

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

MAY 18 2007

U.S. DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

EAGLE INDUSTRIES UNLIMITED, INC.,)
)
Plaintiffs)
)
vs.)
)
1337 TACTICAL and XIAODONG "JON")
CUI,)
)
Defendants.)
_____)

No.

Jury Trial Demanded

4 07CV00994 ERW

COMPLAINT

COMES NOW Plaintiff Eagle Industries Unlimited, Inc. ("EAGLE" or "Plaintiff"), by and through its undersigned counsel, and for its complaint against 1337 Tactical and Xiaodong Jon Cui (collectively "1337 TACTICAL" or "Defendants"), states as follows:

INTRODUCTION

This is an action at law and in equity for patent infringement under the Patent Act, and unfair competition under the Lanham Act.

PARTIES

1. EAGLE is a Missouri corporation with its principal place of business in Fenton, Missouri. EAGLE designs, develops, manufactures, and sells state-of-the art military and law-enforcement-personnel tactical vests designed to assist users to more

efficiently and safely carry and use weapons, communication, medical and safety equipment.

2. Upon information and belief, the individual business entity known as "1337 Tactical" is an business located in Toronto, Ontario, Canada with a online retail business accessible at <http://www.1337tactical.com>. Upon information and belief, 1337 Tactical makes, uses, sells, offers for sale, or imports, "replica" tactical vests and related components for use primarily in "airsoft" or "paintball" activities.

3. Upon information and belief, Mr. Xiaodong Jon Cui is a Canadian citizen or resident with an address at 46 Castleford Dr., Scarborough, Ontario M1T 3X5 Canada.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction of this action under 28 U.S.C. §§ 1331 and 1338(a), this being an action arising under the patent and trademark laws of the United States, in particular 35 U.S.C. § 101, *et seq.*, and 15 U.S.C. § 1125(a). Likewise, this Court has subject matter jurisdiction under 15 U.S.C. § 1121.

5. Venue in this judicial district is proper based upon 28 U.S.C. §§ 1391(c), and 1400(b).

6. 1337 TACTICAL has transacted and continues to transact business in this judicial district, including sales, offers to sell, and importation of items that infringe the intellectual property of EAGLE into this judicial district and the unauthorized use of EAGLE trademarks in this district. By such actions, 1337 TACTICAL has purposefully

availed itself of the jurisdiction of this court. As such, the harms associated with the actions of 1337 TACTICAL are occurring in this District.

FACTS COMMON TO ALL COUNTS

**** Intellectual Property of EAGLE - Patent ****

7. On or about May 23, 2006, United States Patent No. 7,047,570 (the “570 Patent” or “patent-in-suit”), entitled CUT AWAY VEST was duly and legally issued to Matthew A. Johnson with Eagle Industries Unlimited, Inc. noted as the sole assignee. A true and correct copy of the ‘570 Patent is attached hereto as Exhibit 1 and incorporated herein by reference.

**** Intellectual Property of EAGLE – Trademarks ****

8. EAGLE owns the mark shown in US Trademark Application Serial No. 77/071,679 for CIRAS for a wide variety of goods and services, including, *inter alia*, clothing and outerwear for military and law enforcement. EAGLE filed its application prior to any use by 1337 TACTICAL. EAGLE used and continues to use this mark in commerce in connection with some or all of such goods long prior to any use by 1337 TACTICAL.

9. EAGLE owns the mark EAGLE for a wide variety of goods and services, including, *inter alia*, clothing and outerwear for military and law enforcement. EAGLE used and continues to use this mark in commerce in connection with such goods prior to any use by 1337 TACTICAL.

10. EAGLE owns the mark shown in US Trademark Registration No. 1,789,291 for EAGLE & Design for a wide variety of goods and services, including, *inter alia*, gun cases and pouches, ammunition cases, bags, and pouches. EAGLE filed its application and obtained its registration prior to any use by 1337 TACTICAL. EAGLE used and continues to use this mark in commerce in connection with some or all of such goods long prior to any use by 1337 TACTICAL.

