

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
NO. 7:21-CV-155-BO**

MICHAEL JOSEPH COSTABILE, an individual, PRECISION TIME SYSTEMS, INC., a North Carolina Corporation

Plaintiffs,

v.

KEITH FOGLEMAN, an individual, ROGER AYERS, an individual, and USTOPIT, LLC, a North Carolina Limited Liability Company,

Defendants.

THIRD AMENDED COMPLAINT

JURY TRIAL DEMANDED

THIRD AMENDED COMPLAINT

Plaintiffs Michael Joseph Costabile (“Costabile”) and Precision Time Systems, Inc. (“PTS”) (collectively “Plaintiffs”) file this third amended complaint under Federal Rule of Civil Procedure 15, and allege as follows:

NATURE OF THE ACTION

1. This action arises under the patent laws of the United States, 35 U.S.C. §§ 1, *et seq.*, the unfair competition laws of the United States, 15 U.S.C. §§ 1114 and 1125, and the laws of the state of North Carolina, based upon Ustopit, LLC (“Ustopit”), Roger Ayers (“Ayers”), and Keith Fogleman’s (“Fogleman”) (collectively, “Defendants”) direct and indirect infringement of Reexamined U.S. Patent No. 7,920,052 (the “052 Patent”) and U.S. Patent No. 10,504,300 (the “300 Patent”), and unfair business practices and false advertising. Accordingly, Plaintiff seeks damages and injunctive relief under at least 35 U.S.C. §§ 271, 281, 283-285 and 25 U.S.C. §§ 1114 and 1117.

THE PARTIES

2. Costabile is an individual residing in the State of North Carolina with his residence in Oak Island, North Carolina. He is the sole shareholder of PTS.

3. PTS is an organization incorporated in the State of North Carolina, with its principal place of business at 959 Little Macedonia Rd NW, Supply, NC 28462. PTS is the exclusive licensee of the '052 and '300 Patents for the United States.

4. Upon information and belief, Ustopit is a limited liability company organized and existing under the laws of the State of North Carolina, with its principal place of business at 3504 Wordsworth Place, Raleigh, NC 27609.

5. Upon information and belief, Fogleman is an individual residing in the State of North Carolina with his residence at 3504 Wordsworth Place, Raleigh, NC 27609. Upon information and belief, Fogleman is the founder and manager of Ustopit.

6. Upon information and belief, Ayers is an individual residing in the State of Virginia. Upon information and belief, Ayers is, or at salient times was, an owner and member of, and is a spokesperson for, Ustopit.

JURISDICTION AND VENUE

7. This is an action for patent infringement arising under the patent laws of the United States of America, 35 U.S.C. §§1, *et seq.*, including § 271, and federal unfair competition under the laws of the United States of America, 15 U.S.C. §§ 1114 and 1125, North Carolina state law, and the common law. This Court has subject matter jurisdiction over the matters asserted herein under 28 U.S.C. §§ 1331 and 1338. This Court has both original and supplemental jurisdiction of the related state law claims pursuant to 28 U.S.C. §§ 1138(b) and 1367.

8. This Court has personal jurisdiction over Defendants at least because, upon information and belief, Ustopit is organized under the laws of the State of North Carolina, with its principal place of business in this District, Fogleman resides in this District, and Defendants' acts amounting to or in furtherance of patent infringement and unfair competition have been

committed in this District.

9. As set forth herein, Ayers' actions related to Ustopit and this litigation, including the filming of unfair and deceptive advertising at the North Carolina State basketball venue in this District, constitutes sufficient minimum contacts to justify personal jurisdiction before this Court in this action.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1400(b) at least because Ustopit is incorporated in this State and in this District, Fogleman resides in this District, and Defendants' acts amounting to or in furtherance of patent infringement and unfair competition have been committed in this District or Defendants are subject to personal jurisdiction in this District.

FACTUAL BACKGROUND

11. Costabile is the founder, President, and sole shareholder of PTS, a designer and distributor of sports monitoring and timing systems, including its patented Precision Time System products ("PTS products"), which Costabile founded in 1993. Using his experience both as a basketball referee and a licensed Amateur Radio Operator, Costabile developed his first sports monitoring and timing system in his home shop in the early-to-mid-1990s. Costabile is the primary designer for PTS products. As the sole shareholder of PTS, Costabile has a vested financial interest in PTS, and harm to PTS is also harm to Costabile. PTS has been the exclusive licensee of the '052 and '300 Patents since their issuance. PTS is the exclusive marketer and seller of products that embody the '052 and '300 Patents across the United States.

12. Costabile became a basketball referee in 1981. He refereed basketball games at a variety of levels, culminating in refereeing for the National Basketball Association ("NBA"). In 1990, Plaintiff blew a whistle on a foul in the last moments of an NBA game between the Milwaukee Bucks and Philadelphia 76ers that resulted in Charles Barkley making two free throws and winning the game for the 76ers by a single point. This was a highly contested call, because it could not be established whether the whistle had been blown before or after the game clock buzzer went off, ending the game.

13. Due to that whistle incident, Costabile identified a problem with the existing referee technology. In or around 1991, Costabile began work in his home shop on a prototype whistle-activated timing system. In or around 1993, Costabile formed PTS. Then, in or around 1995, Plaintiffs launched the “PTS Generation 1” product, which functions via a microphone near a referee’s whistle and a belt pack worn by a referee. Costabile obtained a patent on that invention, which stops the game clock when a referee’s whistle is blown and starts the clock when a button on a referee’s belt pack is activated.

14. The PTS Generation 1 was used in or around March 1995, by the North Carolina High School Athletic Association during their basketball state championships, with great success.

15. In or around 2006-2007, Costabile prototyped and refined a new device incorporating tracking and recording capabilities to create a new system. In or around 2008, Plaintiffs finalized the new system, which PTS would eventually sell as the PTS Generation 3 system, and later systems.

