IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SERGIO AGUIRRE,	§	
	§	
Plaintiff,	§	**Civil Action No. 5:10-cv-702-XR**
v.	§	
	§	
(1) POWERCHUTE SPORTS, LLC;	§	
(2) JAMES SOWERWINE;	§	**JURY TRIAL DEMANDED**
(3) TC TRUST, LLC; and	§	
(4) OCTAGON, INC.;	§	
	§	
Defendants.	§	

FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT

On August 23, 2010, Plaintiff Sergio Aguirre filed the Original Complaint alleging Patent Infringement in this action. Plaintiff Aguirre amends his complaint to plead action for patent infringement, violation of the Sherman Antitrust Act §2, fraud, intentional interference with prospective business relations, and unjust enrichment and makes the following allegations against Powerchute Sports, LLC, James Sowerwine, TC Trust, LLC, and Octagon, Inc. (collectively the "Defendants").

PARTIES

1. Plaintiff Sergio Aguirre is a Texas resident with his principal residence at 9619 Berryville, San Antonio, Texas 78245.

2. On information and belief, Defendant Powerchute Sports, LLC is a Florida limited liability company with its principal place of business at 2338 Immokalee Road, No. 248, Naples, Florida 34110.

3. On information and belief, Defendant James Sowerwine is a Florida resident with his principal residence at 930 Nottingham Drive, Naples, Florida 34109.

4. On information and belief, Defendant TC Trust, LLC is a Florida limited liability company with its principal place of business at 13487 Rosewood Lane, Naples Florida 34119.

5. On information and belief, Defendant Octagon, Inc. is a District of Columbia corporation with its principal place of business at 800 Connecticut Avenue, 2nd Floor, Norwalk, CT 06854.

JURISDICTION

6. This action arises under the patent laws of the United States, Title 35 of the United States Code. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

7. Additionally, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §1332. Jurisdiction is founded on diversity of citizenship and the matter in controversy exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand Dollars ($75,000.00). As is evidenced by the Paragraphs 2 through 4 of the instant Complaint which is specifically incorporated herein, all of the Defendants are corporations incorporated under the laws of various states as stated *supra* and having their principal places of business in states other than Texas.

8. On information and belief, Defendants are subject to this Court's specific and general personal jurisdiction pursuant to due process and/or the Texas Long

Arm Statute, due at least to their substantial business in this forum, including: (i) at least a portion of the infringements alleged herein; and (ii) regularly doing or soliciting business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from goods and services provided to individuals in Texas and in this Judicial District.

VENUE

9. Venue is proper in this district under 28 U.S.C. §§ 1391(c) and 1400(b). On information and belief, each Defendant has transacted business in this District, and has committed and/or induced acts of patent infringement in this district.

FACTS

Mr. Aguirre and U.S. Patent No. 7,384,344

10. Mr. Aguirre began playing golf at approximately the age of 25. After that time, Mr. Aguirre developed a lifelong love of the game and began to wonder how he could improve his game. This was particularly true as to the improvement of his endurance during a game of golf. Despite working as a carpenter, Mr. Aguirre was unable to develop the musculature and stamina required by a proper, effective golf swing over 18 holes.

11. Starting in March 2002, shortly after his marriage, Mr. Aguirre began tinkering with a concept to improve both his stamina and musculature as it relates to his golf swing.

12. In reviewing the golf-training products that were available, Mr. Aguirre rejected each of the types of physical training devices available. For example, there were certain golf trainers that had no weights attached to them. These unweighted devices fail to provide the correct swing required in the game of golf.

13. Mr. Aguirre also rejected a second category of trainers, systems that relied on a system of hoops, tracks or belts. These systems provided little guidance as to an appropriate swing, although they did tend to increase strength and stamina.

14. Mr. Aguirre also rejected a final category of golf trainers: trainers that were just heavier versions of actual golf clubs or overweighted facsimiles of golf clubs. Again, although these trainers may increase strength, they would not necessarily help a person's swing.

15. While working daily as a carpenter and despite having only a 7th grade education, Mr. Aguirre developed the concepts that are embodied in Provisional Application No. 60/609,932, which he filed on September 14, 2005.

16. On September 14, 2005, Mr. Sergio Aguirre filed United States Patent Application No. 11/226,752 (the "'752 Application"), titled "Physical Conditioning Aid for Golfers."

17. The '752 Application claims priority to Provisional Application No. 60/609,932.

18. As Mr. Aguirre had not requested that the '752 Application be kept confidential, the '752 Application was published on April 13, 2006 under United States Patent Publication No. 2006/0079344 A1. (Ex. A.)

