

Dmitry V. Shelhoff  
Edward D. Pergament  
PERGAMENT & CEPEDA LLP  
89 Headquarters Plaza, 14<sup>th</sup> Floor  
Morristown, New Jersey 07960  
Tel: 973.998.7722  
Fax: 973.998.7720

*Attorneys for Plaintiffs  
Randall Batinkoff and Top Secret*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

RANDALL BATINKOFF and  
TOP SECRET

Plaintiff

v.

DENNIS J. SMOLINSKI

Defendant

Civil Action No. 2:18-cv-12905  
(TGB)(DRG)

**FIRST AMENDED COMPLAINT FOR  
PATENT INFRINGEMENT**

**ELECTRONICALLY FILED**

**DEMAND FOR JURY TRIAL**

Plaintiffs Randall Batinkoff and Top Secret (collectively, “Plaintiffs”), by their attorneys, for his Complaint against Defendant Dennis J. Smolinski (“Smolinski”) and hereby allege as follows:

**NATURE OF THE ACTION**

1. This is a civil action for patent infringement arising under the patent laws of the United States, 35 U.S.C. § 100 *et seq.*, and in particular 35 U.S.C. § 271(a)-(c). This action concerns infringement of U.S. Patent No. 7,841,494 (“the ’494 patent”) (**Exhibit A**).

### **THE PARTIES**

2. Plaintiff Randall Batinkoff is an individual domiciled in California and the President of Top Secret and also a named inventor and the assignee of the '494 patent.

3. Plaintiff Top Secret ("Top Secret") is a California corporation with a principal place of business at 1413 Ashland Ave, Santa Monica, CA 90405.

4. Defendant Dennis J. Smolinski is a former Michigan resident, currently residing at 119 28<sup>th</sup> Street, Newport Beach, California 92663 who was the Owner, the President, the Resident Agent, and the Chief Executive Officer of SMO International Inc. – a corporation organized under the laws of Michigan with a principal place of business at 31745 Mound Road, Warren, Michigan, 48092.

### **THE PATENT-IN-SUIT**

5. The '494 patent, entitled "Pump Dispenser" was duly and legally issued by the United States Patent and Trademark Office ("the USPTO") on November 30, 2010 to Randall Batinkoff. (**Exhibit A**).

6. The '494 patent contains 11 claims, of which claims 1 and 7 are independent claims.

7. The '494 patent claims, *inter alia*, a pump cap for dispensing cosmetic media and an improved dispenser for cosmetic media.

8. Plaintiff Batinkoff is the sole assignee of the '494 patent.

### **JURISDICTION AND VENUE**

9. Subject matter jurisdiction over this action is proper pursuant to the provisions of 28 U.S.C. §§ 1331 and 1338(a).

10. This court has specific personal jurisdiction over Mr. Smolinski because on January 18, 2018 he filed a chapter 7 bankruptcy case *In re Dennis J. Smolinski*, No. 18-40530-tjy in the

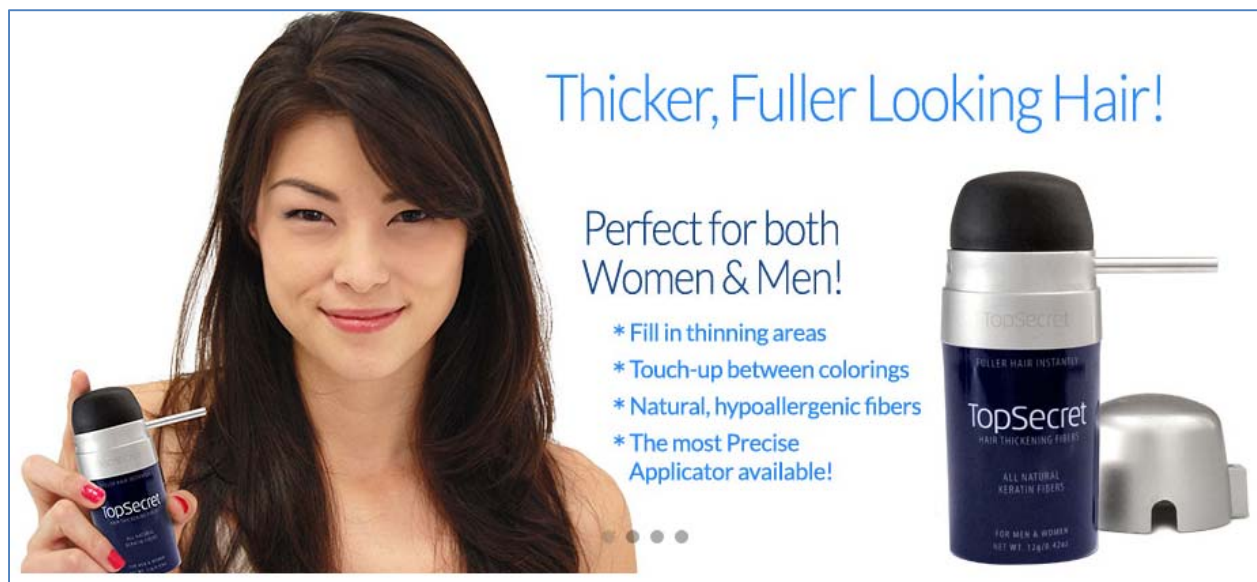
United States Bankruptcy Court for the Eastern District of Michigan.

11. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(b)-(d) and §1400(b).

### **FACTUAL BACKGROUND**

12. Mr. Batinkoff is a successful Hollywood actor, known for his roles in the films *For Keeps*, *School Ties*, *Higher Learning* and many others (65 credits). (<https://www.imdb.com/name/nm0000871/>; [https://en.wikipedia.org/wiki/Randall\\_Batinkoff](https://en.wikipedia.org/wiki/Randall_Batinkoff)).

13. Mr. Batinkoff's insight, ingenuity and business acumen also contributed to his success as a businessman. Using his insight into the costume and beauty industry, Mr. Batinkoff came up with an original inventive concept of a one-handed hair spray applicator and obtained U.S. Patent No. 7,841,494 ("the '494 patent"). The '494 patent claims a hair pump applicator that allows dispensation of hair pieces for fuller, thicker hair for men and women:



14. Mr. Batinkoff's Top Secret Hair Thickening Fibers Applicator® (the "Top Secret Applicator") was the first one-handed applicator. Prior to that, other rudimentary devices required the use of two hands. Mr. Batinkoff' patented product revolutionized the hair care industry and

created what is now a multi-million-dollar niche (which is due to wrongful conduct by Defendants does not at the moment solely belong to Mr. Batinkoff).

15. The '494 patent was duly and properly issued to Mr. Batinkoff and William Brandt on November 30, 2010. The '494 patent contains 11 claims, of which claims 1 and 7 are independent. The '494 patent claims, *inter alia*, a pump cap for dispensing cosmetic media and an improved dispenser for cosmetic media. Mr. Batinkoff is currently the sole assignee of the patent. Mr. Batinkoff's product is a commercial embodiment of the '494 patent.

16. Mr. Batinkoff is also the President of Top Secret ("Top Secret"), which is a 15-year old company engaged in the business of personal care. Top Secret markets and sells the "Top Secret Applicator in conjunction with hair-fiber-containing cans for dispersing pieces of hair for instantly fuller, thicker hair for men and women. (<https://topsecretfibers.com>). Top Secret also sells the Top Secret Applicator and hair care kits including it through stores such as *Bed Bath & Beyond*, *Harmon Face Values* and *Universal Companies*. Top Secret is the exclusive licensee of Batinkoff's rights to the '494 patent.

## COUNT I

### INFRINGEMENT OF THE '494 PATENT BY DENNIS SMOLINSKI AND SMO INTERNATIONAL INC. UNDER 35 U.S.C. § 271(a)-(c)

17. Plaintiffs reallege and incorporate herein by reference each and every allegation in paragraphs 1-18 of this Complaint.

18. Mr. Smolinski was the Owner, the Founder, the President, and the Chief Executive Officer of SMO International. (Affidavit of Liana C. Roberts, D.E. 25).

19. Mr. Smolinski personally solicited investments in SMO International from others. (D.E. 25, ¶ 4).

20. Mr. Smolinski had full control over SMO International and high degree of personal involvement in all operations of his company. (Complaint to Determine Non-

Dischargeability of Debt and Objections to Discharge, Ex. B, ¶¶ 9-25 to Affidavit of Liana C. Roberts, D.E. 25).

