

25 NOV 21 2000 ISSUED

NOV 21 PM 2:21  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

DAYTON WHEEL PRODUCTS CO., INC.,  
115 Compark Road  
Dayton, Ohio 45459

Plaintiff,

vs.

PLAYER WIRE WHEELS, LTD, a/k/a  
B&R WHOLESALE TIRE COMPANY, a/k/a  
B&R WHOLESALE TIRE AND  
WHEEL COMPANY  
116 South Meridian Road  
Youngstown, Ohio 44509

4 : 00 CV 2926

JUDGE

JUDGE GWIN

MAG. JUDGE GALLAS

**COMPLAINT**

Dayton Wheel Products Company, Inc. ("Dayton Wheel"), by and through its undersigned attorneys, for its Complaint against Player Wire Wheels, LTD, also known as B&R Wholesale Tire Company and B&R Wholesale Tire and Wheel Company (collectively, "Player"), alleges as follows:

**I. THE PARTIES**

1. Dayton Wheel is an Ohio corporation with its principal place of business at 115 Compark Road, Dayton, Ohio 45459.

2. Player is an Ohio limited liability corporation with its principal place of business at 116 South Meridian Road, Youngstown, Ohio 44509.

3. Upon information and belief, B&R Wholesale Tire Company and B&R Wholesale Tire and Wheel Company are assumed names under which Player conducts business.

## **II. JURISDICTION AND VENUE**

4. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338.

5. The Court has personal jurisdiction over Player. Player's principal place of business is within this State and judicial district and it transacts business in this State and within this judicial district. Player has caused injury to Dayton Wheel within this state and judicial district as a result of acts committed both within and outside of this State and judicial district. Player has sold and offered products in Ohio and in this judicial district that infringe Dayton Wheel's intellectual property rights.

6. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (c) and 1400(b).

## **III. FACTS COMMON TO ALL COUNTS**

### **A. Dayton's Domed Cap Patent and Trade Dress.**

7. James J. Schardt, an employee of Dayton Wheel, invented a design for a domed-shaped wheel cap (the "Domed Cap"). Mr. Schardt assigned all of his right, title and interest to that design to Dayton.

8. On August 28, 1997, Dayton Wheel caused to be filed with the United States Patent and Trademark Office ("PTO") an application for letters patent entitled "Wheel Hub," which application was given Serial Number 29/76,001.

9. In or about March 1997, Dayton Wheel began manufacturing, advertising and selling the Domed Cap throughout the United States.

10. On March 30, 1999, United States Letters Patent No. Des. 407,362 were duly and legally issued to Dayton Wheel for the ornamental design of its wheel cap (the "'362 Patent"). A

true and accurate copy of the '362 Patent is attached hereto and incorporated herein by reference as Exhibit 1.

11. Dayton Wheel has placed the required statutory notice of the '362 Patent number on all Domed Caps manufactured and sold by it subsequent to the issuance of the '362 Patent.

12. Dayton Wheel has expended significant effort and expense to promote its Domed Cap to the after-market for motor vehicle wheels and accessories. The Domed Cap has become well known to purchasers of such products and its shape and appearance have come to be associated by such purchasers with Dayton Wheel.

13. Dayton Wheel's adoption, use and promotion of the Domed Cap has given the Domed Cap strong secondary meaning and constitutes trade dress, indicating the source of the Domed Cap as being Dayton Wheel.

14. Consumers and potential consumers of automotive products have come to associate the Domed Cap's trade dress with Dayton Wheel and no one else.

15. As a result of this association, Dayton Wheel has acquired trade dress rights in the Domed Cap (the "Domed Cap Trade Dress").

**B. Dayton's Faceted Cap Patent and Trade Dress.**

16. Mr. Schardt also invented a design for a faceted domed-shaped wheel cap (the "Faceted Cap"). Mr. Schardt assigned all of his right, title and interest to that design to Dayton.

17. On November 4, 1998, Dayton Wheel caused to be filed with the United States Patent and Trademark Office ("PTO") an application for letters patent entitled "Wheel Cap," which application was given Serial Number 29/096,052.

