

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JAMES L DRIESSEN

V.

WALMART, INC.

)
) Case No.: 1:19-cv-03239

)
) **JURY TRIAL DEMANDED**

)
) Judge: Emmet G. Sullivan

FIRST AMENDED COMPLAINT

Pursuant to Federal Rules of Civil Procedure, Rule 15(a)(1), Plaintiff files his First Amended Complaint for a Civil Case once as a matter of course within 21 days after serving it. Under the 2012 and 2013 amendments to the U.S. patent system, the Leahy Smith - America Invents Act, codified as 35 U.S.C. § 299 requires that, “accused infringers may not be joined in one action as defendants or counterclaim defendants, or have their actions consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit.” See 35 U.S.C. § 299(b) (unless waived by each defendant). Unless and until waived by all defendants, the court has consolidated these actions for judicial economy, but defendants are not joined at this juncture.

The Parties

1. Plaintiff James L Driessen (hereafter sometimes “Driessen”) is an individual citizen residing at 3080 Southern Elm Ct., Fairfax, VA in Fairfax County, State of Virginia.

2. Defendant Walmart, Inc. (hereafter sometimes “Walmart”) is a corporation with its principal place of business at Walmart Headquarters 702 S.W. 8th St. Bentonville, AR 72716 and can be served with process pursuant to Code of District of Columbia § 29-104.12, at its

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Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

registered agent at C T Corporation System Inc 1015 15th St. NW, Suite 100, Washington, DC 20005, USA.

Nature of the Action

3. This is a civil action for infringement of U.S. Patent Nos. 10,304,052 (hereafter sometimes “the ’052 patent”) (attached as Exhibit A) with preliminary claim chart incorporated herein by reference (attached as Exhibit B) the “Patent-in-Suit” under the patent laws of the United States, 35 U.S.C. § 1 et seq.

Jurisdiction and Venue

4. As set forth more specifically below, this Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the patent laws of the United States, including 35 U.S.C. § 271 et seq.

5. Diversity of citizenship exists under 28 U.S.C. § 1332 because James L Driessen is a resident of the state of Virginia and Walmart is an Arkansas Corporation whose principal place of business is in Arkansas, doing business with facilities maintained in the District of Columbia. This Court has personal jurisdiction over Walmart because, among other things, Walmart has committed, abetted, contributed to, and/or participated in the commission of patent infringement in violation of 35 U.S.C. § 271 in this judicial district and elsewhere that led to foreseeable harm and injury to James L Driessen.

6. This Court also has jurisdiction *in personam* over the entity known as Walmart because, among other things, Walmart has established minimum contacts within the forum such that the exercise of jurisdiction over Walmart will not offend traditional notions of fair play and substantial justice. For example, Walmart has placed products that practice and/or embody the claimed invention of U.S. Patent No. 10,304,052 (the Patent-in-Suit) into the stream of

commerce with the reasonable expectation and/or knowledge that purchasers and users of such products were located within this district. In addition, Walmart has sold, advertised, marketed, and distributed products in this district that practice the claimed invention of the Patent-in-Suit. Walmart derives substantial revenue from the sale of infringing products distributed within the district, and/or expect or should reasonably expect their actions to have consequences within the district, and derive substantial revenue from interstate and international commerce.

7. Additionally, defendant Walmart is a D.C. corporate citizen and by its actions of placing facilities and stores in this district has willingly submitted to suit within this district.

8. Further upon information and belief, Walmart has availed themselves of this Court in previous lawsuits.

9. Walmart has knowingly, actively induced and continues to knowingly actively induce (or are willfully blind to the) infringement of one or more claims of the Patent-in-Suit within this district by making, using, offering for sale, and selling infringing products, as well as by contracting with others to use, market, sell, and offer to sell infringing products, all with knowledge of the asserted Patent-in-Suit, and their claims, with knowledge that their customers will use, market, sell, and offer to sell infringing products in this district and elsewhere in the United States, and with the knowledge and specific intent to encourage and facilitate infringing sales and use of the products by others within this district and the United States by creating and disseminating promotional and marketing materials, instructional materials, and product manuals, and technical materials related to the infringing products.

