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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Innovative Health Technologies (NZ)
Limited,

Plaintiff,

v.

Charles Crawford d/b/a ZenSleep,
Michael O'Brien d/b/a ZenSleep,
Rustam Urmeev d/b/a ZenSleep and
Jane Doe Urmeev, husband and wife,
and Ecommerce Incubator LLC d/b/a
ZenSleep,

Defendants.

Case No. 2:18-cv-03372-PHX-ROS

Hon. Roslyn O. Silver

**Second Amended Complaint for Patent
Infringement and False Advertising**

(Jury Trial Demanded)

Plaintiff Innovative Health Technologies (NZ) Limited ("IHT") brings this action
against Defendants Charles Crawford d/b/a ZenSleep ("Defendant Crawford"), Michael

O'Brien d/b/a ZenSleep ("Defendant O'Brien"), Rustam Urmeev d/b/a ZenSleep ("Defendant Urmeev") and Jane Doe Urmeev, husband and wife, and Ecommerce Incubator LLC d/b/a ZenSleep ("Defendant Ecommerce Incubator") (collectively, the "Defendants"), and alleges as follows:

Nature of Action

1. This action is for patent infringement in violation of the patent laws of the United States, Title 35, United States Code, and false advertising in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c).

2. This action results from Defendants' unauthorized and willful infringement of IHT's United States Patent No. 7,073,506 (the "'506 Patent") and intentionally false and/or misleading statements made in the advertising thereof, causing harm to IHT and individuals in the State of Arizona and this District, and through this action, IHT seeks damages and injunctive relief arising from Defendants' conduct.

The Parties

3. Plaintiff Innovative Health Technologies Limited is a New Zealand company with its principal place of business at HGW Health Board House, 229 Moray Place, Dunedin, New Zealand ("IHT").

4. Upon information and belief, Defendant Charles Crawford is an individual who resides at 1303 West 10th Street, Tempe, Arizona 85281, and is associated with the email address charles@keevaorganics.com. Defendant Crawford is also associated with the address 1963 East Loma Vista Drive, Tempe, Arizona 85282.

5. Upon information and belief, Defendant Crawford has and/or continues to make, use, import, offer for sale, and/or sell "ZenGuard" tongue stabilizing devices under the name ZenSleep, individually or together with Defendants O'Brien, Urmeev, and/or Ecommerce Incubator, at the website www.zensleep.com.

6. Upon information and belief, Defendant Crawford's making, using, importing, selling, and/or offering for sale of the ZenGuard device is without authority, consent, right or license of IHT and in direct infringement of IHT's '506 Patent.

1 7. Upon information and belief, Defendant Michael O'Brien is an individual
2 who resides at 1838 Pacific Avenue, San Francisco, California 94109, and is associated
3 with the email address mr.obrien.michael@gmail.com.

4 8. Upon information and belief, Defendant O'Brien is a co-founder of
5 ZenSleep and has and/or continues to make, use, import, offer for sale, and/or sell
6 "ZenGuard" tongue stabilizing devices under the name ZenSleep, individually or together
7 with Defendants Crawford, Urmeev, and/or Ecommerce Incubator, at the website
8 www.zensleep.com.

9 9. Upon information and belief, Defendant O'Brien's making, using,
10 importing, selling, and/or offering for sale of the ZenGuard device is without authority,
11 consent, right or license of IHT and in direct infringement of IHT's '506 Patent.

12 10. Upon information and belief, Defendant Rustam Urmeev is an individual
13 who resides at 1111 West Elna Rae Street, Tempe, Arizona 85821, and is associated with
14 the email address rustam.urmeev@gmail.com. Defendant Urmeev is also associated with
15 the address 4114 East Calle Redonda, Unit 50, Phoenix, AZ 85018-3765.

16 11. Upon information and belief, Defendant Urmeev is a co-founder of
17 ZenSleep and has and/or continues to make, use, import, offer for sale, and/or sell
18 "ZenGuard" tongue stabilizing devices under the name ZenSleep, individually or together
19 with Defendants Crawford, O'Brien, and/or Ecommerce Incubator, at the website
20 www.zensleep.com. In addition, along with Defendant Crawford, Defendant Urmeev
21 owns or did own Defendant Ecommerce Incubator.

22 12. Upon information and belief, Defendant Urmeev's making, using,
23 importing, selling, and/or offering for sale of the ZenGuard device is without authority,
24 consent, right or license of IHT and in direct infringement of IHT's '506 Patent.