18. Shortly after the filing of the application for letters patent, Dayton Wheel began manufacturing, advertising and selling the Faceted Cap throughout the United States.

19. On October 12, 1999, United States Letters Patent No. Des. 415,088 were duly and legally issued to Dayton Wheel for the ornamental design of the Faceted Cap (the “‘088 Patent”). A true and accurate copy of the ‘088 Patent is attached hereto and incorporated herein by reference as Exhibit 2.

20. Dayton Wheel has placed the required statutory notice of the ‘088 Patent number on all Faceted Caps manufactured and sold by it subsequent to the issuance of the ‘088 Patent.

21. Dayton Wheel has expended significant effort and expense to promote its Faceted Cap to the after-market for motor vehicle wheels and accessories. The Faceted Cap has become well known to purchasers of such products and its shape and appearance have come to be associated by such purchasers with Dayton Wheel.

22. Dayton Wheel’s adoption, use and promotion of the Faceted Cap has given the Domed Cap strong secondary meaning and constitutes trade dress, indicating the source of the Faceted Cap as being Dayton Wheel.

23. Consumers and potential consumers of automotive products have come to associate the Faceted Cap’s trade dress with Dayton Wheel and no one else.

24. As a result of this association, Dayton Wheel has acquired trade dress rights in the Faceted Cap (the “Faceted Cap Trade Dress”).

**C. Infringement of Dayton’s Rights by Player.**

25. On or after the issue date of the ‘362 Patent, it came to Dayton Wheel’s attention that Player was selling wheel caps that were virtually identical in appearance to Dayton Wheel’s Domed Cap (the “Infringing Domed Caps”).

26. On May 28, 1999, Dayton Wheel caused to be sent to Player a letter demanding that it cease all manufacture, importation, offer for sale and sale of the Infringing Domed Caps.

27. In exchange for Dayton Wheel's conditional release of Player from liability resulting from their use, sale and offer for sale of the Infringing Domed Caps prior to October 1, 1999, Player agreed on December 14, 1999 to cease selling those caps and to do the following within one week: (1) deliver to Dayton Wheel copies of all documentation in its possession, custody or control, whether in printed or electronic form, that reflected, related or referred to the purchase and sale of the Infringing Caps, and (2) provide to Dayton Wheel the names, addresses, telephone numbers and names known to it of the entities who supplied them with the Infringing Caps. (A copy of the agreement between Dayton Wheel and Player (the "Agreement") is attached and incorporated herein as Exhibit 3).

28. Player failed to provide the information required by the Agreement by the deadline specified. However, on February 28, 2000, counsel for Player informed Dayton Wheel that the Infringing Caps were supplied by Ascend Industries, Inc.

29. Since execution of the Agreement, Player has not delivered to Dayton Wheel copies of all the documentation in their possession, custody or control, whether in printed or electronic form, that reflect, relate or refer to the purchase and sale of the Infringing Caps, notwithstanding the fact that Dayton Wheel wrote to Player and demanded compliance with the Agreement after the date of Player's initial breach.

30. It came to Dayton Wheel's attention during the SEMA tradeshow, the largest trade show for after-market automobile parts in the United States, that took place in Las Vegas, Nevada, on October 31, 2000 through November 3, 2000, Player willfully and intentionally began using, selling and offering for sale wheel caps after the issue date of the '088 Patent that are virtually identical in appearance to Dayton Wheel's Faceted Cap (the "Infringing Faceted Cap"). A true and accurate copy of an advertisement offering for sale the Infringing Faceted Cap

is attached and incorporated herein as Exhibit 4 and true and accurate copies of photographs of Player's display at the SEMA show are attached as Exhibit 5.

31. Player's use, sale and offer of Infringing Domed Caps and Infringing Faceted Caps (collectively, the "Infringing Caps") infringes '362 and '088 Patents and furthermore is likely to cause consumers and potential consumers of automotive products to falsely conclude that the Infringing Caps are sponsored by, affiliated with or originate from Dayton Wheel.

32. Any deficiencies in the Infringing Caps are likely to be attributed to Dayton Wheel, thus causing damage to Dayton Wheel's business reputation and goodwill.