10. Moreover, Walmart knowingly contributed to the infringement of one or more of the claims in the Patent-in-Suit by others in this district, and continue to contribute to the infringement of one or more of the Patents-in-Suit by others in this district by selling or offering

to sell components of infringing products in this district, which components constitute a material part of the invention of the Patent-in-Suit, knowing of the patent-in-suit and its claims, knowing those components to be especially made or especially adapted for use to infringe one or more of the Patents-in-Suit, and knowing that those components are not staple articles or commodities of commerce suitable for substantial non-infringing use. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1400(b), because Walmart is subject to *in personam* jurisdiction in this district and has committed acts of infringement in this district.

11. The amount in controversy well exceeds \$75,000 because according to best estimates currently available to the Plaintiff, there were approximately 400 Million instrumentalities sold in 2017 in the United States that contained a retail representation of an online digital product known as "+ Digital" or "Redeem Code" (identical to the alleged infringing instrumentality herein) identical to those being sold by Walmart. There is very limited availability to an outsider for Walmart market and sales data and while the exact numbers for 2019 (and/or the time periods relevant to this patent enforcement action), Driessen has confirmed several hundred alleged infringing instrumentalities on any given day in the store Plaintiff has visited located in Columbia Heights within the District of Columbia and in other states. Driessen has consulted with external counsel on many occasions and has spent considerable attorneys fees in preparation for bringing this suit and will continue to incur legal expenses and attorney fees despite handling the bulk of this action *pro-se*.

The Patent-In-Suit

12. United States Patent No. 10,304,052 titled, "Retail Point of Sale Apparatus for Internet Merchandising" was duly and lawfully issued by the U.S. Patent and Trademark Office on May 28, 2019 and is a child application in a chain of applications to the parent application

United State Patent No 7,003,500 which was the subject of a previous suit naming this same defendant. A copy of the '052 patent is attached as Exhibit A. James L Driessen is the sole patent owner of the '052 patent.

13. The '052 patent was published by the U.S. Patent and Trademark Office on January 5, 2017 (as US Patent Publication No. 2017/0004489) with claims substantially similar to the 7,003,500 patent (hereafter sometimes '052 patent) but with perceived indefiniteness of the claiming language in the 7,003,500 patent corrected.

14. On information and belief, Walmart (either directly or through suppliers, manufacturers, customers, endusers, distributors, retailers, streaming services, and online vendors) has monitored Driessen's patent prosecution at least since the previous litigation.

COUNT I

Infringement of U.S. Patent No. 10.304,052

15. Paragraphs 1-14 above with headings are incorporated by reference as if fully stated herein.

16. U.S. Patent No. 10,304,052 "Retail Point of Sale Apparatus for Internet Merchandising," the '052 patent, is valid and enforceable (Exhibit A). Walmart has infringed, and continues to infringe, one or more claims of the '052 patent under 35 U.S.C. § 271(a), either literally and/or under the doctrine of equivalents, by making, using, selling, and/or offering for sale in the United States, and/or importing into the United States, products encompassed by those claims, including for example, by making, using, selling, offering for sale, and/or importing into the United States, digital media known as "DVD + Digital" "Blu-ray + Digital" and/or "Blu-ray + DVD + Digital." Many of the products sold by Walmart include an "INSTANT DIGITAL COPY" as provided through third party media streaming and "digital locker" and "digital

catalogue” services. In other sales the infringing instrumentalities are sold as other product names such as “digital copy” “UltraViolet” “Movies Anywhere” “Digital Now” “WB Digital” “Fox Digital” “Fox Digital Copy” “All Access” “XBOX Live” “DIGITAL CODE” and other marketing, branding, or product descriptions (hereafter “Branded Digital Copy”).

17. Walmart and/or customers and suppliers (e.g. endusers, distributors, retailers, online vendors, and fulfillment and streaming services) directly infringe one or more claims of the '052 patent under 35 U.S.C. § 271(a) by selling, offering to sell, or importing Branded Digital Copy products in the United States. Walmart has also actively induced infringement of, and continues to actively induce infringement of, one or more claims of the '052 patent under 35 U.S.C. § 271(b), either literally and/or under the doctrine of equivalents, by selling, importing, and/or offering for sale other Branded Digital Copy versions of the '052 Infringing Products to its customers with the knowledge of the '052 patent and its claims, with knowledge that its digital disc suppliers will fulfill the redemption offerings with knowledge and specific intent to encourage and facilitate those infringing sales of the '052 Infringing Products through the selling of the Branded Digital Copy versions, which Walmart knows contain URL links to other online vendors (streaming and digital locker related) and creating and disseminating promotional and marketing materials, instructional inserts, manuals, and other technical materials related to the '052 Infringing Products.