16. Costabile has granted PTS an exclusive license to his patents, including the ‘052 and ‘300 Patents, for the United States market, including not only the right to practice the invention, but also Costabile’s promise that others shall be excluded from practicing the patented inventions in the United States.

‘052 PATENT

17. As is customary to protect his investment in the development of such an innovative product, Costabile, through counsel, on October 3, 2008 filed an application for a U.S. Patent, Application No. 12/286,999.

18. This patent application was published on April 8, 2010, with the Publication No. US-2010/0085167 A1.

19. Subsequently, on April 5, 2011, U.S. Patent Number 7,920,052 (the “Original ‘052 Patent”), entitled “SPORTS MONITORING AND TRACKING SYSTEM,” was issued to Costabile. A true and correct copy of the Original ‘052 Patent is attached to this Complaint as

Exhibit 1, and incorporated by reference herein.

20. On or about August 8, 2021, an Ex Parte Reexamination of the Original '052 Patent was filed. After reexamination at the U.S. Patent and Trademark Office the '052 Patent issued on or about May 18, 2022 with substantially the same claims as the Original '052 Patent. A true and correct copy of the '052 Patent is attached to this Complaint as Exhibit 2. Costabile is the sole named inventor and assignee of the '052 Patent, and is the sole owner thereof, and holds all rights, title and interest in that patent. That being said, Costabile has granted PTS an exclusive license to the '052 Patent for the United States market, including not only the right to practice the invention, but also Costabile's promise that others shall be excluded from practicing the patented inventions in the United States.

'300 PATENT

21. Costabile continued his development of timing products for sporting events, and on or around September 4, 2015 filed a Patent Cooperation Treaty ("PCT") patent application PCT/US2015/039693 for a sports event time clock control system in which sonic fingerprints are used to activate the clock.

22. This PCT application was published on March 9, 2017, with Publication No. WO2017/039693.

23. On January 11, 2018, the PCT application entered the U.S. National Stage and became U.S. Patent Application No. 15/743,803.

24. This patent application was published on July 19, 2018, with Publication No. US 2018/0204391 A1.

25. Subsequently, on December 10, 2019, the '300 Patent, entitled "SYSTEM FOR REMOTELY STARTING AND STOPPING A TIME CLOCK IN AN ENVIRONMENT HAVING A PLURALITY OF DISTINCT ACTIVATION SIGNALS," was issued to Costabile. A true and correct copy of the '300 Patent is attached to this Complaint as Exhibit 3, and is incorporated by reference herein. Costabile is a named inventor of the '300 Patent, along with Dennis Brady Whitley. Mr. Whitley is a consultant of PTS and has assigned all his rights in the

‘300 Patent to Costabile, and Costabile holds all rights, title and interest in that patent. That being said, Costabile has granted PTS an exclusive license to the ‘300 Patent for the United States market, including not only the right to practice the invention, but also Costabile’s promise that others shall be excluded from practicing the patented inventions in the United States.

DEFENDANTS’ KNOWLEDGE OF PLAINTIFF’S PATENTED INVENTIONS

26. Defendants are well aware of the ‘052 Patent and ‘300 Patent and have continued their unauthorized infringing activity despite this knowledge.

27. Fogleman and Ayers have both been basketball referees for many years, and, on information and belief, in that role they have had unique access to PTS products, including PTS Generation 3 and later systems, and associated instruction and training manuals, and product specifications. For many years, PTS products have been the exclusive remotely-activated timing system used by the NBA, and the primary system used by college basketball programs, including the NCAA, among others.

28. On information and belief, on or around 2015-2016, Defendant Fogleman, who was employed by Major Display Scoreboards at the time, met with Tim Bennett, the Athletic Director of Chapel Hill High School in Chapel Hill, North Carolina. On information and belief, Fogleman took possession of Chapel Hill High School’s PTS product claiming he would repair and return the system to Mr. Bennett and Chapel Hill High School.

29. On information and belief, in or around 2016, Fogleman instead took the PTS product to Glen Whittaker, an engineer at Major Display Scoreboards, and asked Mr. Whittaker to reverse engineer the Plaintiffs’ product, so that Fogleman could develop and sell an identical competing system to Plaintiffs’ patented device. On information and belief, Fogleman also provided Whittaker with detailed technical specifications regarding the PTS product.

30. On information and belief, on or around November 15, 2016, Mr. Whittaker discovered that Plaintiffs’ PTS product was protected by U.S. Patents. Upon discovering that Plaintiffs’ product was patented, Mr. Whittaker informed Defendant Fogleman that because the PTS products were protected by U.S. Patents he refused to reverse engineer the product for

Fogleman.

31. On information and belief, despite his knowledge of Costabile's patents, including the '052 Patent, and armed with his intimate knowledge of the PTS products gleaned from his years using the patented PTS products as a referee, and his improper inspection and analysis of those PTS products, Fogleman eventually approached Nexus Technologies, Inc. ("Nexus"), who agreed to reverse engineer and create a replica of the PTS products incorporating the inventions claimed in the '052 and '300 Patents. On information and belief, Nexus employee, Brian Langford supervised the reverse engineering, on behalf of Nexus. The result was the Accused Products (defined below at ¶49).

32. On information and belief, Fogleman formed Ustopit on or about March 3, 2021 to develop, market and sell the Accused Products (defined below at ¶49). On information and belief, Ayers is or was, at salient times, a member of Ustopit, and Fogleman, Ayers, and Ustopit each have in the past and continue to market, promote, offer for sale or otherwise economically benefit from Accused Products under the name, WhistleStop (whistlestopworks.com/).¹

33. On or about November 3, 2021, counsel for Fogleman and Ustopit informed Plaintiffs' counsel that Ayers is a member of Ustopit, and that Plaintiffs' counsel should not contact Ayers other than through defense counsel. Until that date, Plaintiffs did not know that Ayers was a member of Ustopit.