11. EAGLE owns the mark shown in US Trademark Application Serial No. 77/160,825 for EAGLE & Design for a wide variety of goods and services as claimed in the application. EAGLE filed its application prior to any use by 1337 TACTICAL. EAGLE used and continues to use this mark in commerce in connection with some or all of such goods long prior to any use by 1337 TACTICAL.

**** The 1337 TACTICAL Business Selling of "Airsoft" Combat Gear ****

12. Upon information and belief, 1337 TACTICAL and/or its authorized representatives (collectively referred to herein as "1337 TACTICAL" for purposes of clarity) operate a business or connected business entities that make, sell, offer to sell, advertise, market, promote, and/or import replica "combat gear" such as combat vests, gun and ammunition packs, holsters, and other equipment used by military or law enforcement professionals in the course of their combat training or in the actual performance of military or law enforcement services.

13. 1337 TACTICAL operates its business(es) to make, sell, offer to sell, advertise, market, promote, and/or import replica “combat gear” for use in connection with the leisure activity of “airsoft.”

14. Airsoft is a sport or recreational game in which players participate in the simulation of military combat or law enforcement-style combat using smoothbore airsoft guns designed as replicas of real firearms.

15. Airsoft is similar in some degrees to the game known as “paintball” in the United States. While “airsoft” can be played with paintballs as ammunition, “airsoft” is most often played with real ammunition – specifically including BBs or other non-bullet ammunition that is designed so as to not impact grave harm on the game participants. Thus, airsoft game participants are often harmed by the ammunition if not protected by appropriate clothing or “combat gear.”

16. The “combat gear” sold by 1337 TACTICAL is not actually suitable or worthy of use by real military or law enforcement in the course of their training or performance of work/services.

17. Upon information and belief, the “combat gear” sold by 1337 TACTICAL may only be suitable for use in the realm of fake, pretend, or make-believe combat situations – such as airsoft games.

18. Upon information and belief, consumers buy the “combat gear” sold by 1337 TACTICAL in order, *inter alia*, to protect themselves against the physical harms involved in the game of airsoft.

**** The 1337 TACTICAL Websites Selling Combat Gear ****

19. Upon information and belief, 1337 TACTICAL offers its “combat gear” by and through interactive retail sites, including www.1337tactical.com.

20. Upon information and belief, 1337 TACTICAL controls, operates, and directs the business activities at www.1337tactical.com.

21. Upon information and belief, 1337 TACTICAL also operates a retail “web store” on the platform available at eBay.com.

22. Upon information and belief, Mr. Cui is an agent, representative, director, and/or employee of 1337 TACTICAL.

23. Mr. Cui is the registered owner of the www.1337tactical.com domain name.

24. By and through the actions of Mr. Cui, 1337 TACTICAL conducts business in the United States and in this judicial district via the interactive retail site located at www.1337tactical.com and through its eBay store.

**** Infringing Actions of 1337 TACTICAL ****

25. 1337 TACTICAL sells, offers for sale, and/or imports vests that infringe one or more of the claims of the ‘570 Patent in this judicial district and elsewhere in the United States and interstate commerce, including via the Internet from its websites, including but not limited to the interactive retail website located at www.1337tactical.com and through its eBay store.

26. Upon investigation, 1337 TACTICAL sells and offers to sell vests in connection with the mark "CIRAS."

27. Upon investigation, 1337 TACTICAL sells and offers to sell replica vests in connection with the mark "EAGLE."

28. A true and correct copy of 1337 TACTICAL website available for viewing on or about March 2007 is attached hereto as Exhibit 2.

29. A true and correct photograph of a vest (hereinafter "Infringing Good(s)" or "Infringing Vest(s)") that was purchased by and through the interactive retail website located at www.1337tactical.com is attached hereto as Exhibit 2.

30. The Infringing Vest was purchased by and through the interactive retail website located at www.1337tactical.com by a resident of this judicial district as shown in Exhibit 2.

31. 1337 TACTICAL's sales and offers for sale of replica military vests in connection with the designations such as "CIRAS" and "EAGLE" are likely to cause confusion and mistake as to the source or origin of 1337 TACTICAL's goods and services and to create a false impression of sponsorship, approval or endorsement of those products by the real maker of the CIRAS and EAGLE branded products.

