

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

VIVE HEALTH, LLC,

Plaintiff,

Case No.:

v.

STANDER, INC.,

Defendant.

_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Vive Heath, LLC (“Vive” or “Plaintiff”), brings this complaint for Declaratory Judgment against Defendant, Stander, Inc. (“Stander” or “Defendant”), asserts a demand for a jury trial, and hereby alleges on information and belief as follows:

NATURE OF THE CASE

1. This case results from Stander’s intentional interference with a leading competitor, Vive, in the bed rail market by having Amazon.com (“Amazon”) remove Vive’s compact bed rail from its platform under the guise of patent infringement.

2. This action arises under the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., the patent laws of the United States, 35 U.S.C. § 1 et seq., and the laws of the State Florida.

3. Vive seeks a declaratory judgment that U.S. Patent No. 8,973,192 (the '192 Patent) is invalid and a declaratory judgment of non-infringement of U.S. Patent No. 8,973,192.

4. Vive seeks damages for Stander's tortious interference with their business, and any other form of relief that this Court may deem appropriate for Stander's.

5. This relief is necessary because Stander has asserted claim 1 of the '192 Patent against Vive by submitting notices of infringement to Amazon.com ("Amazon") through their APEX program. This has caused Vive's Amazon listings for its compact bed rail to be taken down resulting in a significant loss of business for Vive.

THE PARTIES

6. Plaintiff Vive is a Florida Limited Liability Company with its principal place of business at 8955 Fontana Del Sol Way, Naples, FL 34109.

7. Defendant Stander is a Utah Corporation with its principal place of business at 2410 Heritage Drive, Logan, Utah 84321.

JURISDICTION AND VENUE

8. This action arises under the Declaratory Judgment Act 28 U.S.C. § 2201 *et seq.*, and the laws of the State of Florida.

9. This Court has subject matter jurisdiction over the federal law claims in this action under 28 U.S.C. §§ 1331 and 1338.

10. This Court has supplement jurisdiction of the state law claims in this action under 28 U.S.C. § 1367 (a).

11. Venue is proper under 28 U.S.C. § 1391(b)(1) because Stander sent the infringement notice alleging infringement by Vive to Amazon, with the knowledge and understanding that the notice would be sent to Vive, a Florida corporation, who does business in and is subject to personal jurisdiction in this district for the claims asserted herein as is Amazon. Stander also does business in and is subject to personal jurisdiction in this district for the claims asserted herein.

12. Venue is also proper under 28 U.S.C. § 1391 (b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District.

FACTUAL BACKGROUND

13. On April 25, 2023 Stander filed a request with Amazon to remove certain of Vive's bed rail products from Amazon's website on the ground that they infringed Stander's patent, specifically, claim 1 of the '192 Patent. Prior to doing so, Stander has never raised a '192 Patent claim against Vive in any forum, nor had they

notified Vive of any alleged infringement, except for Amazon's Patent Evaluation Express program (Apex).

14. In its notice of infringement to Amazon, Stander alleged that Vive's compact bed rail listed on Amazon's platform infringed claim 1 of the '192 Patent. The Amazon Standard Identification Numbers for those products are: B07NWWKNJ and B094WN9ZFP.

15. To handle removal requests like Stander's, Amazon has created the APEX program whereby patent holders may seek to have products removed from Amazon that allegedly infringed their patents by paying a nominal fee of \$4,000.

16. A patent holder may file a notice of infringement with Amazon for a utility patent through the APEX program that identifies the allegedly infringing product, the patent number and the claim that is allegedly infringed. A patent owner does not need to submit any analysis or evidence to support its allegation of infringement, nor does a patent holder need to obtain a District Court order, an order from the USPTO or an order from the International Trade Commission before going to Amazon. Nothing more is required other than the allegation.

17. After a notice of infringement is filed, Amazon sends an email to the seller, providing it with two options: One, the seller may seek to resolve the issue with the rights holder; or two, the seller may choose to have its claim decided by a neutral third party who follows a process designed by Amazon. Under that process, there is neither discovery nor a hearing. There are no defenses of invalidity allowed, only of non-infringement. The evaluator makes a decision regarding infringement

based upon limited briefing submitted by the parties, with the alleged infringer getting only one brief and the patent holder getting two.

18. On or about April 25, 2023 Vive received notice from Amazon to an email account that receives numerous emails from Amazon daily, and consequently was not seen in time to respond. Vive relies on Seller Central to monitor all important correspondence from Amazon. The notice from Amazon was not sent to the Seller Central account. In fact, Vive was notified through Seller Central that the accused Vive compact bed rail had been removed from the platform, since Vive failed to respond during a three-week deadline imposed by Amazon.

19. Under the Apex program an accused seller such as Vive has only three weeks to reply to a notice of alleged infringement. If the seller cannot come to the agreement with the patent holder and does not wish to have infringement determined under the terms of the Apex program, their product is automatically taken off Amazon.

20. Upon removal of Vive's compact bed rail from Amazon, Vive's representative immediately contacted Amazon to inquire as to what could be done to reinstate its compact bed rail, one of Vive's best selling products, on Amazon.

21. According to the Amazon procedures, after Vive's product was removed from Amazon under the Apex program, Vive essentially had two options: Obtain consent from Stander to move forward with the Apex action or seek judicial intervention.