34. On information and belief, Ayers and Fogleman know each other from refereeing. On information and belief, at some point after the formation of Ustopit, Ayers became a member of Ustopit, or became otherwise financially interested in Ustopit.

35. Until recently, Ayers could be seen on, and participated in the production of, a publicly available video on Ustopit's website (whistlestopworks.com/product) promoting the Accused Products, and claiming the Accused Products are better than any competing product on the market (namely the PTS products) without any disclosure that he financially benefits from

¹ The trademark WhistleStop is owned by Ustopit. On information and belief, the website whistlestopworks.com is owned by Ustopit.

the success of the Accused Products as an owner and member of Ustopit.

36. On information and belief, the video that Defendants created and placed on Ustopit's website was filmed at North Carolina State University, without the university's permission for Ustopit to film such a promotional video for its products. On information and belief, North Carolina State University ordered the Defendants to take down the promotional video or edit the video on the website to remove all references to North Carolina State University because Defendants did not have North Carolina State University's permission. On information and belief, Gregg Zarnstorff, North Carolina State University's Director of Trademarks and Brand Protection informed Defendants on or around November 10, 2021 that to his knowledge, North Carolina State University had not received a request to film on campus, nor had permission been granted to use North Carolina State University's name in any video. On information and belief, Mr. Zarnstorff further stated that to his knowledge, Defendants do not have a paid sponsorship or vendor agreement with North Carolina State University, and such an agreement would be in violation of the North Carolina administration code. The original video was calculated to show the approval and sponsorship of North Carolina State University. At some point after the filing of the First Amended Complaint in this action, Ustopit's promotional video was taken down and removed in response to a demand from North Carolina State University.

37. On information and belief, Defendants have been actively marketing, using, offering for sale, or otherwise economically benefiting from the Accused Products, to multiple parties across the United States, including using and marketing the Accused Products in at least the following basketball tournaments and events: the Referee's Choice Referee Camp in Lynchburg, Virginia (June 11-13, 2021), the TBT West Virginia Regional Tournament in Charleston, West Virginia (July 17-21, 2021), the Maui Invitational Tournament in Las Vegas, Nevada (November 22-24, 2021), and the Fort Myers Tip Off Classic in Fort Myers, Florida (November 22-24, 2021). On information and belief, if the Accused Products had not been used at those events, the PTS Products would have been used in their stead, because the PTS Products

have long been the customary and standard referee-activated systems used at those events, and others like them.

38. In addition, on information and belief, Defendants have met with, demonstrated, and marketed, and continue to meet with, demonstrate, and market, the Accused Products to representatives from high schools, colleges, universities, and athletic conferences across the country, in an attempt to sell, lease, or otherwise economically benefit from, those entities' purchase or use of the Accused Products.

39. On information and belief, Ayers has appeared in video promotions for the Accused Products, and has actively promoted, marketed, and attempted to recruit potential customers and users of the Accused Products, all without disclosing his ownership interest in Ustopit, and continues to do so. Ayers participated in the above video promotions and advertisements without disclosing his equity interest and affiliation with Ustopit. And gained entrance to the venue where the video was filmed upon false premises. This was done for the purpose of showing an affiliation between the venue (North Carolina State University) and Ustopit, Whistlestop, and the Accused Products (defined below at ¶49).

40. On information and belief, Ayers and Fogleman have both refereed basketball games that used the Accused Products, without disclosing that they are or were owners of Ustopit, and have, or had, a financial interest in the use of the Accused Products.

PLAINTIFFS' NOTICE OF INFRINGEMENT TO DEFENDANTS

41. In or around June 2021, Plaintiffs were informed that Fogleman, on behalf of himself and Ustopit, presented and offered for sale, lease, or use the Accused Products (defined below at ¶49) at a basketball camp in South Carolina.

42. In or around June 2021, Plaintiffs learned that Fogleman had failed to return the PTS product to Chapel Hill High School. Plaintiffs reached out to Major Display Scoreboards regarding that unreturned system, and eventually received the system later that month.

43. On or about June 25, 2021, Plaintiffs notified Defendants of their potential infringement of the '052 and '300 Patents by way of a letter sent by certified mail, return receipt

requested, to Fogleman in Raleigh, North Carolina, identifying the '052 and '300 Patents and providing notice that Defendants potentially infringed the patents.

44. On information and belief, Fogleman, on behalf of Defendants, received Plaintiffs' June 25, 2021 letter on or about June 30, 2021, when he signed the return receipt.

45. On or about July 13, 2021, Plaintiffs' counsel communicated with Defendants' counsel, Justin Nifong, regarding Defendants' infringement of the '052 Patent. Mr. Nifong informed Plaintiffs' counsel that he believed that Defendants had designed around the '052 Patent, and therefore denied any infringement.

46. In or around mid-August 2021, Plaintiffs became aware that Defendants had launched and begun offering to sell the Accused Products (defined below at ¶49) and that they did in fact infringe one or more claims of the '052 Patent and the '300 Patent.

47. On information and belief, Defendants were aware of the '052 and '300 Patents at least as early as on or about June 30, 2021, when Defendants received Plaintiffs' letter. As such, Defendants, at least since then, have continued to willfully, wantonly, and deliberately engage in acts of infringement of the '052 and '300 Patents permitting increased damages under 35 U.S.C. § 284, and attorneys' fees and costs incurred under 35 U.S.C. § 285.