21. SMO International was an *alter ego* of Mr. Smolinski.

22. Mr. Smolinski was involved in the design of the Infinity Hair Applicator Pump (the “Accused Product”). (D.E. 25, ¶ 13).

23. The Infinity Hair Applicator Pump (the “Accused Product”) is shown below:



24. Mr. Smolinski and SMO International marketed and sold the Accused Product through at least the following websites:

[www.infinityhair.com](http://www.infinityhair.com)

[www.amazon.com](http://www.amazon.com)

[www.walmart.com](http://www.walmart.com)

[www.jet.com](http://www.jet.com)

[www.bigdaddybeauty.com](http://www.bigdaddybeauty.com)

[www.onesourcebeauty.com](http://www.onesourcebeauty.com)

25. Mr. Smolinski continues to market and sell the Accused Products either personally or through another, yet unidentified corporate entity, on at least the website recited in the preceding

paragraph.

26. On April 2, 2018, Mr. Smolinski testified in a deposition pertaining to proceedings before U.S. Bankruptcy Court Eastern District of Michigan Southern Division that he personally operates the websites: infinityhair.com; bigdaddybeauty.com; and onsourcebeauty.com. (Complaint to Determine Non-Dischargeability of Debt and Objections to Discharge, Ex. B, ¶¶ 31, 33-36 to Affidavit of Liana C. Roberts, D.E. 25). These websites are still active and accessible as of the time of this First Amended Complaint.

27. Mr. Smolinski further testified that the proceeds from sales of products from these websites, including the Accused Product, are going to the bank account held by Smolinitek. *Id.* at 36.

28. Mr. Smolinski and SMO International also marketed and sold the Accused Product with Hair Building Fibers cans of various sizes and hair fibers color and Mr. Smolinski continues to do so either personally or through another, yet unidentified corporate entity.

29. Mr. Smolinski and SMO International directly infringed claims 1-11 of the '494 patent either literally or under the doctrine of equivalents and Mr. Smolinski continues to do so either personally or through another, yet unidentified corporate entity.

30. The Accused Product contains “a pump cap” which is designed for dispensing a cosmetic media (hair fibers) from containers having a base and upright peripheral wall, the wall and base defining a receptacle chamber with an open top end.

31. The Accused Product can be attached to containers of various sizes containing hair fibers as shown below by way of example:



32. The Accused Product contains a “closure” which is designed to cap the open end of the container that contains hair fibers.

33. The Accused Product has a “deformable dome.” This deformable dome is attached to the top wall of the closure.

34. The Accused Product has a component that corresponds to the claimed element “an air pump tube.”

35. The cross-section of the Accused Product demonstrates that it meets the other elements of claim 1 of the '494 patent.

36. The Accused Product is operated with one hand by successively compressing and releasing the deforming dome.

37. The Accused Product also infringes dependent claims 2-6 either literally or under the doctrine of equivalents.

38. Independent claim 7 claims “an improved dispenser for cosmetic media,” comprising “a receptacle” and “a pump cap.” Mr. Smolinski infringes claim 7 either literally or under the doctrine of equivalents, because he sells the Accused Product with containers to which it is attached prior to use.

39. Claims 8-11 depend directly or indirectly upon independent claim 7. Dependent claims 8-11 contain additional limitations concerning the nature of “media” and “fiber” and their dispensation from the Accused Product. Mr. Smolinski infringes claims 8-11 either literally or under the doctrine of equivalents, because he sells the Accused Product with hair fiber containing containers to which it is attached prior to use.

40. Mr. Smolinski induced others to infringe claims of the '494 patent within the meaning of 35 U.S.C. § 271(b).

41. Upon information and belief, the Accused Product is often a “component” within the meaning of 35 U.S.C. § 271(c) and sold by Mr. Smolinski and SMO International together with hair fiber containers or part of a larger kit.