19. After approximately a two-and-a-half year prosecution, the United States Patent and Trademark Office sent a Notice of Allowance to Mr. Aguirre on January 25, 2008.

20. United States Patent No. 7,384,344 (the "'344 Patent) issued to Mr. Aguirre on June 10, 2008. (Ex. B.)

Mr. Aguirre and Zswinger

21. In 2008, Mr. Aguirre began to form Zswinger, Inc., a company meant to manufacture and commercialize the invention of the '344 Patent.

22. Additionally, Zswinger registered and began using the web domain www.zswinger.com on May 28, 2008.

23. In its attempts to market its product, Zswinger has attended numerous golf industry trade shows. Among these shows, Zswinger was a featured exhibitor at the Professional Golf Association Merchandise Show in January of 2010.

24. On information and belief, one of the people who visited Zswinger's exhibition booth was Mr. James Sowerwine.

The Celone Patent and Defendants' Fraud

25. On August 11, 2003, Thomas Celone filed an application for a utility patent. This application was titled "Golf Swing Exercise Device" and given an application number of 10/649, 236 (the "'236 Application").

26. Along with his initial application filed August 11, 2003, Mr. Celone filed a "Request for Non-publication Pursuant to 37 C.F.R. § 1.213." (Ex. C.)

27. On October 4, 2004, the Sierra Patent Group, who had been assisting Mr. Celone, filed a "Request for Withdrawal as Attorney or Agent." The reason listed for the requested withdrawal of Mr. Celone's attorneys was that Mr. Celone had "failed to pay one or more bills rendered by the practitioner for an unreasonable period of time or has failed to honor an agreement to pay a retainer in advance of the performance of legal services." (Ex. D.)

28. On October 29, 2004, the USPTO transmitted a non-final rejection on the '236 Application. This non-final rejection required a reply within 3 months of the mailing date of the non-final rejection. Additionally, the non-final rejection states: "In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication." (Ex. E.)

29. This six-month deadline for reply to the October 29, 2004 non-final rejection passed without reply on April 29, 2005.

30. On February 3, 2005, the USPTO provided notice to Mr. Celone of its acceptance of the withdrawal of the Power of Attorney for Sierra Patent Group and appointing Mr. Celone the attorney/agent for his own application. (Ex. F.)

31. On June 10, 2005, the USPTO sent a Notice of Abandonment to Mr. Celone personally. (Ex. G.)

32. On November 9, 2006—517 days after the Notice of Abandonment was filed by the USPTO—Smith & Hogen filed an Assignment of Rights in Patent Application and a Power of Attorney. The Assignment of Rights in Patent Application was an assignment from Sowerwine Golf Solutions, LLC to Sowerwine Golf, Inc; both

companies having the same principal place of business. (Ex. H.) The Power of Attorney was provided by Sowerwine Golf, Inc. and signed by Mr. James R. Sowerwine. (*Id.*)

33. On November 21, 2006, the USPTO accepted the November 9, 2006 Power of Attorney on behalf of Sowerwine Golf, Inc and mailed a Notice reflecting the same. (Ex. I.)

34. Despite the acceptance of the Power of Attorney by the USPTO, it was not until April 8, 2008 that the attorneys for Sowerwine Golf, Inc. took any further action on the '236 Application. Between the acceptance of the Power of Attorney and the next action on the '236 Application, 504 days elapsed.

35. In its communication on April 8, 2008, Sowerwine Golf, Inc. provided the following items, among other things, to the USPTO: a Petition for Revival of Application for Patent Abandoned Unintentionally ("Petition for Revival"); a Statement Indicating that the Entire Delay was Unintentional ("Statement"); and an Amendment. (Ex. J at 1.)

36. In its Petition for Revival, Sowerwine Golf, Inc. states: "The above-identified application became abandoned for failure to file a timely and proper reply to a notice or action by the United States Patent and Trademark Office. The date of abandonment is the day after the expiration date of the period set for reply in the Office notice or action plus any extensions of time actually obtained. Applicant hereby petitions for revival of this application. " (Ex. J at 2.)

37. In the Statement, Mr. Thomas E. Toner, an attorney or agent for Sowerwine Golf, Inc., states: "The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 C.F.R. 1.137(b)

was unintentional." This statement was made under penalty of perjury and the express acknowledgement that "such willful false statement may jeopardize the validity of this application or document and any registration resulting therefrom." (Ex. J at 4.)

38. Neither Sowerwine Golf, Inc. nor its attorneys gave any other explanation regarding the over three-year delay in responding to the October 29, 2004 Non-Final Rejection. Nor did Sowerwine Golf, Inc. or its attorneys explain how this delay was unintentional.