25 13. Jane Doe Urmeev is the wife of Defendant Urmeev and is named herein
26 solely to bind the marital community.

27 14. At all material times, Defendant Urmeev was acting for and on behalf of
28 his marital community.

15. IHT will amend its complaint to allege the true name of Jane Doe Urmeev when the information has been ascertained.

16. Upon information and belief, Defendant Ecommerce Incubator is a Delaware company with its registered business address at 8 The Green, Suite A, Dover, Delaware 19901.

17. Upon information and belief, Defendant Ecommerce Incubator is a co-founder of ZenSleep and has and/or continues to make, use, import, offer for sale, and/or sell “ZenGuard” tongue stabilizing devices under the name ZenSleep, individually or together with Defendants Crawford, O’Brien, and/or Urmeev, at the website www.zensleep.com.

18. Upon information and belief, Defendant Ecommerce Incubator's making, using, importing, selling, and/or offering for sale of the ZenGuard device is without authority, consent, right or license of IHT and in direct infringement of IHT's '506 Patent.

Jurisdiction and Venue

19. This is an action for patent infringement arising under the United States patent statutes, 35 U.S.C. § 100, et seq., and this Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

20. This Court has personal jurisdiction over Defendants, who, on information and belief, have and continue to solicit, transact, and do business in this District, have and continue to wrongfully cause injury to IHT in this District, and derive substantial revenue from interstate commerce. In particular, without limitation and upon information and belief, Defendants have and/or continue to promote, advertise, and sell the infringing ZenGuard products within this District, including at the website www.zensleep.com, and maintain and operate a ZenSleep return center in this District at 4400 N. Scottsdale Rd., Suite 9759 Scottsdale, AZ 85251. Moreover, on information and belief, this Court also has personal jurisdiction over Defendants Crawford and Urmeev because they reside in this District. Personal jurisdiction over Defendants is also consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

21. Venue in this Court is proper under 28 U.S.C. §§ 1391(b), 1391(c), and 1400(b) because Defendants are doing business in this District, the claims arose in this District, and a substantial part of the events and omissions giving rise to the claims occurred in this District. Finally, because Defendants are subject to personal jurisdiction in this District, venue is proper in this District.

IHT's Distinguished History and Innovative AVEOtsd® Device

22. IHT is a market leader in innovative medical devices for the consuming public. Since its inception in New Zealand in 1998, IHT has developed and fostered a well-deserved reputation in the United States and other countries as a source of high-quality, innovative, and effective medical devices that are trusted by patients and prescribing doctors alike. One specific product is IHT's AVEOtsd® apparatus, a novel tongue stabilizing device that attaches to the tongue and gently pulls it forward to reduce snoring and obstructive sleep apnea.

23. Developed after over 15 years of clinical research into the treatment of snoring and obstructive sleep apnea, and after substantial monetary investment from IHT, the AVEOtsd apparatus is distinguished from similar products by its innovative and novel design, including its attachment to the tongue rather than to teeth or the jaw. In addition, a major benefit of the device is that it does not require specialist fitting to produce a tailored device for the patient.

24. Specifically, as detailed in IHT's United States Patent No. 7,073,506 (the "'506 Patent"), IHT's AVEOtsd invention is a one-piece tongue stabilizing device formed of a resiliently flexible material and comprises a body having a hollow interior within which the end of a user's tongue fits and is held by negative pressure. The body of the device comprises an entry portion having an opening to the hollow interior of the device and a bulb portion connected by a narrower diameter neck portion. To hold the tongue forward to assist in opening user's airway and reducing snoring, tabs extend from the bulb portion which in use engage the exterior of the user's face around the user's mouth or between the user's teeth and lips. Images from the IHT's '506 Patent are below:

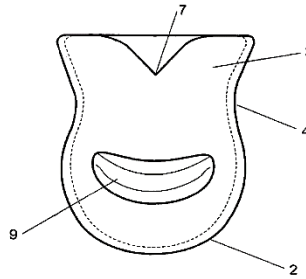
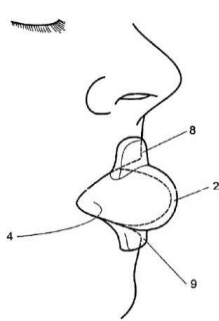


FIGURE 3

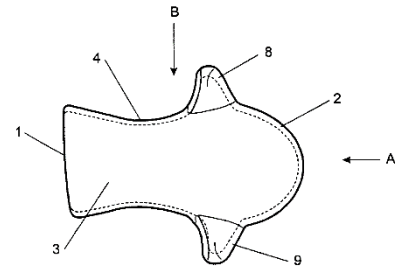


FIGURE 1

25. A true and correct copy of the '506 Patent, which was duly and legally issued on July 11, 2006, is attached to this Complaint as Exhibit A.

