of the application for the '276 patent, Defendant Caterpillar provided to the Patent Office an "Information Disclosure Statement". That statement contained a list of patents referenced by Caterpillar in reference to their application. Included in that list is reference to the '290 patent of Plaintiff Brookins. A true and correct copy of the Henderson/Caterpillar

“Information Disclosure Statement” is attached hereto as Exhibit P4 and incorporated herein.

14. Brookins sued Caterpillar for patent infringement of his ‘290 patent on August 9, 2016 (case 3:16-cv-291). That case was stayed due to the filing of an IPR by Caterpillar.

15. The Patent Board held an oral hearing on June 5, 2018 in the U.S. Patent Office in Alexandria, VA. During that oral hearing, Brookins made clear to Caterpillar that he had filed for and was issued a patent for a continuously variable transmission, the “Retrofit Kit for an Allison Transmission”. True and correct copies of pages 30 and 34 from the transcript of the IPR hearing are attached hereto as Exhibit P5 and incorporated herein. *See* page 30, lines 1-8 & page 34, lines 6-12 of Exhibit P5.

16. On June 18, 2018, Brookins filed suit in Federal Court in Fargo, ND against Caterpillar claiming Abuse of Process, etc. (case 3:18-cv-129). That case involves Caterpillar’s use of false information in the filing of the IPR as well as providing that same false information to this Federal Court in order to get a stay in the patent infringement case.

17. As part of the (129) Abuse of Process case, pursuant to a Motion to Stay by Caterpillar, a hearing was held on August 29, 2018. During that hearing, Brookins and his witnesses, Brian Dahl and Ryan Nelson, all made statements as to the ‘290 patent being obsolete, and the new Brookins product being not to the ‘290 patent, but to 3 new patents. A true and correct copy of the August 29, 2018 hearing transcript is attached hereto as Exhibit P6 and incorporated herein.

18. That Exhibit P6 document, specifically, pages 16-21, 29, & 30 reflect Ernie Brookins, Brian Dahl, and Ryan Nelson’s statements as to the three new patents covering the variable speed product; while pages 37, 38, & 47 contains the Caterpillar attorney’s understanding

of the three new patents, and that the new variable speed product does not relate to the '290 patent.

19. On September 11, 2018 the Patent Board made their decision on the IPR, ruling the '290 patent "unenforceable", or invalid.

20. On October 2, 2018, Brookins dismissed the '290 patent infringement case.

21. On October 9, 2018, as part of his Response to Caterpillar's Motion to Dismiss in the Abuse of Process suit, page 13, Brookins notified Caterpillar of their infringement on his #8,298,107 "Retrofit Kit for an Allison Transmission" patent. A true and correct copy of the Response to Defendant's Motion to Dismiss is attached hereto as Exhibit P7 and incorporated herein.

22. On January 3, 2019, during an oral hearing on the Motion to Dismiss, as page 11 of his power point statement, Brookins again informed Caterpillar of their infringement of the '107 patent. A true and correct copy of Brookins Power Point page is attached hereto as Exhibit P8 and incorporated herein.

23. After waiting over 90 days for Caterpillar to respond to the infringement allegations, Brookins is filing against Caterpillar for infringement of the '107 patent on this date.

24. Based upon information and belief, Defendant Caterpillar has manufactured "continuously variable transmission" systems utilizing the intellectual property and design underlying Plaintiff Brookins' "Retrofit Kit for an Allison Transmission" ('107) patent for selling into the marketplace and has sold products (specifically their XE Model loaders) containing continuously variable transmissions in interstate commerce. Those products including the continuously variable transmission are prominently advertised and displayed on their website. The Caterpillar webpages claim many benefits of the continuously variable transmission, including a significant fuel savings. True and correct copies of pages from the Caterpillar website are attached

hereto as Exhibit P9 and incorporated herein.

25. The photos and description of the Caterpillar continuously variable transmission clearly show their infringement of Plaintiff Brookins' '107 patent.

26. Claim 1 of the '107 patent claims gear sets including rotational members and a ring gear disposed in a main housing; clutches in operable communication with the gear sets; an axial piston pump in operable communication with the rotational members and having ports; and a fluid circuit in fluid communication with the pump and to at least one of the clutches.

27. The product/products being produced/sold by Defendant Caterpillar also include gear sets including rotational members and a ring gear disposed in a main housing; clutches in operable communication with the gear sets; an axial piston pump in operable communication with the rotational members and having ports; and a fluid circuit in fluid communication with the pump and to at least one of the clutches.

28. These elements are clearly shown and described in Defendant Caterpillar's information on its website. A video titled "Cat Medium Wheel Loader XE Advanced Powertrain" can be found on You Tube (first published in 2012). It is also available on the Caterpillar website. A true and correct copy of a screen shot from the video of the Caterpillar "continuously variable transmission" is attached hereto as Exhibit P10 and incorporated herein.