**COUNT I: BREACH OF CONTRACT**

33. Dayton Wheel adopts and incorporates by reference as if fully rewritten herein the allegations set forth in Paragraphs 1 through 32 of this Complaint.

34. Dayton Wheel has performed each of its obligations under the Agreement.

35. By failing deliver to Dayton Wheel within one week copies of the information and documents required by the Agreement, Player has materially breached the Agreement by its express terms.

36. Pursuant to the express terms of the Agreement, Dayton Wheel is relieved of its duty to not bring any cause of action or to assert any claim against Player pertaining to the Infringing Domed Caps as a result of Player's breach.

37. As a result of Player's breach of the Agreement, Dayton Wheel has been damaged in an amount to be proved at trial.

**COUNT II: PATENT INFRINGEMENT BY PLAYER**

38. Dayton Wheel adopts and incorporates by reference as if fully rewritten herein the allegations set forth in Paragraphs 1 through 37 of this Complaint.

39. On March 30, 1999, the '362 Patent was duly and legally issued for the design of the Domed Cap and on October 12, 1999, the '088 Patent was duly and legally issued for the design of the Faceted Cap. Dayton Wheel is the owner of the '362 and '088 Patents.

40. Player willfully and intentionally uses, sells and offers to sell to the public the Infringing Caps in this District without the authority of Dayton Wheel. Such manufacture, use, sale and offer has occurred subsequent to the issue date of the '362 and '088 Patents and continues through the present.

41. Such activity by Player constitutes patent infringement as set forth in 35 U.S.C. § 271(a).

42. Player will continue to infringe the '362 and '088 Patents unless enjoined by the Court from such activity.

43. Dayton Wheel has and will continue to be damaged and to suffer irreparable harm through Player's continuing infringement of the '362 and '088 Patents. Dayton Wheel has no adequate remedy at law.

### **COUNT III: FALSE DESIGNATION OF ORIGIN**

44. Dayton Wheel adopts and incorporates by reference as if fully rewritten herein the allegations set forth in Paragraphs 1 through 43 of this Complaint.

45. Dayton Wheel has adopted and used the Domed Cap Trade Dress and Faceted Cap Trade Dress in interstate commerce as a designation of the origin and quality of its services.

46. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress falsely suggests that its products originate with, are sponsored by or are affiliated with or are of the same quality as products sold by Dayton Wheel.

47. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress is likely to cause confusion as to the origin, source, sponsorship and quality of Dayton Wheel's products.

48. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress constitutes false designation of origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

49. At the time that Player began to use the Domed Cap Trade Dress and Faceted Cap Trade Dress, it had actual notice of Dayton Wheel's prior use and superior rights in and to the Domed Cap Trade Dress and Faceted Cap Trade Dress. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress has been deliberate and willful.

50. Player's false designation of origin has injured Dayton Wheel in an amount not yet determined. Dayton Wheel has no adequate remedy at law.

**COUNT IV: VIOLATION OF OHIO DECEPTIVE TRADE PRACTICES ACT**

51. Dayton Wheel adopts and incorporates by reference as if fully rewritten herein the allegations set forth in Paragraphs 1 through 50 of this Complaint.

52. Player's willful and intentional use of the Domed Cap Trade Dress and Faceted Cap Trade Dress is likely to cause confusion or misunderstanding as to affiliation, sponsorship, approval or certification of their goods and services. Consumers or potential consumers are likely to be confused as to Players' affiliation, connection or association with, or certification by, Dayton Wheel.

53. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress constitutes a deceptive trade practice in violation of the Ohio Deceptive Trade Practices Act, Ohio Rev. Code Ann. § 4165.01 *et seq.*



54. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress has damaged Dayton Wheel in an amount not yet determined. Dayton Wheel has no adequate remedy at law.

**COUNT VI: TRADE DRESS INFRINGEMENT**

55. Dayton Wheel adopts and incorporates by reference as if fully rewritten herein the allegations set forth in Paragraphs 1 through 54 of this Complaint.