48. Despite Plaintiffs' attempt to seek a resolution with Defendants, Defendants stopped responding to Plaintiffs. On information and belief, Defendants had pre-lawsuit knowledge of the '052 Patent and '300 Patent and acted egregiously in that they did nothing to avoid infringement and, in fact, continued to make, use, sell, offer for sale, and/or import into the United States or otherwise economically benefit from infringing products, and continue their ongoing willful infringement of the '052 Patent and '300 Patent. As such, Plaintiffs have brought this action to seek just compensation for Defendants' past and ongoing infringement of the '052 Patent and '300 Patent and seeks appropriate injunctive relief.

DEFENDANTS' PRODUCTS

49. Defendants make, use, sell, offer for sale, and/or import into the United States and this District or otherwise economically benefit from sports monitoring and tracking systems that infringe the '052 Patent and '300 Patent. These systems (the "Accused Products") include the "WhistleStop" product advertised and offered for sale on the website <https://www.whistlestopworks.com/> ("Defendants' website"). Upon information and belief, these systems can be purchased, leased, or otherwise acquired anywhere in the United States, through Defendants' website, and also by contacting Defendants directly by email, phone, or in person. Image 1, below, is part of a screenshot from the above website showing these systems offered for sale online.²



CLAIMS FOR RELIEF

50. Defendants have been and are now infringing, and/or will continue to infringe, claims covered under the '052 Patent and '300 Patent in this Judicial District and elsewhere in the United States by, among other things, making, using, importing, selling, and/or offering for sale or otherwise economically benefiting from the Accused Products.

51. In addition to directly infringing the '052 Patent and '300 Patent pursuant to 35

² Screenshot as of September 1, 2021 at 1:55 p.m. EDT.

U.S.C. § 271(a), either literally or under the doctrine of equivalents, or both, Defendants indirectly infringe the '052 Patent and '300 Patent by instructing, directing, encouraging, and/or requiring customers, purchasers, users, designers, and manufacturers to directly infringe the '052 Patent and '300 Patent, either literally or under the doctrine of equivalents, by making, using, importing, selling, and/or offering for sale or otherwise economically benefiting from the Accused Products.

COUNT I

Direct Infringement of the '052 Patent pursuant to 35 U.S.C. § 271(a)

52. Plaintiffs repeat, reallege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint, as if fully set forth herein.

53. On information and belief, Defendants have directly infringed, and continue to directly infringe at least Claims 1, 15, and 20-22 of the '052 Patent in violation of 35 U.S.C. § 271(a).

54. Defendants' infringement is based upon literal infringement or infringement under the doctrine of equivalents, or both.

55. Defendants' acts of making, using, importing, selling, and/or offering for sale or otherwise economically benefiting from infringing products have been without the permission, consent, authorization, or license of Plaintiffs.

56. Defendants' infringement includes, but is not limited to, the manufacture, use, sale, importation, and/or offer for sale of, or otherwise economically benefiting from, the Accused Products.

57. The Accused Products embody the patented invention of the '052 Patent and infringe the '052 Patent because they constitute sports monitoring and tracking systems utilizing remotely actuated game clock controls with coded identification carried by a plurality of officials and a signal processor to combine the control signals with timing signals.

58. On information and belief, every element of at least Claims 1, 15, and 20-22 of the '052 Patent is practiced by the Accused Products.

59. For example, the Accused Products infringe Claim 20, as they are a monitoring and tracking system for use in sports events that uses a plurality of signal generators, a plurality of stand-alone whistles, and a plurality of officials, and the signal generators are adapted to be carried by a plurality of officials. The Accused Products have a control signal from signal generators that would have to be individually identifiable in order to display signal strength of individual officials. The Accused Products also have a timer on the signal generator and/or game clock, the time of play of which is controlled by the identifiable control signals. The Accused Products have the ability to “recall previous time,” which requires a time record of individually identifiable control signals, in other words, whistle blows. Accordingly, the Accused Products embody all elements of at least Claim 20 of the ‘052 Patent.

60. As can be seen from the images (including snapshots from Ustopit’s promotional video featuring Defendant Ayers) and schematics and images shown below³ found on Defendants’ website (www.whistlestopworks.com/), the Accused Products include a whistle and a belt pack worn by referees, with referees blowing a whistle to stop the game clock. As can be seen in the “WP/AP Diagnostics and Pairing” schematic, each official’s signal is unique. Also, on information and belief, the Printed Circuit Board (“PCB”) of the Accused Products includes a clock generator and internal memory or storage that would automatically generate a time stamped record upon the blowing of a whistle and store information. The Accused Products would inherently record the identity of the initiator when collecting the records for the “recall previous time” functionality advertised on Defendants’ website. In addition, the Accused Products also include SD Card and USB outputs that allow for records to be exported and stored. The Accused Products also include internet access and internet connections, such as an ethernet port, which would allow time-stamped data to be transmitted anywhere via the internet connection, including a remote basketball association office location to be used and stored. As seen in the images below, the Accused Products also “update[] like an app on your phone.”

³ All images below are screenshots from the Defendants’ website, unless otherwise stated.

Accordingly, the Accused Products embody all elements of at least Claims 1, 15, and 20-22 of the '052 Patent.

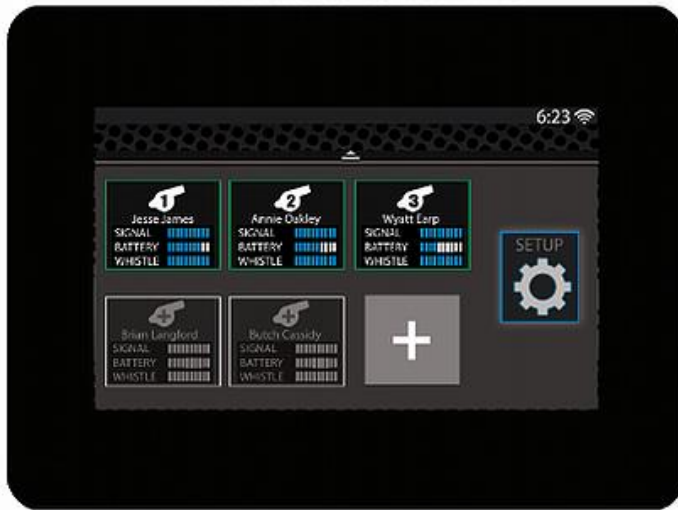


Features

- Stops the clock when the whistle blows at 1/100th of a second.



