

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(NORTHERN DIVISION)**

180S, INC.,)
701 East Pratt Street, Suite 180,)
Baltimore, MD 21202-3101,)
a Delaware corporation)
Plaintiff,)
and)
180S, LLC,)
701 East Pratt Street, Suite 180,)
Baltimore, MD 21202-3101,)
a Maryland limited liability company)
Plaintiff,)
v.)
J. C. PENNEY COMPANY, INC.,)
6501 Legacy Drive,)
Plano, TX 75024-3698,)
a Delaware corporation,)
Defendant,)
and)
J. C. PENNEY CORPORATION, INC.)
6501 Legacy Drive,)
Plano, TX 75024-3698,)
a Delaware corporation,)
Defendant,)
and)
DREW PEARSON MARKETING, INC.,)
11199 Excelsior Blvd.,)
Hopkins, MN 55343,)
a Minnesota corporation,)
Defendant,)
and)
FREE COUNTRY, LTD.,)
80 West 40th Street, 4th Floor,)
New York, NY 10018,)
a New York corporation,)
Defendant.)
_____)

Civil Action No. _____

**COMPLAINT FOR PATENT
INFRINGEMENT, TRADE DRESS
INFRINGEMENT, FALSE
ADVERTISING, UNFAIR
COMPETITION, AND CIVIL
CONSPIRACY**

DEMAND FOR JURY TRIAL

Plaintiffs 180s, Inc. and 180s, LLC, (collectively “180s” or “Plaintiffs”) allege as follows:

THE PARTIES

1. 180s, Inc. is a corporation organized under the laws of the State of Delaware, and having its principal place of business at 701 East Pratt Street, Suite 180, Baltimore, MD 21202-3101. 180s, Inc. owns all right, title, and interest in the intellectual property that is the subject matter of this suit. 180s, LLC, is a limited liability company organized under the laws of the State of Maryland, and having its principal place of business at 701 East Pratt Street, Suite 180, Baltimore, MD 21202-3101. 180s, LLC, is a wholly-owned subsidiary of 180s, Inc. and the exclusive licensee of the intellectual property that is the subject matter of this suit.

2. Defendant J. C. Penney Corporation, Inc. (“JC Penney Corporation”), on information and belief, is a corporation organized under the laws of the State of Delaware, and having a place of business at 6501 Legacy Drive, Plano, TX 75024-3698. According to the JCPenney.com website, JC Penney Corporation is one of the largest department store, catalog, and e-commerce retailers in the United States.

3. Defendant J. C. Penney Company, Inc., (“JC Penney Company”), on information and belief, is a corporation organized under the laws of the State of Delaware, and having a place of business at 6501 Legacy Drive, Plano, TX 75024-3698. According to the JCPenney.com website, JC Penney Corporation is a wholly-owned operating subsidiary of JC Penney Company.

4. Defendant Drew Pearson Marketing, Inc. (“Drew Pearson Marketing”), on information and belief, is a corporation organized under the laws of the State of Minnesota, and having a place of business at 11199 Excelsior Blvd., Hopkins, MN 55343. According to its website, Drew Pearson Marketing is one of the largest headwear companies with the most diverse product line in the industry.

5. Defendant Free Country Ltd. (“Free Country”), on information and belief, is a corporation organized under the laws of the State of New York, and having a place of business at 80 West 40th Street, 4th Floor, New York, NY 10018. According to its website, Free Country manufactures and sells recreational outerwear for men, women, and children.

JURISDICTION AND VENUE

6. This is a civil action for (i) patent infringement arising under the United States patent statutes, Title 35, United States Code, §§ 1 et seq.; (ii) trade dress infringement under Section 43(a) of the Lanham Act, Title 15, United States Code, § 1125(a), and under common law; (iii) false advertising under Section 43(a) of the Lanham Act, Title 15, United States Code, § 1125(a); (iv) unfair competition under Section 43(a) of the Lanham Act, Title 15, United States Code, § 1125(a), and under common law; and (iv) civil conspiracy.

7. This Court has jurisdiction of the subject matter of this action under Title 28, United States Code, §§ 1331, 1338(a), and 1367, and Title 15, United States Code, § 1121.

8. This Court has personal jurisdiction over JC Penney Company, JC Penney Corporation (collectively “JC Penney Defendants”), Drew Pearson Marketing, and Free Country because each of the defendants is doing and has done substantial business in this judicial district, and/or has committed acts of infringement in this judicial district. In addition, the JC Penney Defendants both maintain registered agents in the State of Maryland.

9. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b)-(c) and 1400(b).

