

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

GREATER PERFORMANCE, INC.)
P.O. Box 259)
Cameron, MO 64429)

Plaintiff,)

Case No.: _____

v.)

HARK'N TECHNOLOGIES, INC)
P.O. Box 160327)
Building A15, Sect. 1)
Clearfield, UT 84016)

and)

HARK'N TECHNOLOGIES, LTD.)
13507 Helmsley Ct.)
Charlotte, NC 28273)

Defendants.)

**COMPLAINT FOR DECLARATORY JUDGMENT OF
NONINFRINGEMENT AND INVALIDITY**

COMES NOW Plaintiff Greater Performance, Inc. ("GPI"), and for its complaint against Defendants Hark'n Technologies, Inc. ("Hark'n Inc.") and Hark'n Technologies, Ltd. ("Hark'n Ltd.") alleges and states the following:

1. This is an action for declaratory judgment, pursuant to 28 U.S.C. Sections 2201 and 2202, for the purpose of determining questions of actual controversy as to the alleged infringement of a patent and to the patent's validity.

2. This Court has jurisdiction pursuant to 28 U.S.C. Section 1338 because this is an action arising under an Act of Congress relating to patents. Venue is proper in this district pursuant to 28 U.S.C. Section 1391 because: a) Hark'n Inc. and Hark'n Ltd. are subject to

personal jurisdiction in this judicial district and are therefore deemed to reside in this judicial district; and b) a substantial part of the events or omissions giving rise to the claim took place within De Kalb County, Missouri, which is within the Western District of Missouri.

Parties

3. Plaintiff GPI is a corporation organized under the laws of the State of Missouri with its corporate offices in Cameron, De Kalb County, Missouri.

4. Defendant Hark'n Inc. is a corporation organized under the laws of the State of North Carolina with its corporate offices in Clearfield, Utah.

5. Defendant Hark'n Ltd. is a corporation organized under the laws of the State of North Carolina with its corporate offices in North Carolina.

Factual Background: Greater Performance, Inc.

6. GPI is a corporation that manufactures and sells specialized athletic equipment, including equipment that is utilized in speed training.

7. On or about January 1994, GPI began offering for sale its covered Speedster Lightning Cord. Affidavit of Tim Newman ¶2, ("Newman Aff."), attached hereto as **Exhibit A** and incorporated by reference as if fully set forth herein.¹

8. The covered Speedster Lightning Cord, which is used by athletes in speed training, is made from heavy duty, top-grade latex tubing and is covered with a pliable fabric safety cover. The fabric cover is approximately four times the length of the latex tubing. The purpose of the fabric cover is to protect the athlete, in case the latex cord were to snap, keeping it contained within the safety cover. The fabric cover also protects the latex tubing from abrasion and ultraviolet light exposure. The

¹ Although a facsimile version of the affidavit is attached hereto, it will be replaced with the original affidavit as soon as it has been received by GPI's counsel.

cord further includes attachment means at either end, which are connected to the fabric safety cover. Newman Aff. ¶2, **Ex. A**.

9. GPI sold numerous Speedster Lightning Cords between January 1994 and July 1998. Newman Aff. ¶3, **Ex. A**.

10. GPI has utilized various publications, such as brochures and catalogues, to assist in the marketing and sales of its covered Speedster Lightning Cord. A brochure that was published and distributed to potential customers in 1997 is attached hereto. Newman Aff. ¶4, **Ex. A**.

11. Several companies other than GPI and Hark'n Inc. and/or Hark'n Ltd. manufactured and marketed devices similar to the covered Speedster Lightning Cord prior to July 1998. Such devices also utilized an elastic member, a fabric covering, and attachment means, and were marketed as sports training devices. Newman Aff. ¶5, **Ex. A**.

Factual Background: Hark'n Technologies

12. On information and belief, Hark'n Inc. and Hark'n Ltd. are corporations that manufacture and market sports fitness and training equipment on a nationwide basis.

13. On information and belief, such marketing has occurred within the Western District of Missouri judicial district.

14. U.S. Patent No. 6,202,263 ("the '263 Patent"), entitled "Safety Sleeve Elastic Device," was issued on March 20, 2001. The application for this patent was originally filed July 16, 1998. A true and correct copy of the patent is attached hereto as **Exhibit B** and is incorporated by reference as if fully set forth herein.