26. IHT has and continues to sell its AVEOtsd device throughout the United States and internationally through authorized distributors, licensed physicians, and online direct-to-consumer retail websites, and also advertises, markets, and promotes its AVEOtsd product on a nationwide and worldwide basis through various media, including but not limited to, the Internet, newspapers, direct mail and trade magazines.

27. IHT has continuously and regularly marked its products with the U.S. Patent No. 7,073,506 on the user guide distributed with all AVEOtsd products.

28. In addition to the '506 Patent, IHT also owns strong intellectual property rights for the AVEOtsd apparatus in the other countries. Specifically, IHT owns patents for the AVEOtsd apparatus in Australia, Canada, the EU, Japan, Hong Kong, and New Zealand.

29. All rights, title, and interest in the '506 Patent, including the right to sue for and recover all past, present and future damages for infringement, have been assigned to IHT, who is and has been the sole owner of the '506 Patent since its issuance. See Exhibit B.





Defendants and Their Infringing ZenGuard Device







30. On information and belief, Defendants Crawford, O'Brien, and Urmeev are individuals who reside in and, together with Defendant Ecommerce Incubator, operate out of the State of Arizona under the name ZenSleep, including at the website www.zensleep.com (the "ZenSleep Website"), which, after the filing of the original

Complaint, was taken down and is currently inactive. Defendants manufacture and sell a variety of “snoring solutions,” including ZenStrap, ZenMask, ZenVents, ZenPlugs, and the ZenGuard device at issue in this lawsuit. See Exhibit C.

31. According to Defendants’ ZenSleep Website, the ZenGuard device “position[s] the tongue gently forward, preventing it from falling back and obstructing the airway and eliminating snoring”. Defendants also have and continue to claim that “there is nothing like ZenSleep on the market,” and that the product was invented by ZenSleep. See Exhibit C.

However, even a cursory review of Defendants’ ZenGuard device demonstrates that it reads on all the claims of IHT’s ‘506 Patent. Specifically, the ZenGuard device embodies all the same elements of the IHT’s ‘506 Patent, including but not limited to the fact that it is a flexible one-piece tongue stabilizing device with a hollow body and bulb portion for the user’s tongue, and tabs that engage the user’s face to pull the user’s tongue forward and reduce snoring and assist in opening user’s airway. The elements of claim 1 of the ‘506 Patent and images of the ZenGuard device and IHT’s AVEOstd are shown below:

| Defendants’ ZenGuard Device | IHT’s AVEOstd | The ‘506 Patent |
|---|---|--|
|  |  | “A one piece tongue stabilising device formed of a resiliently flexible material...” |
|  |  | “... and comprising a body having a hollow interior within which the end of a user's tongue fits and is held by negative pressure when the device is fitted on to the user's tongue and which body comprises an entry portion having an opening to the hollow interior of the device...” |

| Defendants' ZenGuard Device | IHT's AVEOtsd | The '506 Patent |
|---|---|---|
|  |  | "... and a squeezable expanded bulb portion connected by a narrower diameter neck portion, and having a flexible wall section whereby the expanded bulb portion may be squeezed and released in application of the device to a user's tongue..." |
|  |  | "...the length dimension of the device from the opening to said entry portion to the narrowest part of said neck portion being shorter than the length dimension of the device from the narrowest part of said neck portion to the distal end of said bulb portion, said body also comprising a cut out into the side wall of the entry portion, and..." |
|  |  | "...integrally moulded tabs extending from the bulb portion which in use engage the exterior of the user's face or between the user's teeth and lips, to hold the tongue forward to assist in opening user's airway and reducing snoring, said tabs comprising a first tab extending from the exterior of said bulb portion substantially perpendicular to a longitudinal axis of the device and a second tab extending in substantially an opposition direction to said first tab" |

32. Moreover, Defendants have and continue to claim on the ZenSleep Website that ZenSleep is an "FDA Approved Facility," while using the FDA logo and providing an FDA "registration number." ZenSleep also claims that it was featured in publications including Forbes, WebMD, the Mayo Clinic, and others. See Exhibit C.