39. When the USPTO granted Sowerwine Golf, Inc.'s petition, it did so with the following caveat: "It is not apparent whether the statement of unintentional delay was signed by a person who would have been in a position of knowing that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition . . . . If petitioner discovers that the delay was intentional, petitioner must notify office." (Ex. K.)

40. Later in the '236 Application and despite receiving a Notice of Allowance, Sowerwine Golf, Inc. once more abandoned the application on November 17, 2009.

41. When the Notice of Allowance was granted, the Notice provided: "THE ISSUE FEE AND PUBLICATION FEE . . . MUST BE PAID WITHIN THREE MONTHS FROM THE MAILING DATE OF THIS NOTICE OR THIS APPLICATION SHALL BE REGARDED AS ABANDONED. THIS STATUTORY PERIOD CANNOT BE EXTENDED." (Ex. L.)

42. Therefore, the '236 Application was abandoned again on February 17, 2010.

43. On February 15, 2010, Sowerwine Golf, Inc. was dissolved and its interest in the '236 Application was assigned to Powerchute Sports, LLC. (Ex. M.)

44. The same day Powerchute Sports, LLC transferred its interest, or a portion thereof, to TC Trust, LLC. (*Id.*)

45. On March 10, 2010, the TC Trust petitioned for revival of the abandoned '236 Application. (Ex. N.)

46. Once again, the attorneys prosecuting the '236 Application stated: "The above-identified application became abandoned for failure to file a timely and proper reply to a notice or action by the United States Patent and Trademark Office. The date of abandonment is the day after the expiration date of the period set for reply in the Office notice or action plus any extensions of time actually obtained. Applicant hereby petitions for revival of this application. " (Ex. N at 3.)

47. Once again, an attorney or agent working on the '236 Application stated: "The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 C.F.R. 1.137(b) was unintentional. " This statement was made under penalty of perjury and the express acknowledgement that "such willful false statement may jeopardize the validity of this application or document and any registration resulting therefrom." (Ex. N at 5.)

48. On June 22, 2010, the USPTO granted the revival petition of the '236 Application. (Ex. O.)

49. On July 27, 2010, United States Patent No. 7,762,929 issued from the '236 Application. (Ex. P.)

The Defendants' Business Organizations and Relationships

50. On information and belief, Sowerwine Golf, Inc. was a company formed by Mr. Sowerwine to market his golf services as well as certain other golf-related products or services.

51. Sowerwine Golf, Inc. was formed on February 20, 2003 and voluntarily dissolved on August 14, 2009. (Ex. Q.)

52. On information and belief Sowerwine Golf Solutions, LLC is a company formed by Mr. Sowerwine to market his golf services as well as certain other golf-related products or services.

53. Sowerwine Golf Solutions, LLC was formed January 15, 2002 and lists Mr. Sowerwine as President and Mr. Gary Handler as Manager. (Ex. R.)

54. On information and belief, Powerchute Sports, LLC ("Powerchute Sports"), is a company that was formed by Mr. Sowerwine to manufacture and market, among other things, a product called the "Powerchute."

55. Powerchute Sports was formed and registered with the Florida Secretary of State on July 2, 2009 and Mr. Tim Yablonowski is listed as Manager. (Ex. S.)

56. On information and belief, TC Trust, LLC ("TC Trust") is a company that was formed by Mr. Sowerwine, among others, to manufacture, among other things, a product called the "Powerchute."

57. TC Trust, LLC was formed and registered with the Florida Secretary of State on December 30, 2009 and Mr. Timothy Yablonowski is listed as "MGRM." (Ex. T.)

58. On June 7, 2010, Octagon, Inc. and Powerchute Sports announced a partnership in which "Octagon will provide digital and social media consulting services to Powerchute and assist with sales and marketing efforts." (Ex. U.)

Powerchute Sports's Marketing

59. Throughout its marketing material, Powerchute Sports emphasizes the "patented" quality of its invention. For example, on its homepage, the very first description of the product is a reference to "Powerchute's patented design . . . ." (*See* *www.powerchutesports.com*, last visited Aug. 17, 2010, Ex. V.) Similarly, the webpage titled "What is Powerchute?", contains no fewer than four different references to the "patented" nature of the product. (*See* *http://www.powerchutesports.com/what-is-powerchute.html*, last visited Aug. 17, 2010, Ex. W; *see also* Exs. X-Y (providing additional examples where Powerchute Sports stresses the "patented" nature of the invention).)