32. 1337 TACTICAL's unauthorized use of the CIRAS and EAGLE trademarks in connection with vests and military/law enforcement products that are substantially similar to those offered by EAGLE has caused or, unless enjoined by this Court, will cause a likelihood of confusion and deception of purchasers, as well as members of the public who see the CIRAS and EAGLE marks promoted in the same

channels of trade as the products from 1337 TACTICAL. The natural and probable result is that EAGLE has suffered, and will continue to suffer irreparable injury to and dissipation of its reputation and goodwill for which EAGLE has no adequate remedy at law.

33. On information and belief, 1337 TACTICAL's actions have caused, are causing and/or are likely to cause actual confusion between the goods and services offered by EAGLE in connection with the CIRAS and EAGLE trademarks.

34. 1337 TACTICAL, by and through its related entities, imported the Infringing Vest into this judicial district as also shown in Exhibit 2.

**** Willfulness of 1337 TACTICAL's Infringing Actions ****

35. 1337 TACTICAL is not a subsidiary, affiliate, licensee or related company of EAGLE. EAGLE has not authorized or licensed 1337 TACTICAL to make, use, sell, offer to sell, or import any products under the '570 Patent.

36. On or about March 14, 2007, EAGLE contacted 1337 TACTICAL concerning the Infringing Goods. EAGLE requested that 1337 TACTICAL cease the further infringement of the '570 Patent. 1337 TACTICAL refused to comply with the request.

37. 1337 TACTICAL is not a subsidiary, affiliate, licensee or related company of EAGLE. EAGLE has not authorized or licensed 1337 TACTICAL to distribute or sell products bearing any of the trademarks owned by EAGLE, any marks likely to confuse

consumers concerning the origin of EAGLE branded or licensed items, or any reproductions, copies or colorable imitations thereof.

38. On or about March 14, 2007, EAGLE contacted 1337 TACTICAL concerning the Infringing Goods. EAGLE requested that 1337 TACTICAL cease the further infringement of the CIRAS and EAGLE trademarks. 1337 TACTICAL refused to comply with the request.

39. 1337 TACTICAL's acts demonstrate a deliberate, willful, and bad faith intent to create confusion and mistake, to deceive purchasers and to trade on the established reputation and goodwill of EAGLE by falsely implying an association, connection, affiliation or relationship with EAGLE and its goods to the great and irreparable injury.

40. After March 14, 2007, 1337 TACTICAL, by and through its related entities, "shipped and imported" imported the Infringing Vest into this judicial district, as shown in Exhibit 3, with full knowledge of the intellectual property rights of EAGLE and in blatant disregard for such known, existing, and valid intellectual property rights

FIRST CLAIM FOR RELIEF
Patent Infringement (35 U.S.C. § 271)

**** United States Patent No. 7,047,570 ****

41. EAGLE incorporates the allegations of paragraphs 1 through 37 as if fully set forth herein.

42. Upon information and belief, 1337 TACTICAL has in the past and is still infringing one or more of the claims of the '570 Patent by manufacturing, selling and/or

offering for sale, within the United States, cut away vests that embody the inventions claimed in the '570 Patent, or by contributing to or inducing infringement of those claims, in violation of 35 U.S.C. § 271. A true and correct copy of a photograph of the infringing device is attached hereto as Exhibit 3 and incorporated herein by reference.

43. Upon information and belief, 1337 TACTICAL had actual knowledge and notice of the '570 Patent prior to manufacturing, selling, offering for sale, or importing the infringing device.

44. EAGLE designs, produces, sells, and/or offers for sale tactical cut away vests that embody the claimed inventions of the '570 Patent.

45. EAGLE has provided 1337 TACTICAL with notice of the '570 Patent and of 1337 TACTICAL's infringement of the same. Despite this notice, 1337 TACTICAL continues to infringe the '570 Patent.

46. 1337 TACTICAL has no license from EAGLE but has nonetheless deliberately, knowingly and willfully infringed the '570 Patent, thereby causing irreparable harm and damage to EAGLE, which damage should be trebled pursuant to 35 U.S.C. § 284.

47. The acts of 1337 TACTICAL constitute willful infringement making this cause an exceptional case within the provisions of 35 U.S.C. § 285, thereby entitling EAGLE to recover its attorneys' fees upon prevailing in this action.

