

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 02 6051

ROBERT BUSSE & COMPANY, INC.,
d/b/a BUSSE HOSPITAL DISPOSABLES

Plaintiff,

v.

ZEROWET, INC.,

Defendant.

CIVIL ACTION NO.

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOV 14 2002

BROOKLYN OFFICE

WEXLER, J.

ms
fl

COMPLAINT

Plaintiff Robert Busse & Company, Inc., d/b/a Busse Hospital Disposables

MALL, M.J.

("Busse"), by and through its undersigned attorneys, as and for its Complaint against Defendant Zerowet, Inc., alleges:

PARTIES

1. Plaintiff Busse is a corporation organized and existing under the laws of New York and has its principal place of business located at 75 Arkay Drive, Hauppauge, NY 11788.
2. Upon information and belief, defendant Zerowet, Inc. ("Zerowet") is a corporation organized and existing under the laws of California, and has its principal place of business located at 26811 Westvale Road, Palos Verdes Peninsula, CA 90274.
3. Upon information and belief, Zerowet is the exclusive licensee of United States Patent No. 4,769,003 ("the '003 patent"), attached as Exhibit A, which Zerowet purports covers a wound irrigation splashback shield, including the Zerowet Splashshield®.

NATURE OF THE ACTION

4. This action states a claim arising under the patent laws, Title 35, United States Code and seeks, *inter alia*, a declaratory judgment, under Title 28, United States Code §§ 2201, 2202 and 1338(a), of non-infringement and invalidity of the '003 patent.

VENUE AND JURISDICTION

5. There is an actual, substantial and continuing justiciable controversy between Busse and Zerowet as to (i) whether Busse's irrigation splash shield guard, known as the Busse SAF-SHIELD™ (the "Busse Shield"), infringes the '003 patent, and (ii) whether the '003 patent is invalid.

6. Jurisdiction of this Court is based on 28 U.S.C. §§ 1338(a), 2201 and 2202. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and 1391(c).

7. The Court, upon information and belief, has personal jurisdiction over defendant Zerowet, in that Zerowet is doing business in the form of soliciting sales and also making continuous and systematic sales of Zerowet products to customers in New York within this judicial district. Zerowet's products, upon information and belief, are widely sold and delivered to customers in New York within this judicial district.

FIRST CAUSE OF ACTION

(Declaratory Judgment of Non-Infringement)

8. The allegations of the preceding paragraphs 1-7 are repeated, realleged, and incorporated herein by reference.

9. This is a declaratory judgment action brought pursuant to 28 U.S.C. §§ 2201 and 2202, arising under patent laws 35 U.S.C. § 1 *et seq.* An actionable and justiciable controversy

now exists between Busse and Zerowet relating to Busse's alleged infringement of the '003 patent.

10. Busse is engaged in the business of making and selling disposable hospital products, including the Busse Shield.

11. On October 29, 2002, Zerowet threatened to sue Busse for infringement of the '003 patent and demanded that it cease and desist from any further making, using, selling, offering to sell or importing of the Busse Shield.

12. Zerowet also has demonstrated its willingness to assert the '003 patent against competitors. On April 5, 2002, Zerowet commenced a lawsuit in the Central District of California against two competitors that sell their own irrigation shield products.

13. Although that lawsuit concerns different parties, products and non-infringement issues, the court in that case, on September 30, 2002, denied a preliminary injunction motion filed by Zerowet. The court based this denial on the finding that a serious question exists as to whether the '003 patent is obvious (and thus invalid), explaining that three prior art references "raise a serious question as to render the '003 patent invalid." The court further explained that the '003 patent has "little to no novelty value," "flaunt[s] de minimis skill in the field of the invention," and is "entirely obvious" in light of three prior art references.

14. The Busse Shield, upon information and belief, does not infringe the '003 patent.

15. Accordingly, Busse is entitled to a judgment declaring that the Busse Shield does not infringe the '003 patent.

SECOND CAUSE OF ACTION

(Declaratory Judgment of Invalidity)

16. The allegations of the preceding paragraphs 1-15 are repeated, realleged, and incorporated herein by reference.

17. This is a declaratory judgment action brought pursuant to 28 U.S.C. §§ 2201 and 2202, arising under patent laws 35 U.S.C. § 1 *et seq.* An actionable and justiciable controversy now exists between Busse and Zerowet relating to the validity of the '003 patent.

18. Zerowet's '003 patent, and each of the claims thereof are, upon information and belief, invalid for failure to comply with the requirement of one or more of the provisions of 35 U.S.C. § 102 and/or 35 U.S.C. § 103.

19. Accordingly, Busse is entitled to a judgment declaring the '003 patent invalid under 35 U.S.C. § 102 and/or 35 U.S.C. § 103.

RELIEF SOUGHT

WHEREFORE, Busse requests relief as follows:

1. Declaratory judgment that United States Patent No. 4,769,003 is not infringed by the manufacture, use, offer for sale, sale, distribution or importation of the Busse Shield.
2. Declaratory judgment that United States Patent No. 4,769,003 is invalid under 35 U.S.C. § 102.
3. Declaratory judgment that United States Patent No. 4,769,003 is invalid under 35 U.S.C. § 103.
4. A permanent injunction enjoining Zerowet, its officers, agents, directors, servants, employees, subsidiaries, and assigns, and all those acting under the authority of, or in privity with, them or with any of them, from asserting or otherwise seeking to enforce the '003 patent against

Busse or any person or entity making, selling, distributing, offering for sale, using or importing the Busse Shield.

5. An award to Busse of reasonable attorneys' fees, as Zerowet's assertion that the Busse Shield infringes the '003 patent and that the '003 patent is valid and enforceable, among other things, renders this case an exceptional case under 35 U.S.C. § 285.

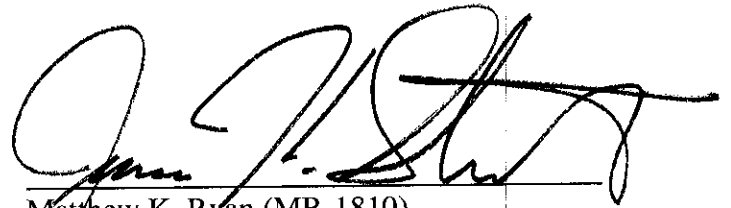
6. An award to Busse of its attorneys fees, costs and expenses incurred in seeking a judgment of non-infringement and invalidity of the '003 patent.

7. An award to Busse of such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 14, 2002

FROMMER LAWRENCE & HAUG LLP
Attorneys for Plaintiff

By:



Matthew K. Ryan (MR-1810)
James K. Stronski (JS-4883)
745 Fifth Avenue
New York, New York 10151
(212) 588-0800