29. Though they have been made aware of their infringement of Brookins' '107 patent, 10 days ago at the oral hearing, as well as over 90 days ago in Brookins Response to Motion to Dismiss, Caterpillar has not denied infringement of Brookins' '107 patent; which they have been aware of since March 5, 2013, when they filed application for their own '276 patent, referencing Brookins patent.

**COUNT ONE – PATENT INFRINGEMENT**

30. Plaintiff incorporates paragraphs 1-29 herein.

31. Defendant Caterpillar has infringed and is still infringing upon the ‘107 Retrofit Kit patent and claims thereof by making, selling, and using continuously variable transmission systems in their construction equipment including their XE model loaders that embody the ‘107 patented invention; and Defendant Caterpillar will continue to do so unless enjoined by this Court.

32. Plaintiff has complied with the statutory requirement of placing notice of the Letters Patent for the Retrofit Kit patent on any and all transmission systems they manufacture utilizing the patented intellectual property including the ‘107 patent.

33. Plaintiff has given Defendant Caterpillar notice of the infringement, yet the Defendant continues to make, sell, and use continuously variable transmission systems embodying the Retrofit Kit ‘107 patent.

34. Plaintiff Ernie Brookins, as the inventor and owner of the Retrofit Kit ‘107 patent has suffered damages as a direct and proximate result of the patent infringement by Defendant Caterpillar.

35. U.S. Patent #8,298,107 titled “Retrofit Kit for an Allison Transmission” and entered hereto as Exhibit P1 was issued to Plaintiff Ernie Brookins on October 30, 2012.

36. Claim 1 of the ‘107 patent reads:

“1. A retrofit kit for an Allison transmission comprising:  
a main housing;  
gear sets being disposed in said main housing and including rotational members, said gear sets including a first rotational member and a second rotational member and also including a ring gear being rigidly connected to said second rotational member;  
clutches being in operable communications with said gear sets;  
an axial piston pump being in operable communication with at least one of said rotational members and having ports, said second rotational member being in operable communication with said axial piston pump; and

a fluid circuit being in fluid communication with said axial piston pump through said ports and to at least one of said clutches.

37. The Caterpillar continuously variable transmission system consists of at least one gear set including rotational members and also includes a ring gear; clutches in operable communication with the gear set; an axial piston pump in operable communication to at least one of the rotational members and having ports; and a fluid circuit in fluid communication with the pump and to at least one of the clutches.

38. The Caterpillar continuously variable transmission contains each and every one of the components of claim 1 of the '107 patent. A comparison can be made of the '107 patent to the Caterpillar continuously variable transmission as portrayed in their video by examining the screen shot which is Exhibit P10.

39. The '107 claim 1 "main housing" cannot be seen in the P10 screen shot, however, it is common knowledge that the gears, etc. would be encased in a housing in order for the components to be properly lubricated.

40. The '107 claim 1 "gear set" and "rotational members" are obvious and present in the screen shot of Exhibit P10. The "ring gear" is present as well, highlighted on the screen shot as well as in the writing. In the Caterpillar continuously variable transmission, there is at least one, and in fact there are numerous "gear sets", including planetary gear sets, spur gear sets, as well as rotational interface gear sets, as can be seen in the screen shot.

41. The '107 claim 1 "clutches" are also present in the video, and serve to shift from the mechanical path mode comprised of the planetary and other gear sets, to the hydrostatic variator (pump) mode.

42. The '107 claim 1 "axial piston pump" is plainly visible on the far right of the Exhibit P10 screen shot; comprising a portion of the hydrostatic variator mode.



43. The '107 claim 1 "fluid circuit", while not visible in the screen shot, is necessary in order to carry the fluid to and from the pump. The "ports" of the axial piston pump are not visible, since the housing of the pump is not shown; but are known to be there.

44. The '107 claim 2 describes the invention "in operable communication with a drive source"; while the Caterpillar product is for use in a loader with a drive source (an engine). It also claims certain parts of a planetary gear set, including a "planetary carrier", "planetary gears", and a "sun gear", which the Caterpillar planetary gear set obviously contains.

45. The '107 claim 3 describes that parts of the planetary gear set, that being the "ring gear" and the "planetary gears", are in "operable communication" with each other; which is the same in the Caterpillar product planetary gear set; as well as in every planetary gear set.

46. The '107 claim 4 describes two of the "rotational members" as being "collinear" to each other, which is plainly visible on the Exhibit P10 screen shot.

47. The '107 claim 5 "plurality of pistons" and "angled swash plate" are in the "axial piston pump" of the Caterpillar XE loader.

48. The '107 claim 6 "charge pump" is not visible in the screen shot, since the "fluid circuit" is not shown in the video; however, nearly every hydrostatic pump system utilizes one.