BACKGROUND

10. 180s designs, manufactures and sells innovative performance wear, including ear warmers, gloves, and glasses. Founded by two University of Pennsylvania Wharton Business School students who invented and patented the first of its kind wrap-behind-the-head ear warmer, 180s has experienced more than a 9,000% growth since 1998, qualifying it as the ninth fastest growing privately held company in the nation according to *Inc. Magazine*. Headquartered

in Baltimore's inner-city, 180s is also ranked number one on the ICIC-Inc. Inner City 100 list, an annual ranking of the fastest growing inner-city private companies in the United States.

11. 180s' success has been driven largely by its innovative ear warmer products, which are protected by a significant portfolio of patents, including the two patents asserted in this action, and for which distinctive and nonfunctional trade dress exists. True and correct reproductions of photographs of a "180s" brand ear warmer are attached as Exhibits A and B. The distinctive trade dress for the "180s" ear warmer comprises some or all of the following elements: the overall shape of the product, the fabric selection, the existence of one or more labels on the interior middle portion of the product, the substantially-flat collapsed configuration, the overlap of one ear portion over the other in the collapsed configuration, and the selection of binding that is a different color than the interior fabric.

12. On January 27, 2003, United States Patent No. 6,502,247 ("the '247 Patent"), entitled "Apparatus and Method for Making an Ear Warmer Having Interior Seams," was duly and legally issued to Brian Edward Le Gette et al., and was assigned to Gray Matter Holdings, LLC, a limited liability company organized under the laws of the State of Delaware. A true and correct copy of the '247 patent is attached as Exhibit C.

13. On August 13, 2003, Gray Matter Holdings, LLC, changed its name to 180s, Inc.

14. On May 18, 2004, United States Patent No. 6,735,784 ("the '784 Patent"), entitled "Apparatus and Method for Making an Ear Warmer and an Ear Warmer Frame," was duly and legally issued to Matthew Isom et al., and was assigned to 180s, Inc.. A true and correct copy of the '784 patent is attached as Exhibit D.

15. 180s, Inc. is now the sole owner of the entire right, title, and interest in the '247 Patent and the '784 Patent, and 180s, LLC, is the exclusive licensee under the '247 Patent and the '784 Patent.

16. The trade dress rights in 180s' ear warmers are assigned to 180s, Inc., which has

exclusively licensed those trade dress rights to 180s, LLC.

17. Prior to on or about February 23, 2004, 180s, LLC, and the JC Penney Defendants had a business relationship whereby 180s, LLC, sold “180s” ear warmer products to the JC Penney Defendants. The JC Penney Defendants in turn sold the “180s” ear warmer products through various channels, including their website, JCPenney.com, and their retail stores.

18. On or about February 2004, 180s, LLC, notified the JC Penney Defendants that it would discontinue selling the “180s” ear warmer products to the JC Penney Defendants. By on or about February 23, 2004, 180s, LLC, no longer sold “180s” ear warmer products to the JC Penney Defendants.

19. On or about June 25, 2004, 180s, LLC, sent letters to several buyers and managers of the JC Penney Defendants. In the letters, 180s, LLC, warned the JC Penney Defendants that infringing ear warmer products were being offered to retail partners of 180s, LLC. In the letters, 180s, LLC, further notified the JC Penney Defendants of the existence of several issued patents directed to ear warmers and owned by 180s, including the ‘247 Patent.

20. In September, 2004, less than three months after these June 25, 2004 letters, 180s discovered that the JC Penney Defendants had begun selling and offering to sell through the JCPenney.com website an ear warmer under the name “Ear Wrap™ by Free Country®.” True and correct printouts of pages from the JC Penney Defendants’ website offering the Ear Wrap™ product for sale are attached as Exhibits E through G.

21. True and correct reproductions of photographs of an Ear Wrap™ product purchased through the JC Penney Defendants’ website are attached as Exhibits H through J. As shown in Exhibit I, a label entitled “Free Country” is attached to the Ear Wrap™ product. As shown in Exhibit J, another label includes the designation “Drew Pearson Marketing.” As shown in Exhibit G, the JC Penney Defendants, in promoting the Ear Wrap™ product on their website, use photographs that portray the Ear Wrap™ product as having a collapsible configuration in

which one ear cup overlaps the other. As shown in Exhibit H, however, the Ear Wrap™ product does not have a collapsible configuration.

COUNT ONE—INFRINGEMENT OF THE ‘247 PATENT

22. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 21 of this Complaint as though fully set forth herein.