56. The Infringing Domed and Faceted Caps are so similar in style, design and appearance to Dayton Wheel's Domed and Faceted Caps as to be likely to cause confusion as to the origin, source and sponsorship of Dayton Wheel's products.

57. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress infringes on Dayton Wheel's rights in the Domed Cap Trade Dress and Faceted Cap Trade Dress in violation of the laws of the State of Ohio.

58. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress has damaged Dayton Wheel in an amount not yet determined. Dayton Wheel has no adequate remedy at law.

**COUNT VII: UNFAIR COMPETITION**

59. Dayton Wheel adopts and incorporates by reference as if fully rewritten herein the allegations set forth in Paragraphs 1 through 58 of this Complaint.

60. Player willfully and intentionally has used the Domed Cap Trade Dress and Faceted Cap Trade Dress in connection with its goods, with notice of Dayton Wheel's prior use of and exclusive right to the Domed Cap Trade Dress and Faceted Cap Trade Dress.

61. By reason of the foregoing, Player has traded on Dayton Wheel's valuable reputation and goodwill in its name and marks and has caused a likelihood of confusion and misunderstanding as to the source, sponsorship and approval of its goods.

62. By reason of the foregoing, Player has caused a likelihood of confusion that it is affiliated, connected or associated with Dayton Wheel.

63. Player's use of the Domed Cap Trade Dress and Faceted Cap Trade Dress constitutes unfair competition under Ohio and other applicable law.

64. Player's unfair competition has damaged Dayton Wheel in an amount not yet determined. Dayton Wheel has no adequate remedy at law.

**PRAYER FOR RELIEF**

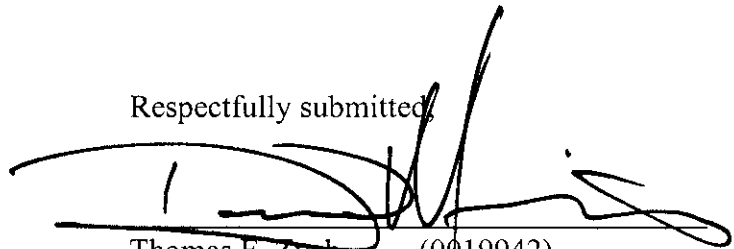
WHEREFORE, Dayton Wheel prays that the Court enter judgment for it on the complaint against Ascend and that it:

1. Order Player to specifically perform its obligations under the Agreement;
2. Preliminarily and permanently enjoin Player, its officers, agents, servants, employees, attorneys and upon those persons in active concert or participation with it who receive actual notice of that order, and from further infringing of the '362 and '088 Patents and Dayton's Wheel's protectable trade dress in its wheel caps, and preliminarily and permanently enjoin Player from continuing its deceptive trade practices;
3. Award Dayton Wheel actual, punitive and treble damages against Player for its intentional and wrongful conduct as alleged in the Complaint;
4. Order an accounting of all profits received by Player as a result of its wrongful conduct as alleged in the complaint;
5. Order Player to deliver up for destruction all Infringing Caps, packaging, marketing and promotional materials and all other items incorporating or bearing the Domed or Faceted Cap Trade Dresses or any other simulation or imitation of the Domed or Faceted Cap Trade Dress;

6. Award Dayton Wheel the costs of this action, including reasonable attorneys' fees; and,

7. Award Dayton Wheel all other relief, legal and equitable, to which it may be entitled and as the Court deems appropriate.

Respectfully submitted,



Thomas F. Zych (0019942)  
David T. Movius (0070132)  
THOMPSON HINE & FLORY LLP  
3900 Key Center  
127 Public Square  
Cleveland, Ohio 44114-1216  
(216) 566-5500 (telephone)  
(216) 566-5800 (facsimile)  
david.movius@thompsonhine.com (e-mail)

Theodore D. Lienesch (0016452)  
THOMPSON HINE & FLORY LLP  
P.O. Box 8801  
2000 Courthouse Plaza, N.E.  
Dayton, Ohio 45401-8801  
(937) 443-6600 (telephone)  
(937) 443-6637 (facsimile)

Attorneys for Plaintiff  
Dayton Wheel Products Company

10619354.1