33. An instruction video on the ZenSleep Website actually shows IHT's

1 AVEOtsd device, and not the infringing ZenGuard product. See Exhibit C.

2 34. On information and belief, ZenSleep has never been reviewed or discussed
3 by any of these publications, nor is the company an “FDA Approved Facility,” as the
4 FDA does not approve medical facilities, and the “FDA Registration Number” provided
5 on the ZenSleep Website is fictitious.

6 35. On information and belief, Defendants began manufacturing, using,
7 importing, offering for sale, and/or selling the ZenGuard device at least as early as January
8 2017.

9 36. On information and belief, Defendant Ecommerce Incubator is the listed
10 owner of the pending United States trademark applications for the marks ZENGUARD
11 (Ser. No. 88/124,828) (the “ZENGUARD Application”) and ZENSLEEP (Ser. No.
12 88/124,787) (the “ZENSLEEP Application”), which were both filed on September 20,
13 2018. In its ZENGUARD Application, Defendant Ecommerce Incubator filed a specimen
14 of use showing the infringing ZenGuard device at issue in this lawsuit, and claimed that
15 it first used the mark in U.S. commerce in connection with this product at least as early
16 as January 1, 2016. See Exhibit F. Defendants’ acts of making, using, importing, selling,
17 and/or offering for sale the infringing ZenGuard devices have been and continue to be
18 without the permission, consent, authorization, or license of IHT.

19 37. On multiple occasions, IHT notified Defendants of their infringement of the
20 ‘506 Patent, and requested that Defendants enter into discussions with IHT to address the
21 injury and harm caused by Defendants’ conduct. Specifically, on May 16, 2018 and
22 August 16, 2018, IHT sent written notice to Defendants identifying the ‘506 Patent and
23 providing clear notice to Defendants that they were and are continuing to infringe the
24 ‘506 Patent. See Exhibit D.

25 38. Defendants ignored IHT’s May 16, 2018 letter. In response to IHT’s August
26 16, 2018 letter, Defendant O’Brien summarily disregarded IHT’s claims, stating that he
27 sees “no infringement in any way of the [‘506 Patent]” and otherwise refused to
28 substantively discuss IHT’s concerns or reach an amicable resolution, while Defendants

1 Crawford and Urmeev/Ecommerce Incubator ignored IHT's attempts to resolve this
2 matter prior to filing this lawsuit.

3 39. In addition to the letters IHT sent to Defendants on May 16, 2018 and
4 August 16, 2018, Defendants' own ZenSleep Website provides a detailed product review
5 of IHT's AVEOtsd device, comparing it to their infringing ZenGuard product, thus
6 demonstrating that Defendants' actions are calculated, willful, and with knowledge of
7 IHT's AVEOtsd device. Moreover, on information and belief, the review is fabricated
8 and copied from a 2015 article by Mark Walton that makes no reference to Defendants'
9 ZenGuard product. See Exhibit E.

10 40. Defendants' actions, made despite having actual knowledge and notice of
11 IHT's ownership of the '506 Patent, are willful, deliberate, without license, and carried
12 out with full knowledge of the '506 Patent and in blatant disregard of IHT's valuable
13 intellectual property rights.

14 41. As a direct and proximate result of Defendants' infringement of the '506
15 Patent, IHT has suffered and will continue to suffer irreparable harm, damages and
16 economic injury.

17 42. IHT has no adequate remedy at law, and unless Defendants are restrained
18 and enjoined by the Court, Defendants' infringement will continue to cause damage and
19 irreparable injury to IHT.

20 **Count I**

21 **Patent Infringement – 35 U.S.C. § 271**

22 43. IHT repeats and realleges all allegations of this Complaint as though fully
23 set forth herein.

24 44. The '506 Patent is valid and enforceable.

25 45. Defendants have been and are, without authority, consent, right or license,
26 directly infringing the '506 Patent by making, using, selling, importing, and/or offering
27 to sell in the United States the ZenGuard device, which is embodied in and protected by
28 IHT's '506 Patent, in violation of 35 U.S.C. § 271.