COUNT I: INFRINGEMENT OF U.S. PATENT NO. 7,384,344

60. Mr. Aguirre incorporates by reference Paragraphs 1-59 as set forth fully herein.

61. Mr. Sergio Aguirre is the inventor and owner of United States Patent No. 7,384,344 (the "'344 Patent") entitled "Physical Conditioning Aid for Golfers." The '344 Patent issued on June 10, 2008, and was filed on September 14, 2005. A true and correct copy of the '344 Patent is attached as Exhibit B.

Powerchute Sports: Infringement

62. Upon information and belief, Defendant Powerchute Sports, Inc. has been and now is directly and jointly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '344 Patent in the State of Texas, in this Judicial District, and elsewhere in the United States, by, among other things, making, using, selling and/or offering for sale systems and/or methods for physically conditioning golfers covered by one or more claims of the '344 Patent to the injury of Mr. Aguirre, including the sale of its Powerchute product. Defendant Powerchute Sports is thus liable for infringement of the '344 Patent pursuant to 35 U.S.C. § 271.

Powerchute Sports: Willful Infringement

63. Powerchute Sports, LLC's infringement has been willful.

64. On information and belief, Mr. James Sowerwine, an employee, owner and/or principal of Powerchute Sports, LLC, attended the Professional Golf Association Merchandise Show in January of 2010 and visited Zswinger's exhibition booth, among the materials that Zswinger provided at this booth was information related to the patented-nature of the Zswinger product.

65. As a result, Mr. Sowerwine and Powerchute Sports were aware of the '344 Patent and on notice that their product was infringing.

James Sowerwine: Infringement

66. Upon information and belief, Defendant James Sowerwine has been and now is directly and jointly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '344 Patent in the State of Texas, in this Judicial District, and elsewhere in the United States, by, among other things, making, using, selling and/or offering for sale systems and/or methods for physically conditioning golfers covered by one or more claims of the '344 Patent to the injury of Mr. Aguirre, including the sale of Powerchute Sports, LLC's Powerchute product. Defendant James Sowerwine is thus liable for infringement of the '344 Patent pursuant to 35 U.S.C. § 271.

James Sowerwine: Willful Infringement

67. Powerchute Sports, LLC's infringement has been willful.

68. On information and belief, Mr. James Sowerwine, an employee, owner and/or principal of Powerchute Sports, LLC, attended the Professional Golf Association Merchandise Show in January of 2010 and visited Zswinger's exhibition booth, among the materials that Zswinger provided at this booth was information related to the patented-nature of the Zswinger product.

69. As a result, Mr. Sowerwine and Powerchute Sports were aware of the '344 Patent and on notice that their product was infringing.

TC Trust: Infringement

70. Upon information and belief, Defendant TC Trust, LLC has been and now is directly and jointly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '344 Patent in the State of Texas, in this Judicial District, and elsewhere in the United States, by, among other things, making, using, selling and/or offering for sale systems and/or methods for physically conditioning golfers covered by one or more claims of the '344 Patent to the injury of Mr. Aguirre, including the sale of Powerchute Sports, LLC's Powerchute product. Defendant TC Trust, LLC is thus liable for infringement of the '344 Patent pursuant to 35 U.S.C. § 271.

Octagon: Infringement

71. Upon information and belief, Defendant Octagon, Inc. has been and now is directly and jointly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '344 Patent in the State of Texas, in this Judicial District, and elsewhere in the United States, by, among other things, making, using, selling and/or offering for sale systems and/or methods for physically conditioning golfers covered by one or more claims of the '344 Patent to the injury of Mr. Aguirre, including the sale of Powerchute Sports, LLC's Powerchute product. Defendant Powerchute Sports is thus liable for infringement of the '344 Patent pursuant to 35 U.S.C. § 271.

Relief

72. As a result of these Defendants' infringement of the '344 Patent, Mr. Aguirre has suffered monetary damages in an amount not yet determined, and will continue to suffer damages in the future unless Defendants' infringing activities are enjoined by this Court.

73. Unless a preliminary and permanent injunction is issued enjoining these Defendants and their agents, servants, employees, representatives, affiliates, and all others acting in active concert therewith from infringing the '344 Patent, Mr. Aguirre will be greatly and irreparably harmed.

COUNT II: SHERMAN ANTITRUST ACT §2

74. Mr. Aguirre incorporates by reference Paragraphs 1-73 as set forth fully herein.

75. Defendants James Sowerwine, Powerchute Sports and TC Trust received United States Patent No. 7,762,929 (the "Celone Patent") by virtue of committing fraud on the USPTO both by omission and commission.