WP/AP DIAGNOSTICS AND PAIRING



LOCKING/LATCHING CONNECTORS FOR UNINTERRUPTED GAMEPLAY



- Updates like an app on your phone.

- Powered by built-in, rechargeable lithium batteries.

No false stops from heavy breathing or crowd noise.

61. In addition to the above images taken from Defendants' website, the two photos below were taken of the Accused Products while in use at a basketball tournament in Las Vegas, Nevada, on or about November 23, 2021, at which, upon information and belief, Defendants were refereeing.



62. Despite their knowledge of the '052 Patent, Defendants have directly infringed the '052 Patent in complete and reckless disregard of Plaintiffs' patent rights.

63. As such, Defendants have acted recklessly and continue to willfully, wantonly, and deliberately engage in acts of infringement of the '052 Patent, justifying an award to Plaintiffs of increased damages under 35 U.S.C. § 284, and attorneys' fees and costs incurred under 35 U.S.C. § 285. Plaintiffs similarly are entitled to an injunction precluding Defendants

from continued infringement of the '052 Patent.

COUNT II

Indirect Infringement of the '052 Patent pursuant to 35 U.S.C. § 271(b)

64. Plaintiffs repeat, reallege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint, as if fully set forth herein.

65. Defendants have induced and continue to induce infringement of at least Claims 1, 15, and 20-22 of the '052 Patent under 35 U.S.C. § 271(b).

66. In addition to directly infringing the '052 Patent, Defendants have indirectly infringed the '052 Patent pursuant to 35 U.S.C. § 271(b) by instructing, directing, encouraging, and/or requiring customers, purchasers, users, designers, and manufacturers to directly infringe the '052 Patent, either literally or under the doctrine of equivalents, by making, using, offering for sale, selling, and/or importing into the United States or otherwise economically benefiting from the Accused Products. Defendants knew or were willfully blind to the fact that they were inducing others, including customers, purchasers, users, designers, and manufacturers to directly infringe Claims 1, 15, and 20-22 of the '052 Patent by making, using, offering for sale, selling and/or importing into the United States or otherwise economically benefiting from the Accused Products.

67. Defendants knowingly and actively aided and abetted the direct infringement of the '052 Patent by instructing and/or encouraging their customers, purchasers, and users to use the Accused Products in violation of the '052 Patent. Such instructions and encouragement included, but are not limited to, advertising and promoting the use of the Accused Products, in an infringing manner.

68. On information and belief, Defendants maintain and update an HTTP site advertising and offering for sale the Accused Products, at <https://www.whistlestopworks.com/>.⁴

69. Defendants are actively promoting the Accused Products by, at least, presenting

⁴ As of at least September 1, 2021 at 1:00p.m. EDT.

the Accused Products to potential customers, including high schools, colleges, universities, and athletic conferences, at events such as basketball camps, on the internet, and at in-person meetings where they promote or demonstrate the Accused Products.

70. In addition, upon information and belief Defendants have convinced potential customers, such as high schools, colleges, universities, and athletic conferences, to use the Accused Products for basketball games and tournaments.

71. Defendants' infringement of the '052 Patent has injured and continues to injure Plaintiffs in an amount to be proven at trial, but not less than a reasonable royalty.

72. Despite their knowledge of the '052 Patent, Defendants have instructed, directed, encouraged, and/or required customers, purchasers, users, designers, and manufacturers to directly infringe the '052 Patent in complete and reckless disregard of Plaintiffs' patent rights.

73. As such, Defendants have acted recklessly and continue to willfully, wantonly, and deliberately engage in acts of indirect infringement of the '052 Patent, justifying an award to Plaintiffs of increased damages under 35 U.S.C. § 284, and attorneys' fees and costs incurred under 35 U.S.C. § 285. Plaintiffs similarly are entitled to an injunction precluding Defendants from continued indirect infringement of the '052 Patent.

COUNT III

Direct Infringement of the '300 Patent pursuant to 35 U.S.C. § 271(a)

74. Plaintiffs repeat, reallege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint, as if fully set forth herein.

75. On information and belief, Defendants have directly infringed, and continue to directly infringe at least Claims 1-7 of the '300 Patent in violation of 35 U.S.C. § 271(a).

76. Defendants' infringement is based upon literal infringement or infringement under the doctrine of equivalents, or both.

77. Defendants' acts of making, using, importing, selling, and/or offering for sale or otherwise economically benefiting from infringing products have been without the permission, consent, authorization, or license of Plaintiffs.

78. Defendants' infringement includes, but is not limited to, the manufacture, use, sale, importation and/or offer for sale or otherwise economically benefit from of the Accused Products.

79. The Accused Products embody the patented invention of the '300 Patent and infringe the '300 Patent because they constitute a system for remotely starting and stopping a time clock in an environment with a plurality of distinct activation signals and noises.

80. On information and belief, every element of at least Claims 1-7 of the '300 Patent is practiced by the Accused Products.