15. The '263 Patent lists Shon Les Harker as inventor. Legal counsel for "Hark'n Technologies" represented to GPI in a letter dated June 14, 2001, that "Hark'n Technologies" is

the holder of the '263 Patent.² A true and correct copy of the letter is attached hereto as **Exhibit C** and is incorporated by reference as if fully set forth herein.

16. The abstract for the '263 Patent states:

The present invention provides a unique safety sleeve elastic device having an elastic member of a certain longitudinal length. The elastic member provides stretching capability of up to seven times the elastic member's original length depending on the material selected. A flexible sleeve member is disposed around the elastic member. The sleeve member is less elastic than the elastic member and provides a stretch limitation to the elastic member to prevent a user from stretching the elastic member beyond a safe elongation. The ends of the sleeve and elastic members are secured proximate to one another. The ends of the elastic members are further secured to connectors. The elastic member provides stretch capability while the sleeve member provides safety features to protect the elastic member and the user. **Ex. B.**

17. The '263 Patent contains a total of 17 claims, 4 independent and 13 dependent. Two of the independent claims are drawn to the actual apparatus. The other two independent claims are drawn to a method for producing the apparatus. **Ex. B.**

18. In its letter of June 14, 2001, legal counsel for "Hark'n Technologies" notified GPI that its products were infringing on Patent '263 and demanded that GPI "immediately stop all infringing activity, including the manufacture, sale, or advertising of any infringing products." **Ex. C.**

REQUEST FOR DECLARATORY JUDGMENT

19. GPI repeats and reallages the allegations set forth in paragraphs 1 through 18 of the Complaint as though set forth in full herein, and incorporates them by reference.

² Legal counsel did not specify in the letter whether the holder of the '263 Patent is Hark'n Technologies, Inc. or Hark'n Technologies, Ltd. Once the precise holder of the patent is made clear, GPI will amend its Complaint as necessary.

20. An actual, present and existing controversy has arisen between GPI and Hark'n Inc. and/or Hark'n Ltd. with respect to whether GPI's covered Speedster Lightning Cord infringes on Patent '263. GPI requests a judicial determination of whether GPI's product infringes on Patent '263 and whether said patent is valid.

21. Under United States patent law, specifically 35 U.S.C. Section 102(a), a patent can be invalidated if it can be shown the subject matter of the patent was already known and in use by others in the United States prior to the inventor's date of invention. Further, under 35 U.S.C. Section 103(a), a patent can be invalidated if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains.

22. The '263 Patent is invalid because:

a) GPI was producing, marketing, and selling its covered Speedster Lightning Cord, which involves the same subject matter of the '263 Patent, on a continuous basis for nearly four and one half years prior to July 16, 1998;

b) Several companies other than GPI and Hark'n Inc. and/or Hark'n Ltd. manufactured and marketed devices involving the same subject matter of the '263 Patent prior to July 16, 1998;

c) The invention described by the '263 Patent is obvious as that term is defined and interpreted by applicable statutes and case law; and

d) The '263 Patent is overly broad as that concept is defined by applicable case law.

23. GPI has not infringed on a validly-issued patent owned by Hark'n Inc and/or Hark'n Ltd.

24. The conduct of Hark'n Inc. and/or Hark'n Ltd. in obtaining and enforcing its '263 Patent has been unreasonable and inequitable. Therefore, under 35 U.S.C. Section 285, GPI is entitled to an award of reasonable attorneys' fees in bringing this action.

WHEREFORE, Plaintiff Greater Performance, Inc. prays that judgment be entered in its favor against Defendants Hark'n Technologies Inc. and Hark'n Technologies Ltd.:

1. declaring that GPI's covered Speedster Lightning Cord does not infringe on U.S. Patent No. 6,202,263;
2. declaring that U.S. Patent No. 6,202,263 is invalid;
3. awarding GPI its reasonable attorneys' fees; and
4. granting such other and further relief as the Court deems just and proper.

JURY TRIAL DEMAND

Greater Performance, Inc. demands trial by jury on all issues so triable.

Respectfully submitted,

POLSINELLI SHALTON & WELTE
A PROFESSIONAL CORPORATION

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