18. Walmart has contributed to the infringement of, and continues to contribute to the infringement of, one or more claims of the '052 patent under 35 U.S.C. § 271(c) and/or 271(f), either literally and/or under the doctrine of equivalents, by selling, offering for sale, and/or importing into the United States, the '052 Infringing Products and Branded Digital Copy versions, knowing that those products constitute a material part of the inventions claimed in the

'052 patent, knowing that those products are especially made or adapted to infringe, and knowing that those products are not staple articles or commodities of commerce suitable for non-infringing use; rather that the components are used for or in systems that infringe one or more claims of the '052 patent.

19. Walmart has knowledge of the '500 patent since at least as early as 2009, when Driessen sued Walmart for patent infringement of the parent patent US 7,003,500 in the United States District Court for the District of Utah Case no. 2:2009 cv 00140 resulting in some claims of the '500 Patent being invalidated for indefiniteness. The '052 patent presumptively corrected those technicalities in the claiming language. At least as early as November 1, 2019 Driessen informed Walmart of the '052 patent issuance correcting perceived indefiniteness of the '500 patent claims and proposed scheduling a time to meet and participate in licensing discussions . On information and belief, Walmart has known about the '500 parent patent since as far back as 2007.

20. On information and belief, Walmart had knowledge of the '052 patent application since the time it was published as US Patent Publication No. 2017/0004489 on January 5, 2017, as a result of monitoring Driessen's patent prosecution activities. Walmart has infringed, and continues to infringe, the '052 patent. Driessen has been and continues to be damaged by Walmart's infringement of the '052 patent. Walmart has willfully infringed, and continues to willfully infringe, the '052 patent despite having knowledge of the '052 patent at least through Driessen's November 1, 2019 correspondence concerning their infringement. Walmart's conduct in infringing the '052 patent renders this case exceptional within the meaning of 35 U.S.C. § 285. The BLU-RAY + DVD + DIGITAL product (and those mentioned above by any other name) are a payment system, method of merchandise transfer, and/or method for selling (as set forth in

claims 1, 14, and 19 of the '052 patent respectively) for preselected and itemized content serialized downloadable media material objects with codes on a physical access CARD, and according to the preliminary claim chart (Exhibit B) which at this stage of the litigation is incorporated hereto, but not binding and subject to final submission during standard and patent specific discovery process.

Prayer For Relief

WHEREFORE, Driessen prays for judgment as follows:

- A. A holding and judgment that Walmart has directly and/or indirectly infringed the Patent-in-Suit;
- B. That Walmart has willfully infringed each asserted claim of the Patent-in-Suit;
- C. That Driessen be awarded all damages adequate to compensate him for Walmart's infringement of the Patent-in-Suit, including damages pursuant to 35 U.S.C. §284 and provisional damages pursuant to 35 U.S.C. § 154(d), such damages to be determined by a jury and, if necessary to adequately compensate Driessen for the infringement, an accounting, and that such damages be trebled and awarded to Driessen with pre-judgment and post-judgment interest;
- D. That this case be declared an exceptional case within the meaning of 35 U.S.C. § 285 and that Driessen be awarded the attorney fees, costs, and expenses that he incurs prosecuting this action; and
- E. That Driessen be awarded such other and further relief as this Court deems just and proper.

Demand For Jury Trial

Driessen has demanded a trial by jury on all issues so triable.

Dated: 1-22-20

BY:



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Certificate of Service to unrepresented Parties: By signing above, Filer certifies that a copy of this paper was sent via U.S. Postal Service First Class postage pre-paid to Defendant's place of business at Walmart Headquarters 702 S.W. 8th St. Bentonville, AR 72716 to the attention of Defendant's Legal Department, in a manner most reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Upon the appearance of counsel in this matter, the requirement of a certificate of service or other proof of service is satisfied by the automatic notice of filing sent by the CM/ECF software to pro se parties who have obtained CM/ECF passwords —and to counsel.