

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

VEM LLC.,

Plaintiff,

v.

Bass Pro, Inc., BPS Direct, LLC,
Bass Pro Outdoor World, L.L.C., and
Southern Plastics Company, Inc.,

Defendants.

Civil Action No.

Jury Trial Demanded

COMPLAINT FOR PATENT INFRINGEMENT

COMES NOW VEM LLC (hereinafter “Vertical Lures”), the Plaintiff herein, and by and through its counsel, files this Complaint against the Defendants Bass Pro, Inc., BPS Direct, LLC, Bass Pro Outdoor World, L.L.C., and Southern Plastics Company, Inc., and in support thereof respectfully shows the Court as follows:

NATURE OF THE CASE

1. Plaintiff, Vertical Lures seeks legal and equitable remedies for infringement of United States Patent No. D537,144 for a “JIG FISH LURE” (hereinafter the ‘144

Patent) and Federal unfair competition arising under the Lanham Act, 15 U.S.C. §1125(a), resulting from the actions and conduct of Defendants as set forth herein.

PARTIES

2. Plaintiff Vertical Lures is a South Carolina corporation having a regular and established place of business in Pickens, South Carolina.

3. Upon information and belief, Defendant Bass Pro, Inc. is a Delaware corporation with offices located in Springfield, Missouri. Upon information and belief, Defendant Bass Pro, Inc. does business in this District and sells the offending product in this District.

4. Upon information and belief, Defendant BPS Direct, LLC is a Delaware company with offices located in Springfield, Missouri.

5. Upon information and belief, Defendant BPS Direct, LLC's registered agent for the service of process is the Corporation Process Company, 180 Satellite Blvd. Ste 400, Duluth, GA 30097. Upon information and belief, Defendant BPS Direct, LLC does business in this District and sells the offending product in this District.

6. Upon information and belief, Defendant Bass Pro Outdoor World, L.L.C. is a Missouri company with offices located in Springfield, Missouri. Upon information and belief, Defendant Bass Pro Outdoor World, L.L.C.'s registered agent for the service of process is the Corporation Process Company, 180 Satellite Blvd. Ste 400, Duluth, GA 30097.

7. Upon information and belief, Defendant Bass Pro Outdoor World, L.L.C. does business in this District and sells the offending product in this District. Hereinafter, Bass Pro, Inc., BPS Direct, LLC, and Bass Pro Outdoor World, L.L.C. are collectively referred to as “Bass Pro Shops.”

8. Upon information and belief, Defendant Southern Plastics Company, Inc. is an Alabama corporation with offices located in Eufaula, Alabama.

9. Upon information and belief, Defendant Southern Plastics Company, Inc. does business in this District and sells the offending product to Bass Pro Shops for resale in this District. Hereinafter, Southern Plastics Company, Inc. is referred to as “Southern Plastics.”

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the patent laws of the United States, Title 35 of the United States Code, including 35 U.S.C. § 271 *et seq.*

11. Upon information and belief, the Defendants are subject to this Court’s specific and general personal jurisdiction, pursuant to due process and/or the Georgia Long Arm Statute, due at least to their substantial business in this forum, including related to the infringements alleged herein.

12. Upon information and belief, the Bass Pro Shops Defendants have interactive websites through which the infringing products are sold in this District, conduct direct

mail and catalog campaigns through which the infringing products are sold in this District, and operate stores under the name Bass Pro Shops in this District through which the infringing products are sold.

13. Upon information and belief, Defendant Southern Plastics manufactures and sells the infringing products, including selling the infringing products to the Bass Pro Shops Defendants for resale in this District.

14. Upon information and belief, the Defendants are also subject to the Court's general jurisdiction, including from regularly doing or soliciting business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from goods and services provided to persons or entities in Georgia.

15. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 and 1400(b) for at least the reasons that a substantial part of the events giving rise to these claims occurred in this District, because Vertical Lures has suffered injury in this District, and because Defendants reside in this District under the patent venue statute by having committed acts of patent infringement in this District.

FACTS

16. On February 20, 2007, the '144 Patent was duly and legally issued by the United States Patent and Trademark Office ("USPTO") to inventor Eric Harrell. The '144 Patent issued from an application filed with the USPTO on February 9, 2006 and has been at all times since its date of issue, valid and enforceable. A true and correct

copy of the '144 Patent is attached hereto as Exhibit "A."

17. Vertical Lures is the owner of the '144 Patent by assignment and has standing to bring this lawsuit for infringement of the '144 Patent.

18. The claim of the '144 Patent covers an ornamental design for a jig fish lure, as shown and described in the '144 Patent.