48. By reason of 1337 TACTICAL's infringement of the '570 Patent, EAGLE has been and will continue to be seriously damaged and irreparably harmed unless 1337 TACTICAL is enjoined from further infringing the '570 Patent and EAGLE is

adequately compensated for such infringement by this Court pursuant to the provisions of 35 U.S.C. §§ 283 and 284.

SECOND CLAIM FOR RELIEF
Federal Unfair Competition (15 U.S.C. § 1125(a))

****The CIRAS Trademarks****

49. EAGLE repeats and incorporates the allegations set forth in all preceding paragraphs as if set forth in full herein.

50. By engaging in the acts described above, 1337 TACTICAL has sold and marketed its Infringing Goods in interstate commerce using designations and representations that are confusingly similar to the CIRAS trademarks.

51. 1337 TACTICAL's actions are likely to cause confusion, to cause mistake, and to deceive purchasers, prospective purchasers, and the public.

52. 1337 TACTICAL's actions demonstrate an intentional, willful and malicious intent to trade upon the goodwill associated with the CIRAS trademarks.

53. 1337 TACTICAL's actions constitute unfair competition in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1125(a).

54. EAGLE is being and will continue to be damaged by 1337 TACTICAL's infringing activities, which are likely to cause confusion among the purchasing public as to the true identity, source, sponsorship or affiliation of the Infringing Goods and Services of 1337 TACTICAL.

55. Because of 1337 TACTICAL's infringing activities, EAGLE has suffered and will continue to suffer damage to its business reputation and goodwill, and the loss of sales and profits it would have made but for the improper acts of 1337 TACTICAL.

56. Because of 1337 TACTICAL's intentional infringing activities, EAGLE is entitled to injunctive relief, an accounting for profits, damages, costs and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125, 1116 and 1117. EAGLE is further entitled to have its damages award enhanced and its damages award trebled as authorized by 15 U.S.C. § 1117.

THIRD CLAIM FOR RELIEF
Federal Unfair Competition (15 U.S.C. § 1125(a))

****The EAGLE Trademarks****

57. EAGLE repeats and incorporates the allegations set forth in all preceding paragraphs as if set forth in full herein.

58. By engaging in the acts described above, 1337 TACTICAL has sold and marketed its Infringing Goods in interstate commerce using designations and representations that are confusingly similar to the EAGLE trademarks.

59. 1337 TACTICAL's actions are likely to cause confusion, to cause mistake, and to deceive purchasers, prospective purchasers, and the public.

60. 1337 TACTICAL's actions demonstrate an intentional, willful and malicious intent to trade upon the goodwill associated with the EAGLE trademarks.

61. 1337 TACTICAL's actions constitute unfair competition in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1125(a).

62. EAGLE is being and will continue to be damaged by 1337 TACTICAL's infringing activities, which are likely to cause confusion among the purchasing public as to the true identity, source, sponsorship or affiliation of the Infringing Goods and Services of 1337 TACTICAL.

63. Because of 1337 TACTICAL's infringing activities, EAGLE has suffered and will continue to suffer damage to its business reputation and goodwill, and the loss of sales and profits it would have made but for the improper acts of 1337 TACTICAL.

64. Because of 1337 TACTICAL's intentional infringing activities, EAGLE is entitled to injunctive relief, an accounting for profits, damages, costs and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125, 1116 and 1117. EAGLE is further entitled to have its damages award enhanced and its damages award trebled as authorized by 15 U.S.C. § 1117.

WHEREFORE, EAGLE prays:

1. That 1337 TACTICAL and its principals, officers, employees, servants, agents, representatives, distributors, attorneys and persons, firms or corporations under their control or in active concert or participation with 1337 TACTICAL be permanently enjoined by and restrained from infringing the '570 Patent, or inducing or contributing to the infringement of the patent-in-suit;
2. For an order that 1337 TACTICAL deliver to EAGLE any and all of their products that infringe any of the claims of the '570 Patent, pursuant to 35

U.S.C. § 283, and impounding all cut away vests that infringe the claims of the '570 Patent in 1337 TACTICAL's possession or under its control;