23. The JC Penney Defendants, Drew Pearson Marketing, and Free Country have each infringed—directly, indirectly, or both—at least one claim of the ‘247 Patent under Section 271 of Title 35 of the United States Code by making, using, selling, and/or offering to sell in the United States and/or importing into the United States devices embodying the inventions claimed in the ‘247 Patent, including, but not limited to, an ear warmer device sold under the name “Ear Wrap™.”

24. On information and belief, the JC Penney Defendants, Drew Pearson Marketing, and Free Country will continue to infringe the ‘247 Patent unless enjoined by this Court.

25. On information and belief, the infringement of the ‘247 Patent by at least the JC Penney Defendants and Drew Pearson Marketing has been willful.

COUNT TWO—INFRINGEMENT OF THE ‘784 PATENT

26. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 25 of this Complaint as though fully set forth herein.

27. The JC Penney Defendants, Drew Pearson Marketing, and Free Country have each infringed—directly, indirectly, or both—at least one claim of the ‘784 Patent under Section 271 of Title 35 of the United States Code by making, using, selling, and/or offering to sell in the United States and/or importing into the United States devices embodying the inventions claimed in the ‘784 Patent, including, but not limited to, an ear warmer device sold under the name “Ear Wrap™.”

28. On information and belief, the JC Penney Defendants, Drew Pearson Marketing, and Free Country will continue to infringe the '784 Patent unless enjoined by this Court.

29. On information and belief, the infringement of the '784 Patent by at least the JC Penney Defendants and Drew Pearson Marketing has been willful.

**COUNT THREE—TRADE DRESS INFRINGEMENT UNDER 15 U.S.C. 1125(a)
(LANHAM ACT §43(a)) AND UNDER COMMON LAW**

30. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 29 of this Complaint as though fully set forth herein.

31. On information and belief, the JC Penney Defendants, Drew Pearson Marketing, and Free Country have sold or used in commerce the "Ear Wrap™" product having trade dress confusingly similar to the trade dress of the ear warmer products sold by 180s, LLC, which trade dress is owned by 180s, Inc. and exclusively licensed to 180s, LLC.

32. The trade dress of the "Ear Wrap™" is likely to cause confusion, mistake, or deception as to the source or sponsorship of the product.

33. On information and belief, at least the JC Penney Defendants and Drew Pearson Marketing knew of the trade dress of the ear warmer products sold by 180s, LLC, and intentionally and directly sold the "Ear Wrap™" product having trade dress confusingly similar to such trade dress, in knowing, deliberate, and willful disregard of Plaintiffs' trade dress rights.

34. The actions of the JC Penney Defendants, Drew Pearson Marketing, and Free Country described above, and specifically, without limitation, the JC Penney Defendants', Drew Pearson Marketing's, and Free Country's use of the Plaintiffs' trade dress for ear covering products, constitute trade dress infringement in violation of Section 43(a) of the Lanham Act and common law trade dress infringement.

35. Plaintiffs have been, and will continue to be, damaged and irreparably harmed by the actions of the JC Penney Defendants, Drew Pearson Marketing, and Free Country, which will

continue unless the JC Penney Defendants, Drew Pearson Marketing, and Free Country are enjoined by this Court.

**COUNT FOUR—FALSE ADVERTISING UNDER 15 U.S.C. 1125(a)
(LANHAM ACT §43(a))**

36. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 35 of this Complaint as though fully set forth herein.

37. The actions of the JC Penney Defendants described above constitute false advertising in violation of Section 43(a) of the Lanham Act. Combined with the above-described facts, the JC Penney Defendants' use in commerce of the photograph showing the "Ear Wrap™" product as collapsible is false and/or misleading such as to cause confusion and/or a likelihood of confusion or mistake as to (i) the origin, association, or approval by 180s of the "Ear Wrap™" product, and/or (ii) the characteristics of the "Ear Wrap™" product.

38. Plaintiffs have been, and will continue to be, damaged and irreparably harmed by the actions of the JC Penney Defendants, which will continue unless the JC Penney Defendants are enjoined by this Court.

**COUNT FIVE—UNFAIR COMPETITION UNDER 15 U.S.C. 1125(a)
(LANHAM ACT §43(a)) AND UNDER COMMON LAW**

39. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 38 of this Complaint as though fully set forth herein.

40. The actions of the JC Penney Defendants, Drew Pearson Marketing, and Free Country described above constitute unfair competition in violation of Section 43(a) of the Lanham Act and unfair competition under common law.

41. Plaintiffs have been, and will continue to be, damaged and irreparably harmed by the actions of the JC Penney Defendants, Drew Pearson Marketing, and Free Country, which will continue unless the JC Penney Defendants, Drew Pearson Marketing, and Free Country are enjoined by this Court.