19. Since February 2006, Vertical Lures has been advertising, promoting, marketing and selling fishing lures under the name "TUBE-X." Vertical Lures has marked the advertising materials and product packaging, first with the label "Patent Pending," and later with the number of the '144 Patent.

20. In March 2006, representatives of Bass Pro Shops contacted Vertical Lures and requested samples of the TUBE-X fishing lures. Vertical Lures provided samples of its TUBE-X product to Bass Pro Shops. The accompanying literature about the TUBE X fishing lures were marked with the label "Patent Pending."

21. In 2008, representatives of Bass Pro Shops again contacted Vertical Lures requesting samples of the TUBE X fishing lures. Vertical Lures provided samples of its TUBE-X product to Bass Pro Shops. The accompanying literature about the TUBE-X fishing lures were marked with the number of the '144 Patent.

22. In July 2008, representatives of Bass Pro Shops met with Vertical Lures at a trade show in Las Vegas and discussed Bass Pro Shops buying the TUBE-X fishing lures from Vertical Lures for resale by Bass Pro Shops. The product literature about

the TUBE-X product provided to Bass Pro Shops at that meeting in July 2008 was marked with the number of the '144 Patent.

23. Upon information and belief, in December 2008, Bass Pro Shops began offering for sale and selling fishing lures that infringe the '144 Patent, including a fishing lure under the name DART TUBE. A true and accurate copy of a page from the Bass Pro Shops website offering the DART TUBE product for sale is attached hereto as Exhibit "B."

24. Upon information and belief, since December 2008, Bass Pro Shops has sold its infringing fishing lures, including the DART TUBE product through Bass Pro Shops retail stores, catalogs, the internet, and through third-party sports, hunting, and gaming stores located in the United States, including a Bass Pro Shop retail store in the Northern District of Georgia.

25. Upon information and belief, since at least December 2008, Southern Plastics has manufactured and sold fishing lures that infringe the '144 Patent, including manufacturing, selling, and delivering fishing lure products, including the DART TUBE fishing lures, to Bass Pro Shops in Georgia for resale in Georgia, including resale in the Northern District of Georgia .

26. The Defendants' manufacture and sale of the infringing fishing lure products, including the DART TUBE fishing lures, have been without the permission, authority, or license of Vertical Lures.

COUNT ONE: PATENT INFRINGEMENT

27. The allegations of each and every of the foregoing paragraphs are repeated and realleged as if set forth herein.

28. Upon informatoin and belief, Defendant Southern Plastics has infringed and is presently infringing the '144 Patent by making, using, selling, and/or offering to sell within the United States, fishing lures, including the Dart Tube fishing lures sold to the Bass Pro Shops Defendants.

29. Upon information and belief, Defendant Southern Plastics will continue to infringe the '144 Patent unless enjoined by this Court.

30. Upon information and belief, the Bass Pro Shops Defendants have infringed and are presently infringing the '144 Patent by using, importing, selling and/or offering to sell within the United States, including within this District, fishing lures, including the Dart Tube fishing lures.

31. Upon information and beleif, the Bass Pro Shops Defendants will continue to infrige the '144 Patent unless enjoined by this Court.

32. The Defendants' acts have been without the permission, license, or consent of Plaintiff Vertical Lures.

33. At the time it began selling its infringing fishing lures, at least the Bass Pro Shops Defendants knew about the Plaintiff's patent and were aware of the Plaintiff's products in the marketplace. However, the Bass Pro Shops Defendants chose to

infringe, and continue to infringe in reckless disregard of the '144 Patent.

34. Upon information and belief, the acts of patent infringement of at least the Bass Pro Shops Defendants has been willful, with the knowledge that the acts were unlawful, and for the purpose of deriving revenue or other financial gain.

35. The acts of Defendants constitute patent infringement in violation of 35 U.S.C. § 271 *et seq.*

36. Plaintiff Vertical Lures is entitled to an injunction pursuant to 35 U.S.C. § 283, restraining Defendants, their officers, agents, employees, and all persons acting in concert with them from engaging in further infringement of Plaintiff's '144 Patent.

37. Plaintiff Vertical Lures is entitled to recover its damages sustained as a result of the Defendants' infringement, including the Defendants' profits pursuant to 35 U.S.C. § 289, but in any event no less than a reasonable royalty pursuant to 35 U.S.C. § 284.

38. Plaintiff Vertical Lures is further entitled to recover its costs, expenses and reasonable attorney's fees incurred in bringing the present action pursuant to 35 U.S.C. § 284.

39. The circumstances of this case, including the willful infringement of Defendants, renders this case an exceptional case under 35 U.S.C. § 285.

40. The circumstances of this case justify an enhancement of the damages under 35 U.S.C. § 284, up to three times the actual damages.