3. For a judgment that 1337 TACTICAL has infringed and is presently infringing one or more of the claims of the patent-in-suit by the manufacture, use sale and/or offer for sale of the infringing products;
4. For an accounting of all damages resulting from such infringement including an accounting of all profits derived from use of the accused infringing devices, and for an award of up to three (3) times the amount of damages found and assessed pursuant to 35 U.S.C. § 284;
5. For an award to EAGLE of all costs, interest and reasonable attorneys' fees pursuant to 35 U.S.C. §§ 284 and 285;
6. For an order that 1337 TACTICAL and all its agents, officers, employees, representatives, successors, assigns, attorneys, subsidiaries, parent companies, affiliates, retailers, independent contractors, customers, licensees, and all other persons acting for, with, by, through, or under authority from 1337 TACTICAL, or in concert or participation with 1337 TACTICAL, and each of them, be enjoined permanently, from:
 - (a) manufacturing, distributing, marketing, selling or offering for sale any goods or services that bear any of the Infringing Marks or any designation that is likely to cause harm, confusion, or dilution as to the CIRAS or EAGLE trademarks,

whether used alone or in combination with any other words or symbols;

(b) using any terms, marks, words or symbols that so resemble the CIRAS or EAGLE trademarks or any names, marks or designations of EAGLE as to be likely to cause confusion, mistake, deception or misunderstanding in connection with the manufacture, distribution, advertising, promotion or sale of any product which is not authorized by EAGLE, including but not limited to the marks used on or in connection with 1337 TACTICAL's Infringing Goods and Services;

(c) expressly or by implication, representing that 1337 TACTICAL or its goods are those of or are affiliated with, or authorized, licensed, endorsed or sponsored by EAGLE or its subsidiaries, affiliates or related companies;

(d) selling any goods or services or engaging in any actions which are likely to dilute or tarnish the distinctive quality of the CIRAS or EAGLE trademarks, names and forms of advertisement or otherwise cause injury to the business reputation of EAGLE, including but not limited to the Infringing Goods and Services;

(e) making or engaging in any express or implied false descriptions, false designations, or false representations with respect to the products of 1337 TACTICAL and those of EAGLE;

(f) otherwise infringing upon the CIRAS or EAGLE trademarks or unfairly competing with EAGLE in any manner whatsoever;

7. That 1337 TACTICAL be ordered to recall all products bearing the CIRAS or EAGLE trademarks, or any other confusingly similar mark, including but not limited to any of 1337 TACTICAL's Infringing Goods that have been shipped by 1337 TACTICAL or under their authority, to any customer including, but not limited to, any wholesaler, distributor, retailer, consignor, or marketer, and also to deliver to each customer a copy of this Court's order as it relates to said injunctive relief against 1337 TACTICAL;
8. That 1337 TACTICAL be ordered to deliver up for impoundment and destruction all of 1337 TACTICAL's Infringing Goods, and materials or documents used in the promotion or sales of 1337 TACTICAL's Infringing Goods, or other materials in the possession, custody, or under the control of 1337 TACTICAL or its business associates that are found to adopt, infringe, or otherwise harm any of the intellectual property of EAGLE or that otherwise unfairly compete with EAGLE and its products and services;

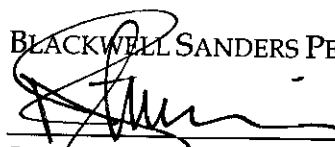
9. That 1337 TACTICAL be compelled to account to EAGLE for any and all profits derived by 1337 TACTICAL from the sale or distribution of Infringing Goods and Services as described in this Complaint;
10. That EAGLE be awarded all damages caused by the acts forming the basis of this Complaint;
11. Based on 1337 TACTICAL's knowing and intentional use of the intellectual property of EAGLE, the damages award be trebled pursuant to 15 U.S.C. § 1117 and the award of 1337 TACTICAL's profits be enhanced as provided for by federal law;
12. 1337 TACTICAL be required to pay to EAGLE the costs of this action and its reasonable attorneys' fees pursuant to 15 U.S.C. § 1117;
13. For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff Eagle Industries Unlimited, Inc. demands a jury trial on all issues so triable in this case.

Respectfully submitted,

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