81. For example, the Accused Products infringe Claim 4, as they are a remote time clock control and identification system for use by officials in sports events that includes a game clock, whistles to be blown by officials that generate a sonic signal that will start and stop the game clock, and a wearable pack to transmit the signal to the base unit. The Accused Products inherently analyze the sonic signals to create a sonic fingerprint that includes averaging over a range of harmonic frequencies, including at least two of the next strongest harmonics, above and below, the dominant harmonic frequency, in order to ensure it is an official's whistle that stops or starts the game clock, and not some other noise. The Accused Products include a base unit that stores the sonic fingerprint file generated to compare with sonic signals generated by an official blowing their whistle, as evidenced by the fact that the Accused Products are capable of responding to the specific whistles used by referees in the NCAA and NBA, as well as the "Recall Previous Time" feature. The Accused Products generate specific signal identification information for each official, including unique whistle or signal data for each official. In addition, the Accused Products record information related to each official's whistle activation, including the strength of the whistle, signal, and battery and other data. Accordingly, the Accused Products embody all elements of at least Claim 4 of the '300 Patent.

82. On information and belief, the Accused Products include a way to analyze sonic signals and determine which official activated the whistle by analyzing harmonic frequencies, including a dominant harmonic frequency. On information and belief, then, the harmonic signals

are processed or otherwise sampled and used to detect when a referee's whistle is blown.

83. On information and belief, the Accused Products send these signals to a base station to store those sonic fingerprint signals, which are generated during a sports event, to establish a match used for actuation of a game clock. On information and belief, the Accused Products perform analysis using a band pass filter, to generate a sonic fingerprint, that is matched with a prerecorded sonic fingerprint to identify the official who blew the whistle and record the identity of that official and the time the whistle was blown.

84. Defendants' infringement of the '300 Patent has injured and continues to injure Plaintiffs in an amount to be proven at trial, but not less than a reasonable royalty. Despite their knowledge of the '300 Patent, Defendants have directly infringed the '300 Patent in complete and reckless disregard of Plaintiffs' patent rights. As such, Defendants have acted recklessly and continue to willfully, wantonly, and deliberately engage in acts of infringement of the '300 Patent, justifying an award to Plaintiffs of increased damages under 35 U.S.C. § 284, and attorneys' fees and costs incurred under 35 U.S.C. § 285. Plaintiffs similarly are entitled to an injunction precluding Defendants from continued infringement of the '300 Patent.

COUNT IV

Indirect Infringement of the '300 Patent pursuant to 35 U.S.C. § 271(b)

85. Plaintiffs repeat, reallege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint, as if fully set forth herein.

86. Defendants have induced and continue to induce infringement of at least Claims 1-7 of the '300 Patent under 35 U.S.C. § 271(b).

87. In addition to directly infringing the '300 Patent, Defendants have indirectly infringed the '300 Patent pursuant to 35 U.S.C. § 271(b) by instructing, directing, encouraging, and/or requiring customers, purchasers, users, designers, and manufacturers to directly infringe the '300 Patent, either literally or under the doctrine of equivalents, by making, using, offering for sale, selling, and/or importing into the United States or otherwise economically benefiting from the Accused Products. Defendants knew or were willfully blind to the fact that they were

inducing others, including customers, purchasers, users, designers, and manufacturers to directly infringe Claims 1-7 of the '300 Patent by making, using, offering for sale, selling, and/or importing into the United States or otherwise economically benefiting from the Accused Products.

88. Defendants knowingly and actively aided and abetted the direct infringement of the '300 Patent by instructing and/or encouraging their customers, purchasers, users, designers, and manufacturers to use the Accused Products in violation of the '300 Patent. Such instructions and encouragement included, but are not limited to, advertising and promoting the use of the Accused Products, in an infringing manner.

89. On information and belief, Defendants maintain and update an HTTP site advertising and offering for sale the Accused Products, at <https://www.whistlestopworks.com/product>.⁵

90. Defendants are actively promoting the Accused Products by, at least, presenting the Accused Products to potential customers, including high schools, colleges, universities, and athletic conferences, at events such as basketball camps, on the internet, and at in-person meetings where they demonstrate the Accused Products.

91. In addition, upon information and belief Defendants have convinced potential customers, such as high schools, colleges, universities, and athletic conferences, to use the Accused Products for basketball games and tournaments.

92. Defendants' infringement of the '300 Patent has injured and continues to injure Plaintiffs in an amount to be proven at trial, but not less than a reasonable royalty. Despite their knowledge of the '300 Patent, Defendants have instructed, directed, encouraged, and/or required customers, purchasers, users, designers, and manufacturers to directly infringe the '300 Patent in complete and reckless disregard of Plaintiffs' patent rights. As such, Defendants have acted recklessly and continue to willfully, wantonly, and deliberately engage in acts of infringement of

⁵ As of at least September 1, 2021 at 1:00p.m. EDT.

the '300 Patent, justifying an award to Plaintiffs of increased damages under 35 U.S.C. § 284, and attorneys' fees and costs incurred under 35 U.S.C. § 285. Plaintiffs similarly are entitled to an injunction precluding Defendants from continued infringement of the '300 Patent.

COUNT V

Federal Unfair Competition pursuant to 15 U.S.C. § 1125

93. Plaintiffs repeat, reallege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint, as if fully set forth herein.

94. Plaintiffs use, market, economically benefit from, and sell products that embody the '052 and '300 Patents across the United States through Costabile, and his company's, PTS, efforts. The PTS products are marketed and used across the United States in NBA games, as well as at high school and college level basketball. Through the sale and use of its products, PTS benefits, as does PTS's sole owner and shareholder, Costabile.

95. Upon information and belief, Defendants are using, marketing, economically benefiting from, or offering for sale, the Accused Products across the United States under the names WhistleStop and Whistlestopworks, and are therefore directly competing with products of Plaintiffs.

96. Upon information and belief, Defendant Ayers was and is using, marketing, economically benefiting from, or offering for sale, the Accused Products – while, at the same time being compensated as a professional referee, without informing those entities for whom he is refereeing that he is, or was, a member of Ustopit and, therefore, has or had a financial stake in whether or not those entities use or acquire the Accused Products. In short, Ayers was being paid to officiate, and also potentially economically benefiting from the use of the Accused Products, without disclosing that conflict of interest to his employers and any customers.