**COUNT TWO: FEDERAL UNFAIR COMPETITION – TRADE DRESS
INFRINGEMENT**

41. The allegations of each and every of the foregoing paragraphs are repeated and realleged as if set forth herein.

42. Prior to the Defendants' first sale of their infringing fishing lures, including the Dart Tube fishing lures, Vertical Lures introduced into the marketplace a novel, unique, and inherently distinctive fishing lure product design. The look and feel of Vertical Lure's fishing lure, referred to herein as the TUBE-X Trade Dress, is attached hereto as Exhibit "C."

43. Vertical Lures is the owner of all right, title, and interest in the and to the TUBE-X Trade Dress, including the right to bring suit for past, present , and future infringement, and to collect past, present and future damages.

44. Vertical Lures has continuously used the TUBE-X Trade Dress to designate its buseinss, its services, and its related products. Vertical Lures has developed a local and national reputation and a high degree of goodwill associated with its use of the TUBE-X Trade Dress. Vertical Lures is substantially recognized by, and identified with, the TUBE-X Trade Dress.

45. As a result of the long, continuous, and wide spread use, promotion, and advertising of the TUBE-X Trade Dress, it has become associated with Vertical Lures, has acquired a secondary meaning, and has become an asset of substantial value as a

symbol of Vertical Lures, its quality name, its quality services, its quality products, and its goodwill.

46. The TUBE-X Trade Dress is distinctive.

47. The TUBE-X Trade Dress is nonfunctional.

48. On information and belief, since at least December 2008, Defendants have marketed, offered for sale, and sold their fishing lures, including the Dart Tube fishing lure, a picture of which is attached hereto as Exhibit "D." Defendants' fishing lures have the same look and feel as the look and feel of the TUBE-X Trade Dress.

49. The TUBE-X Trade Dress was first used long before Defendants first used their infringing fishing lure design.

50. Defendants have, and continue to, offer for sale and sell fishing lures similar in look and feel to Vertical Lures' fishing lure depicted in Exhibit "C."

51. When Defendants first began manufacturing, using, offering for sale, and selling their fishing lures, Defendants knew that Vertical Lures had long been using its TUBE-X Trade Dress and that Vertical Lures owned the TUBE-X Trade Dress.

52. Defendants' fishing lures, including the DART TUBE fishing lures, share significant similarities with, and infringes upon, Vertical Lures' strong and distinctive TUBE-X. Moreover, Defendants' fishing lures have, and continue to, directly compete with Vertical Lures' TUBE-X products through similar channels of trade to similar customers.

53. Upon information and belief, Defendants intentionally advertise, offer for sale, and sell in a manner designed to confuse the public into mistaking the Defendants' fishing lures with Vertical Lures' TUBE-X Trade Dress. As such, Defendants' fishing lures falsely represents to the trade and customers that Defendants' fishing lures originate from Vertical Lures, and that Defendants and Defendants' fishing lures are in some manner affiliated with Vertical Lures.

54. Due to the striking similarity between the Defendants' fishing lures and Vertical Lures' TUBE-X Trade Dress, Vertical Lures' customers and others who deal with Defendants or Vertical Lures, likely will be confused as to the source of goods and services offered by Vertical Lures and Defendants.

55. Due to the striking similarity between the Defendants' fishing lures and Vertical Lures' TUBE-X Trade Dress, there has been actual confusion by customers and others who deal with Defendants or Vertical Lures as to the source of goods and services offered by Vertical Lures and Defendants.

56. Defendants' fishing lures depicted in Exhibit "D" infringe Vertical Lures' trade dress rights in and to the TUBE-X Trade Dress.

57. Upon information and belief, at least the Bass Pro Shops Defendants have intentionally and willfully infringed Vertical Lures' TUBE-X Trade Dress.

58. Upon information and belief, Defendants have profited from their use, offers for sale, and sales of fishing lures similar in look and feel to the fishing lures depicted in Exhibit "D."

59. Upon information and belief, Defendants have and continue to use Vertical Lures' TUBE-X Trade Dress in a willful attempt to confuse the public and thereby wrongfully divert Vertical Lures' customers and/or potential customers away to Defendants.

60. Defendants' advertising, use, sale, and offer for sale of the fishing lures depicted in Exhibit "D," and designs similar thereto, falsely describe and represent Defendants as being sponsored by, approved by, or affiliated with Vertical Lures. Defendants have caused, with knowledge of such false designation of origin or description or representation, such designs to be used in interstate commerce.