COUNT SIX—CIVIL CONSPIRACY

42. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 41 of this Complaint as though fully set forth herein.

43. On information and belief, one or more of the JC Penney Defendants and Drew Pearson Marketing entered into an agreement to perform unlawful acts described above, including patent infringement, trade dress infringement, and unfair competition.

44. Plaintiffs have been, and will continue to be, damaged and irreparably harmed by the JC Penney Defendants' and Drew Pearson Marketing's unlawful acts, which will continue unless the JC Penney Defendants and Drew Pearson Marketing are enjoined by this Court.

REQUEST FOR RELIEF

WHEREFORE, the Plaintiffs request the following relief:

- A. a preliminary and permanent injunction against the JC Penney Defendants, Drew Pearson Marketing, and Free Country, their respective officers, agents, servants, employees, attorneys, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, enjoining them from continued acts of infringement of the '247 Patent;
- B. a preliminary and permanent injunction against the JC Penney Defendants, Drew Pearson Marketing, and Free Country, their respective officers, agents, servants, employees, attorneys, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, enjoining them from continued acts of infringement of the '784 Patent;
- C. a preliminary and permanent injunction against the JC Penney Defendants, Drew Pearson Marketing, and Free Country, their respective officers, agents, servants, employees, attorneys, parent and subsidiary corporations, assigns and successors


- in interest, and those persons in active concert or participation with them, enjoining them from continued acts of infringement of the Plaintiffs' trade dress;
- D. a preliminary and permanent injunction against the JC Penney Defendants, their respective officers, agents, servants, employees, attorneys, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, enjoining them from continued acts of false advertising;
- E. a preliminary and permanent injunction against the JC Penney Defendants, Drew Pearson Marketing, and Free Country, their respective officers, agents, servants, employees, attorneys, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, enjoining them from continued acts of unfair competition;
- F. a judgment holding the JC Penney Defendants, Drew Pearson Marketing, and Free Country liable for infringement of the '247 Patent;
- G. a judgment holding the JC Penney Defendants, Drew Pearson Marketing, and Free Country liable for infringement of the '784 Patent;
- H. a judgment holding the JC Penney Defendants, Drew Pearson Marketing, and Free Country liable for infringement of the Plaintiffs' trade dress;
- I. a judgment holding the JC Penney Defendants liable for false advertising;
- J. a judgment holding the JC Penney Defendants, Drew Pearson Marketing, and Free Country liable for unfair competition;
- K. a judgment holding the JC Penney Defendants and Drew Pearson Marketing liable for civil conspiracy;
- L. an accounting of damages resulting from the infringement by the JC Penney Defendants, Drew Pearson Marketing, and Free Country of the '247 Patent,

- together with prejudgment and postjudgment interest;
- M. an accounting of damages resulting from the infringement by the JC Penney Defendants, Drew Pearson Marketing, and Free Country of the '784 Patent, together with prejudgment and postjudgment interest;
 - N. an accounting and award of the profits of the JC Penney Defendants, Drew Pearson Marketing, and Free Country and Plaintiffs' damages resulting from the infringement of Plaintiffs' trade dress by JC Penney Defendants, Drew Pearson Marketing, and Free Country;
 - O. an accounting and award of the profits of the JC Penney Defendants and Plaintiffs' damages resulting from the acts of false advertising by the JC Penney Defendants;
 - P. an accounting and award of the profits of the JC Penney Defendants, Drew Pearson Marketing, and Free Country and Plaintiffs' damages resulting from the acts of unfair competition by JC Penney Defendants, Drew Pearson Marketing, and Free Country;
 - Q. an accounting of damages resulting from the acts of civil conspiracy by the JC Penny Defendants and Drew Pearson Marketing;
 - R. that the infringement by the JC Penney Defendants and Drew Pearson Marketing of the '247 Patent be adjudged willful and Plaintiffs' damages be trebled pursuant to Title 35, United States Code, § 284;
 - S. that the infringement by the JC Penney Defendants and Drew Pearson Marketing of the '784 Patent be adjudged willful and Plaintiffs' damages be trebled pursuant to Title 35, United States Code, § 284;
 - T. that this be adjudged an exceptional case and that the Plaintiffs be awarded their attorneys' fees pursuant to Title 35, United States Code, § 285; and

U. that the Court grant the Plaintiffs such other relief as it deems just and equitable.

Dated: September 17, 2004

180s, INC. and 180s, LLC


By
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DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs 180s, Inc. and 180s, LLC, hereby demand a trial by jury of all issues triable of right by a jury.

Dated: September 14, 2004

180s, INC. and 180s, LLC

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