97. Similarly, Ayers appears in at least one video promoting the Accused Products, and Defendants did not disclose his ownership interest in Ustopit in violation of Federal Trade Commission guidelines for endorsements at 16 CFR §255. Further, that video is replete with misrepresentations and false statements, including the voiceover, and personal statements by

Defendant Ayers. As can be seen from the screenshot below, the video that Defendants made and posted on the Ustopit website promoting the Accused Products claims that the Accused Products are the most “Technologically Advanced, Most Reliable, [and] Most Durable” products on the market.⁶ The video goes on to make statements that it is “[a] system so advanced, it stops the clock when the whistle blows at 1/100th of a second” and that it is the “most reliable referee clock control system in the world.” On information and belief, contrary to the statements made in this video, the Accused Products were largely untested or in Beta testing at the time of the making of the promotional video and such claims are demonstrably false. Moreover, on information and belief, the Accused Products are not more reliable than the PTS products (which have been used without issue in thousands of sporting events), the PTS products also stop the clock when the whistle blows within 1/100th of a second, and the PTS products are in fact more technologically advanced. Further, Defendant Ayers claims in the Ustopit promotional video that the Accused Products “work[] every time,” that “Whistlestop is a game changer for this whole country,” and that “there’s nothing else on the market now like” the Accused Products. Those statements are blatantly false. Not only do the Accused Products practice the inventions of the ‘052 and ‘300 Patents, they are essentially a knockoff, being the result of reverse engineering the PTS products. As the Accused Products attempt to replicate the PTS products’ functions and operations, and the PTS products’ patented features, they cannot be a game changer for the whole country. Moreover, the Accused Products do not “work every time,” as Plaintiffs have been informed, and on that basis understand, that there have been multiple instances of problems with the Accused Products during use in games, when they fail to operate as intended or do not work properly.

⁶ While the screen only shows the words “Technologically Advanced,” the voiceover states “the most technologically advanced.”



98. Furthermore, Plaintiffs are also informed, and on that basis understand, that Fogleman, Ayers, and other members or representatives of Ustopit have been making the same false statements about the Accused Products directly to Plaintiffs' customers or potential customers, for example, stating that the patented PTS products do not work well, that PTS products make mistakes, that PTS products are old technology, and that the Accused Products are better, more reliable, more technologically advanced, and work every time.

99. In addition, Plaintiffs have been informed, and on that basis understand that Defendants or their representatives or agents, such as other members of Ustopit or those affiliated with Ustopit, who are NCAA referees, have tried to misleadingly blame mistakes made in triggering whistle calls during games using the PTS products, when in fact it was those officials who made the errors.

100. Similarly, Plaintiffs have been informed, and on that basis understand, that on or about December 18, 2021, in Las Vegas, NV, shortly before a men's NCAA basketball game between the University of North Carolina and the University of Kentucky that was set up to be officiated with a PTS product, an Ustopit representative unilaterally replaced the already connected PTS product with an Accused Product. Plaintiffs are informed, and on that basis understand, that Ayers, along with another referee, Eric Curry, orchestrated the removal and replacement of the PTS product with the Accused Product. Eric Curry and Ayers also officiated that game.

101. Plaintiffs are informed, and on that basis understand that Defendants and their representatives have replaced PTS products with Accused Products at other sporting events, without permission from those in charge of the events.

102. Throughout sports history, there have been occurrences of officials being involved in scandals, including incidents such as point shaving in the NCAA. Sports officials, including those who officiate NCAA basketball games, should be above reproach and without a conflict of interest. On information and belief, Fogleman and Ayers, while officiating games, failed to disclose their financial interest in the Accused Products while promoting those products over Plaintiffs' products.

103. Moreover, as set forth above, Defendants have copied Plaintiffs' products, and are attempting to benefit economically by offering these knockoffs to Plaintiffs' economic detriment.

104. Defendants' conduct has proximately caused Plaintiffs' economic and reputational harm. For instance, it has caused Plaintiffs to lose business, including at least at the following events: the Referee's Choice Referee Camp in Lynchburg, Virginia (June 11-13, 2021), the TBT West Virginia Regional Tournament in Charleston, West Virginia (July 17-21, 2021), the Maui Invitational Tournament in Las Vegas, Nevada (November 22-24, 2021), and the Fort Myers Tip Off Classic in Fort Myers, Florida (November 22-24, 2021). Absent the misrepresentations, false statements, and omissions, PTS products would have been used at the above events, as they have for years. Because of the unfair competition of Defendants, including the false statements and omissions by Fogleman and Ayers, the Accused Products were used instead of PTS products, causing Plaintiffs harm. Plaintiffs are informed, and therefore understand, that Ayers and Fogelman have misused their positions as professional officials in that customers and potential customers of the parties gave particular weight to Ayers and Fogelman's misrepresentations and statements - because they are referees, and as such are considered above reproach. Because Ayers and Fogelman are officially sanctioned referees, their false statements, misrepresentations and omissions are particularly harmful to Plaintiffs. As Costabile is the sole owner and shareholder of PTS, any financial harm to PTS results in

financial harm to Costabile.

105. Costabile is known throughout the basketball-sports industry as the inventor of the patented PTS Systems, and his reputation is essential to his business of promoting and marketing PTS Systems. PTS's reputation is likewise directly tied to the PTS products, and Defendants' false statements, misrepresentations, and omissions negatively impact the reputation of the PTS products, and therefore both PTS and Costabile.

106. Defendants have acted with knowledge of the '052 and '300 Patents, as well as Plaintiffs' products on the market. Upon information and belief, Defendants' conduct is willful, deliberate, and intentional.