22. On May 22, 2023, counsel for Vive contacted counsel for Stander to discuss proceeding with an Apex action. Stander's counsel advised Vive's counsel that Stander would not consent to the Apex action since Vive's products had already been removed from Amazon.

23. Subsequently, Vive again contacted Amazon about what steps could be taken to reinstate its compact bed rail. Vive was informed that if it filed a Declaratory Judgment action its product would be reinstated while the action was pending.

COUNT I: INVALIDITY OF U.S. PATENT NO. 8,973,192

24. Vive repeats and realleges each and every allegation contained in Paragraphs 1 through 19 as though fully set forth herein.

25. The claims of the '192 Patent are invalid under 35 U.S.C. § 102 as being anticipated in view of the prior art, including at least U.S. Patent No. 6,138,301 and a YouTube video dated— October 4, 2010— of Amy Walz, an Occupational Therapist at Jamestown Hospital, demonstrating the construction of bed rail having the same design as the design claimed in the '192 patent.

26. The claims of the '192 Patent are invalid under 35 U.S.C. § 103 as obvious in view of the prior art, including at least U.S. Patent Nos. 6,138,301, 6,401,280, 3,739,793 and a YouTube video dated— October 4, 2010— of Amy Walz, an Occupational Therapist at Jamestown Hospital, demonstrating the construction of bed rail having the same design claimed in the '192 patent.

27. The claims of the ‘192 Patent are invalid for failure to satisfy the requirements of 35 U.S.C. § 112.

28. An actual and justiciable controversy therefore exists between Vive and Stander regarding the validity of the claims of the ‘192 Patent.

29. A judicial declaration is necessary to determine the parties’ respective rights regarding the ‘192 Patent.

30. Vive is entitled to a judgment declaring that the claims of the ‘192 Patent are invalid under 35 U.S.C. §§ 102, 103, and/or 112.

COUNT II: NON-INFRINGEMENT OF U.S. PATENT NO. 8,973,192

31. Vive repeats and realleges each and every allegation contained in Paragraphs 1 through 23 as though fully set forth herein.

32. In its complaint to Amazon, Stander alleged that the Vive’s compact bed rail infringed claim 1 of the ‘192 Patent.

33. The Vive compact bed rail does not practice claim 1 of the ‘192 Patent, or any other claim of the ‘192 Patent at least because “the first and second base portions, the first and second upright support portions, and the handle portion” of the Vive Compact Bed Rail are not “configured to be oriented in a substantially rectangular, coplanar orientation when the device is in a storage configuration” as required by independent claim 1.

34. Accordingly, Vive has not infringed and does not infringe claim 1 of the ‘192 Patent, or any other claim of the ‘192 Patent.

35. An actual and justiciable controversy therefore exists between Vive and Stander regarding whether Vive has infringed the claims of the '192 Patent.

36. A judicial declaration is necessary to determine the parties' respective rights regarding the '192 Patent.

37. Vive is entitled to a judgment declaring that it has not infringed and does not infringe any claim of the '192 Patent.

COUNT III: UNFAIR COMPETITION

38. Vive repeats and realleges each and every allegation contained in Paragraphs 1 through 23 as thoroughly set forth herein.

39. Stander's actions with Amazon regarding Vive's products amounted to unfair methods of competition in commerce, which resulted in injuries to Vive.

40. Without ever reaching out to Vive directly, Stander instead went directly to the Apex program and later refused Vive's request to utilize the same program.

41. Stander is therefore engaged in unfair methods of competition in violation of Florida's Deceptive and Unfair Trade Practices Act, *see* Fla. Stat. § 501.204.

COUNT IV: TORTIOUS INTERFERENCE

42. Vive repeats and realleges every allegation contained in Paragraphs 1 through 23 as though fully set forth herein.

43. Stander knowingly and intentionally interfered with Vive's valid business expectancies and relationship with Amazon by wrongly filing an unsubstantiated notice of infringement with Amazon. Stander's intentional interference directly led to the termination of those expectancies when Amazon removed Vive's products from the marketplace. Stander did so for improper purpose and with improper means thereby resulting in damages for Vive.

44. Stander therefore committed tortious interference with Vive's business expectancies in violation of Florida state law.

PRAYER FOR RELIEF

45. WHEREFORE, Vive respectfully requests that the Court enter judgment in favor of Vive and grant the following relief:

- a. A judgment declaring that the claims of the '192 Patent are invalid under 35 U.S.C. §§ 102, 103 and/or 112;
- b. A judgment declaring that Vive has not infringed and does not infringe and claims of the '192 Patent;
- c. For a preliminary and permanent injunction precluding Stander and its officers, directors, employees, agents, and all other persons acting in concert or participation with Stander from suing for infringement, restraining commerce on the basis of allegations of infringement, or otherwise asserting infringement of the '192 Patent against Vive;
- d. Damages sufficient to compensate Vive for Stander's tortious conduct;

- e. A judgement that this is an exceptional case under 35 U.S.C. § 285;
- f. An award to Vive of its reasonable attorneys' fees, costs and expenses pursuant to 35 U.S.C. § 285 or otherwise permitted by law; and
- g. For such other and further relief that the Court deems just and proper.

JURY TRIAL DEMAND

46. Vive respectfully demands a trial by jury on all claims and issues so triable.

Date: July 28, 2023

Respectfully submitted,
/s/ Kenneth W. Cohen
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