42. Each and every product that had been sold by Defendants that includes the Accused Product infringes the '494 patent.

43. Defendants failed to pay either Batinkoff or Top Secret any royalties for the sales of the Accused Product.

44. Plaintiffs suffered lost profits because of the infringing sales of Mr. Smolinski and SMO International.

## **COUNT II**

### **WILLFUL INFRINGEMENT OF THE '494 PATENT BY DENNIS SMOLINSKI AND SMO INTERNATIONAL, INC.**

45. Plaintiffs realleges and incorporate herein by reference each and every allegation in paragraphs 1-45 of this Complaint.

46. Mr. Smolinski knew of the '494 patent, because he attempted to license it from Mr. Batinkoff. (D.E. 25, ¶¶ 6-7).

47. Mr. Smolinski and SMO International also knew that the Accused Product infringes claims of the '494 patent.



48. Despite the knowledge of the '494 patent, Mr. Smolinski personally and through SMO International proceeded to market and sell the infringing Accused Product. (D.E. 25, ¶ 13).

49. Mr. Smolinski continues to market and sell the infringing Accused Product.

50. Despite Mr. Smolinski and SMO International's knowledge of the '494 patent, they willfully, wantonly, and deliberately engaged in the acts of infringement alleged herein, either by themselves, or through the approval, direction, and control of others.

51. All of the acts of Mr. Smolinski and SMO International are without the permission, license or consent of Plaintiffs and, if allowed to continue, will cause irreparable injury to Plaintiffs, unless enjoined by the Court.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs seek relief as follows:

- A. A judgment that the claims of the '494 patent are valid and enforceable.
- B. A judgment be entered that Defendants Dennis Smolinski and his company SMO International, jointly and separately, have infringed one or more claims of the '494 patent by making, using, offering to sell, or selling the Accused Product either by itself or as part of a kit, within the United States or imported same into the United States under 35 U.S.C. § 271(a);
- C. A judgment be entered that Defendants Dennis Smolinski and his company SMO International, jointly and separately, have induced infringement of one or more claims of the '494 patent by making, using, offering to sell, or selling the Accused Product either by itself or as part of a kit, within the United States or imported same into the United States under 35 U.S.C. § 271(b);
- D. A judgment be entered that Defendants Dennis Smolinski and his company

SMO International, jointly and separately, have contributorily infringed one or more claims of the '494 patent by making, using, offering to sell, or selling the Accused Product either by itself or as part of a kit, within the United States or imported same into the United States under 35 U.S.C. § 271(c);

E. A judgment that that Defendants Dennis Smolinski and his company SMO International, jointly and separately, have willfully infringed one or more claims of the '494 patent by making, using, offering to sell, or selling the Accused Product either by itself or as part of a kit, within the United States or imported same into the United States under 35 U.S.C. §284;

F. That Defendants Dennis Smolinski personally and his company SMO International, and their officers, agents, servants and employees, and those persons in active concert or participation with any of them, be preliminarily and permanently enjoined from commercially manufacturing, using, offering to sell, selling, or importing into the United States the Accused Product and any other product that infringes or induces or contributes to the infringement of one or more claims of the '494 patent prior to its expiration;

G. An award of lost profits pursuant to 35 U.S.C. §284 in the amount of 10,000,000 dollars;

H. An award of reasonable royalties pursuant to 35 U.S.C. § 284;

I. An award of enhanced (treble) damages for Defendants willful infringement of Plaintiff Batinkoff's '494 patent pursuant to 35 U.S.C. §284;

J. That Plaintiffs be awarded damages for its costs, disbursements, expert witness fees, and attorneys' fees and costs incurred in prosecution this action, for an exceptional case pursuant to 35 U.S.C. § 285 and as otherwise provided by law; and

K. Such other and further relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury of all issues properly triable by jury in this action.

Dated: June 21, 2019

*/s/ Dmitry Shelhoff*  
Dmitry V. Shelhoff  
Edward D. Pergament  
PERGAMENT & CEPEDA LLP  
89 Headquarters Plaza, 14<sup>th</sup> Floor  
Morristown, New Jersey 07960  
Tel: 973.998.7722  
Fax: 973.998.7720  
[dshelhoff@pergamentcepeda.com](mailto:dshelhoff@pergamentcepeda.com)  
[epergament@pergamentcepeda.com](mailto:epergament@pergamentcepeda.com)

*Attorneys for Plaintiff  
Randall Batinkoff and Top Secret*