107. Plaintiffs have suffered damage and irreparable harm as a result of Defendants' conduct, misrepresentations, and omissions, and will continue to suffer irreparable injury unless Defendants are enjoined from engaging in further such acts in violation of 15 U.S.C. § 1125(a)(1)(A).

COUNT VI

Unfair Competition under N.C. Gen. Stat. §§ 75-1, et seq. and North Carolina Common Law

108. Plaintiffs repeat, reallege, and incorporate by reference the allegations in the foregoing paragraphs of this Complaint, as if fully set forth herein.

109. Section 75-1.1 of the North Carolina Unfair and Deceptive Trade Practices Act provides that "'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."

110. Defendants were at all times relevant hereto, engaged in commerce in the State of North Carolina by making, using, selling, economically benefiting from, offering for sale, lease, or use, the Accused Products, including but not limited to doing so from Ustopit's principal place of business in the State of North Carolina.

111. Further to that commerce, Defendants have promoted the Accused Products throughout the United States, including through a promotional video advertisement that was filmed at North Carolina State University without permission. On information and belief, a North

Carolina State University representative stated that he was not aware of any request to film on campus, nor was he aware of any paid sponsorship or vendor agreement with Defendants, and that any such agreement would be in violation of the North Carolina administrative code.

112. Section 75-1.1 of the North Carolina Unfair and Deceptive Trade Practices Act provides that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” Under North Carolina law, Defendants’ fraudulent acts and misconduct, including their deceptive advertising, are unfair or deceptive acts or practices in or affecting trade or commerce within the meaning of N.C. Gen. Stat. § 75-1.1 et. seq. and the common law of the state of North Carolina.

113. As described in more detail in the foregoing paragraphs, Defendants have engaged in an extensive campaign of false statements, misrepresentations, and omissions, in the process of marketing, promoting, advertising, manufacturing, using, or otherwise economically benefiting from the Accused Products.

114. Upon information and belief, Defendants’ conduct was willful, deliberate, and intentional.

115. Plaintiffs have suffered damages and irreparable harm that was proximately caused by Defendants’ unfair competition and will continue to suffer irreparable injury unless Defendants are enjoined from engaging in further such acts in violation of N.C. Gen. Stat. §§ 75-1, *et seq.* and the common law of the State of North Carolina.

116. Pursuant to N.C. Gen. Stat. § 75-16, Plaintiffs are entitled to recover, and hereby request, their actual damages and damages in the amount three times their actual injury. Plaintiffs are further entitled to recover, and hereby request, an award of their reasonable attorneys’ fees and all costs of this action pursuant to N.C. Gen. Stat. § 75-16.1.

117. Pursuant to the common law of North Carolina, Plaintiffs are entitled to recover, and hereby request, their actual damages and punitive damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the Court enter judgment in favor of Plaintiffs and against Defendants as follows:

- A. Finding that Defendants are and have been directly and indirectly infringing the '052 Patent;
- B. Finding that Defendants are and have been directly and indirectly infringing the '300 Patent;
- C. A preliminary and permanent injunction enjoining Defendants and their affiliates, employees, agents, officers, directors, attorneys, successors, and assigns, and all those acting on behalf of or in active concert or participation with any of them, from infringing the '052 Patent, directly or indirectly;
- D. A preliminary and permanent injunction enjoining Defendants and their affiliates, employees, agents, officers, directors, attorneys, successors, and assigns, and all those acting on behalf of or in active concert or participation with any of them, from infringing the '300 Patent, directly or indirectly;
- E. Requiring that Defendants render a full and complete accounting to Plaintiffs for Defendants' profits, gains, advantages or the value of business opportunities received from their acts of infringement;
- F. Requiring that Defendants pay Plaintiffs damages, not less than a reasonable royalty, as Plaintiffs shall prove at trial against Defendants, together with interest and costs as fixed by the Court, that is adequate to compensate Plaintiffs for Defendants' direct and indirect infringement of the '052 Patent;
- G. Requiring that Defendants pay Plaintiffs damages, not less than a reasonable royalty, as Plaintiffs shall prove at trial against Defendants, together with interest and costs as fixed by the Court, that is adequate to compensate Plaintiffs for Defendants' direct and indirect infringement of the '300 Patent;
- H. A determination that Defendants' infringement has been willful, wanton, and

deliberate and that the damages that Defendants must pay Plaintiffs be trebled pursuant to 35 U.S.C. § 284;

I. Finding the case exceptional under 35 U.S.C. § 285 and requiring that Defendants pay Plaintiffs all of their attorneys' fees and costs and expenses in this action;

J. Order an accounting and order Defendants to pay over to Plaintiffs:

- i. All monetary gains, profits, and advantages derived by Defendants from the acts complained of herein;
- ii. Damages incurred by Plaintiffs;
- iii. Treble damages as provided by law;
- iv. Punitive and exemplary damages as provided by law and to be determined by the Court after a full hearing on the merits; and
- v. Plaintiffs' costs and disbursements in this action, including reasonable attorneys' fees and prejudgment and post-judgment interest.

K. A determination that Defendants' conduct has been willful, wanton, and deliberate, and that the damages that Defendants must pay Plaintiffs be trebled pursuant to N.C. Gen. Stat. § 75-16;

L. Awarding that Defendants pay Plaintiffs all of their attorneys' fees and costs and expenses in this action pursuant to N.C Gen. Stat. § 75-16.1;

M. Awarding Plaintiffs actual damages and punitive damages pursuant to North Carolina common law;

N. Awarding Plaintiffs prejudgment interest, post-judgment interest, and costs; and

O. An order awarding Plaintiffs such other and further relief as the Court may deem appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues so triable.

DATED: June 29, 2022

Respectfully submitted,

/s/ Ronald C. Finley

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of North Carolina using the CM/ECF Filing System, which will send notification via electronic means to all counsel of record.

This 29th day of June, 2022.

/s/ James L. Lester

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