49. The '107 claims 7 and 8 includes a "valve" in the "fluid circuit" used to control the flow in the "axial piston pump", "to substantially prevent rotation of a selected said rotational member to which it is interconnected". The Caterpillar product uses the swash plate of the pump to produce the same action.

50. The '107 claim 9 describes the "axial piston pump" as including a "cylinder block", which every axial piston pump, including the Caterpillar pump, has.

51. Defendant Caterpillar does not claim any patent coverage or protection for their

“continuously variable transmission”, either on their product, their website, or in conjunction with any Caterpillar-produced videos of the product; as they would be required to do by law, were they claiming any such protection. Failure of Defendant Caterpillar to do so further damages Plaintiff, as other parties, while assuming there is no patent coverage, may copy the “continuously variable transmission” and unintentionally infringe on Plaintiff’s patent.

52. The Caterpillar “continuously variable transmission” in their products including the XE loader, infringes on the ‘107 patent claims 1, 2, 3, 4, 5, 6, 7, 8, & 9.

53. Defendant Caterpillar has been aware of Plaintiff Brookins’ ‘107 patent since at least March 5, 2013 when they filed for their ‘276 patent, as is proven by Exhibits P3 and P4. In fact, a search of the USPTO shows that on or before March 5, 2013, a search of the U.S. patent office website for Ernie Brookins’ ‘290 patent, would at that time have clearly also shown the Brookins ‘107 Retrofit Kit CVT patent. On or before March 5, 2013, a search of the patent office website for any patents issued to “Ernie Brookins” (a search any good patent attorney would have made before filing a patent application) would have shown not only the issued ‘290 patent, but the issued ‘107 variable speed patent as well. True and correct copies of USPTO website search pages are attached hereto as Exhibit P11 and P12 and incorporated herein.

54. The Caterpillar Information Disclosure Statement, Exhibit P4, that referenced the ‘290 patent, should indeed have also referenced Plaintiff Brookins’ ‘107 patent, which was for a variable speed continuously variable transmission, or CVT, and certainly qualified as “prior art” to their ‘276 patent application for a “Controller For Varying Gear Ratios in Transmission System” variable speed system. They were aware of both of Brookins patents, choosing to reference the ‘290 hydraulic clutch patent; while failing to reference the ‘107 CVT patent to the examiner.

55. Caterpillar was aware of the '107 patent on or before March 5, 2013. (Exhibits P3 & P4), keeping that information from the patent examiner.

56. They were reminded of the '107 patent by Brookins on June 5, 2018 at the IPR hearing (Exhibit P5) and did nothing.

57. They were again reminded of the '107 patent during the August 29, 2018 hearing (Exhibit P6) and again did nothing.

58. They were told of their infringement of the '107 patent on October 9, 2018 in Brookins Response to Motion to Dismiss (Exhibit P7), making no effort to deny it.

59. And, they were informed again of their infringement of the '107 patent on January 3, 2019 during the hearing on Motion to Dismiss (Exhibit P8) and again did not deny it.

60. How many times do they have to be told?

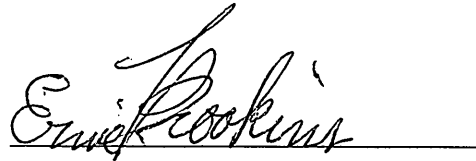
**WHEREFORE**, Plaintiff Ernie Brookins respectfully requests this Court enter relief as follows:

1. A preliminary and final injunction against continuing infringement by Defendant Caterpillar Inc.
2. An accounting for damages and interest thereon;
3. Plaintiff's costs and disbursements, including any attorney fees, as permitted by applicable law; and
4. For such other and further relief as this Court deems just and equitable.

**JURY DEMAND**

Plaintiff demands a jury trial of any factual issues pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Dated this 16 day of January, 2018

A handwritten signature in cursive script, reading "Ernie Brookins", is written over a horizontal line.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTH EAST DIVISION

Ernie Brookins,

Plaintiff

v.

Caterpillar Inc.,

Defendant.

Civil No.

**CERTIFICATE OF SERVICE**

I hereby certify that an exact copy of the following documents was served upon C.T. Corporation Systems, which is the Registered Agent in the State of North Dakota for Caterpillar, Inc., by placing a copy in the United States Mail, postage prepaid, and mailing to their last known address.

Documents sent:

Summons

Complaint in Civil Action

Exhibits 1 through 12

Names and Addresses to which the documents were sent:

By U.S. first class mail:

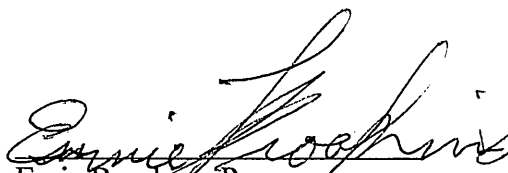
Caterpillar, Inc.

C.T. Corporation Systems

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Dated: January 16, 2019

  
Ernie Brookins, Pro se