61. Defendants have willfully promoted in interstate commerce their businesses using a confusing simulation of Vertical Lures' TUBE-X Trade Dress in such a manner so as to falsely designate an origin or an association with Vertical Lures, with Vertical Lures' TUBE-X Trade Dress, and with Vertical Lures' reputation and goodwill, so as to cause confusion or mistake among purchasers as to the true origin, source, sponsorship, or affiliation of Defendants' goods, all to the Defendants' profit and to Vertical Lures' monetary damage. Vertical Lures has been irreparably damaged by Defendants' use of such false designation and misrepresentation.

62. Defendants have intentionally traded upon Vertical Lures' reputation and goodwill, established through Vertical Lures' long and continuous advertising, use and sales of its TUBE-X Trade Dress, by Defendants' use of a confusingly similar fishing lure design in similar channels of trade to similar customers.

63. Defendants' acts, as set forth above, constitute unfair competition, false designation of origin, and false description in violation of 15 U.S.C. §1125(a), Section 43(a) of the Lanham Act.

64. Defendants will, if not enjoined by this Court, continue their acts of unfair competition by the use of the false designation and false representations set forth above, which acts have caused, and will continue to cause Vertical Lures immediate and irreparable harm. Pursuant to 15 U.S.C. §1116 and Fed. R. Civ. P. 65(a), Vertical Lures is entitled to an Order of this Court enjoining Defendants' unlawful activities. Vertical Lures has no adequate remedy at law.

65. As a result of Defendants' conduct set forth above, Vertical Lures has been, and continues to be, irreparably damaged. Pursuant to 15 U.S.C. §1117, Vertical Lures is entitled to a judgment for: (1) each Defendant's profits; (2) damages sustained by Hart; (3) treble damages; (4) such sum as the Court deems just; (5) attorneys' fees; (6) costs of this action; and (7) interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for an Order of this Court, entering judgment:

- A. That the Defendants have infringed the '144 Patent;
- B. That the Defendants, their officers, agents, employees, representatives, and all others acting in concert therewith, are enjoined from further infringement of the '144 Patent;
- C. That Vertical Lures is awarded all of the profits generated by Defendants infringement pursuant to 35 U.S.C. § 289;
- D. That Vertical Lures is awarded damages pursuant to 35 U.S.C. § 284 in an amount adequate to compensate Plaintiff for the patent infringement (in no event less than a reasonable royalty);
- E. That based on the willful nature of the infringement, the damages are increased to three times the amount of damages found or assessed, and Vertical Lures is awarded its costs and reasonable attorney's fees, all in accordance with 35 U.S.C. §§ 284-285;
- F. That this case is exceptional under 35 U.S.C. § 285 such that Vertical Lures is awarded its reasonable attorney's fees;
- G. That the Defendants shall destroy or surrender all infringing products, at Vertical Lures' election;
- H. That each Defendant, its corporate officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with it, be preliminary and permanently enjoined and restrained:

(i) from using any fishing product similar in look and feel to the fishing lure attached as Exhibit “D,” or any other designation or trade dress confusingly similar to Vertical Lures’ TUBE-X Trade Dress; and

(ii) from otherwise infringing upon Vertical Lures’ rights in and to its TUBE-X Trade Dress and from otherwise unfairly competing with Vertical Lures in any manner;

I. That each Defendant be ordered to deliver up for destruction its documents, signs, packages, forms, advertisements, business cards, letterheads and other representations and means for reproducing the same or any printed material bearing any fishing lures similar in look and feel to the fishing lure attached as Exhibit “C,” or any designation or trade dress confusingly similar to Vertical Lures’ TUBE-X Trade Dress, and to obliterate, destroy, or remove all other uses or designations confusingly similar to Vertical Lures’ TUBE-X Trade Dress;

J. That each Defendant be directed to file with the Court and serve on Vertical Lures, no later than thirty (30) days after the issuance of an injunction, a report in writing under oath setting forth in detail the manner and form in which each Defendant has complied with the Court’s injunction;

K. That an accounting be conducted and judgment be rendered against each Defendant for:

(i) all profits received by each Defendant from its sale of any and all fishing lures similar in appearance to the fishing lure represented in Exhibit “C” pursuant to 15 U.S.C. §1117 *et. seq.* and the common law;

(ii) all damages sustained by Vertical Lures on account of each Defendant’s unfair competition pursuant to 15 U.S.C. §1117 *et. seq.* and the common law; and

(iii) actual compensatory damages in an amount not presently known, but to be computed during the pendency of this action;

J. That such damages assessed against each Defendant be trebled as provided by 15 U.S.C. §1117;

K. That Vertical Lures is awarded its taxable costs, expenses, and pre-judgment and post-judgment interest; and

L. That Vertical Lures is awarded such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff requests a trial by jury of any and all issues so triable by right.

Respectfully submitted, this 13th day of September, 2011.

/s/ Robert B. Dulaney III
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