1 55. Defendants also have and continue to claim that “there is nothing like
2 ZenSleep on the market,” and that the product was invented by ZenSleep, when it was
3 not and despite actual and constructive notice of IHT’s ‘506 Patent and AVEOtsd device,
4 as alleged herein. See Exhibit C.

5 56. Moreover, Defendants fabricated a product review on the ZenSleep
6 website, comparing IHT’s AVEOtsd device to the infringing ZenGuard product, when in
7 fact the original 2015 review by Mark Walton from which the Defendants’ review was
8 copied makes no reference to Defendants’ ZenGuard product. See Exhibit E.

9 57. Upon information and belief, Defendants made and continue to make their
10 false and/or misleading statements with knowledge of their falsity and/or misleading
11 character, and/or willfully and with reckless disregard for their falsity or misleading
12 character in violation of 15 U.S.C. § 1125.

13 58. Upon information and belief, Defendants’ statements will confuse and/or
14 deceive a substantial portion of their intended audience into believing Defendants have a
15 factual basis to assert that their products are FDA approved, reputable third-party
16 publications have endorsed or otherwise reviewed Defendants’ products, and that
17 Defendants invented the ZenGuard device and that no other product like it is available in
18 the marketplace.

19 59. Defendants’ statements are material as it relates to customers’ purchasing
20 decisions, and they are prominently advertised on the ZenSleep website in connection
21 with the ZenGuard device and near the product purchasing options.

22 60. Defendants caused and directed its false and/or misleading statements to
23 enter interstate commerce.

24 61. Upon information and belief, IHT has suffered and will continue to suffer
25 irreparable harm, damages and economic injury as a direct and proximate result of
26 Defendants’ false and misleading statements.

27 62. IHT has no adequate remedy at law for the harm caused by Defendants’
28 acts, and Defendants’ infringement of the ‘506 Patent will continue unless restrained and

1 enjoined by this Court.

2 **Prayer for Relief**

3 WHEREFORE, IHT prays for judgment and relief as follows:

4 A. An entry of judgment holding that Defendants have infringed and
5 are infringing one or more claims of the '506 Patent, directly and/or indirectly, literally
6 and/or under the doctrine of equivalents;

7 B. An entry of judgment holding that Defendants have committed and
8 are committing unfair competition and false advertising;

9 C. A preliminary and permanent injunction against Defendants and
10 their officers, employees, agents, servants, attorneys, instrumentalities, and/or those in
11 privity with them from infringing or inducing the infringement of the '506 Patent, and for
12 all further and proper injunctive relief pursuant to 35 U.S.C. § 283;

13 D. A preliminary and permanent injunction against Defendants and
14 their officers, employees, agents, servants, attorneys, instrumentalities, and/or those in
15 privity with them from continuing to unfairly compete with IHT through false,
16 misleading, and/or deceptive advertisements, letters, promotional materials, articles or
17 oral or written statements regarding the nature, quality, characteristics, sponsorship or
18 approval of Defendants' ZenGuard products;

19 E. An award to IHT of such past damages, not less than a reasonable
20 royalty, as it shall prove at trial against Defendants that is adequate to fully compensate
21 IHT for Defendants' infringement of the '506 Patent;

22 F. An award of monetary damages against Defendants in the amount of
23 Defendants' profits gleaned from its false, misleading, and or tortious acts, pursuant to 15
24 U.S.C. § 1117;

25 G. A determination that Defendants' infringement of the '506 Patent
26 has been willful, wanton, and deliberate and that the damages against it be increased up
27 to treble on this basis or for any other basis in accordance with the law;

28 H. A determination that Defendants' false and misleading statements

1 were made willfully, wantonly, and deliberately and that the damages against it be
2 increased up to treble on this basis or for any other basis in accordance with the law;

3 I. An accounting of all infringing sales and revenues, together with
4 post judgment interest and prejudgment interest from the first date of infringement of the
5 ‘506 Patent;

6 J. A finding that this case is “exceptional” and an award to IHT of its
7 costs and reasonable attorneys’ fees, as provided by 35 U.S.C. § 285 and 15 U.S.C. §
8 1117; and

9 K. Such further and other relief as the Court may deem proper and just.

10 **Jury Demand**

11 Plaintiff demands a trial by jury on all issues so triable.

12
13
14 DATED this 22nd day of May, 2019.

15 **Norvell IP llc**

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17
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