76. As noted above, the original inventor of the material claimed in the Celone Patent abandoned the application on April 29, 2005 and a notice confirming this abandonment was sent from the USPTO on June 10, 2005. (*See* Exs. E & G.)

77. 517 days after this Notice of Abandonment was sent Smith & Hogen, a firm representing Sowerwine Golf, Inc., finally appeared to take over the prosecution. The date of Smith & Hogen's first appearance was November 9, 2006.

78. Importantly, this first appearance by Smith & Hogen was made only after the publication of the '344 Patent owned by Mr. Aguirre, which occurred on April 13, 2006.

79. Despite the USPTO accepting the Power of Attorney of Smith & Hogen on November 21, 2006, it was not until April 8, 2008 that Smith & Hogen, on behalf of Sowerwine Golf, Inc., filed a petition to revive the '236 Application, which led to the Celone patent.

80. Smith & Hogen's failure to take any action following the USPTO's acceptance of their Power of Attorney represents another delay of 504 days and, again, occurs only after the USPTO sent a Notice of Allowance to Mr. Aguirre on January 25, 2008 for the '344 Patent. Finally, this occurred only shortly before the '344 Patent was issued on June 10, 2008.

81. Charitably, Smith & Hogen delayed 504 days—1 year, 4 months and 18 days—prior to pursuing prosecution of the Celone patent. The only excuse given for this delay was that it was "unintentional." (*See* Ex. J.) This averment was made under penalty of perjury and pursuant to 37 C.F.R. §1.56. On information and belief, this statement was false. This statement itself constitutes a willful, false statement made to the USPTO and as stated would "jeopardize the validity of . . . and any registration resulting therefrom." (*See Id.*)

82. In the same document, however, Smith & Hogen, acting on behalf of Sowerwine Golf, Inc., committed a further fraud on the USPTO—a fraud of omission.

83. When granting the petition to revive, the USPTO reminded the attorneys or agents of Smith & Hogen that their duty to investigate the circumstances of abandonment extended beyond the time that their own client owned the interest in the '236 Application, writing: "It is not apparent whether the statement of unintentional delay was signed by a person who would have been in a position of knowing that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition . . . . If petitioner discovers that the delay was intentional, petitioner must notify office." (Ex. K.)

84. A review of the prosecution record itself indicates that the delay between the Notice of Abandonment and the Power of Attorney filed by Smith & Hogen, on behalf of Sowerwine Golf, Inc. was due for a specific reason: Mr. Celone, the original inventor of the material claimed in the '236 Application, had failed to pay his bills. (*See* Ex. D.) This failure to pay for his counsel resulted, understandably, in that counsel withdrawing from representation. (*Id.*) The USPTO approved the withdrawal of Mr. Celone's counsel. (Ex. F.)

85. Therefore, if Smith & Hogen intended to represent that the entire period from April 25, 2005 until April 8, 2008—a period of 1079 days or 2 years, 11 months and 14 days[1]—this was a willful, fraudulent statement resulting in a fraud on the

[1] By contrast, the time between Mr. Aguirre's filing of the utility application for the '344 Patent and the actual issuance of that patent was only 1000 days, between September 14, 2005 and June 10, 2008. (*See* Ex. B.) In other words, Mr. Aguirre was able to complete

USPTO and a violation of 37 C.F.R. §1.56. If, in the alternative, Smith & Hogen's averment only addressed the period that Sowerwine Golf, Inc. owned the rights to the '236 Application, the failure to investigate the circumstances of Mr. Celone's abandonment or the failure to report the results of such investigation, was an omission that resulted in a fraud on the USPTO and a violation of 37 C.F.R. §1.56.

86. Finally, even after the USPTO granted a Notice of Allowance for the '236 Application, Sowerwine Golf, Inc., Powerchute Sports, LLC, and TC Trust, LLC—all of whom owned an interest in the '236 Application during the relevant period (even if only for a portion of the day)—abandoned the application.

87. This abandonment, although much shorter than the previous abandonment, is critical because it is during this time that the assignment of the rights to the patent, or a portion thereof, passed through three separate entities: Sowerwine Golf, Inc., Powerchute Sports, LLC, and TC Trust, LLC. Any of these three entities could have paid the issue fee and publication fee required by January 17, 2010, but each failed to do so. To claim, as Smith & Hogen once again did on March 10, 2010, that this abandonment was unintentional is false. Again, this false statement results in a fraud on the USPTO and a violation of 37 C.F.R. §1.56.

88. Finally, on information and belief, at least one person associated with the prosecution of the '236 Application was aware of United States Patent Publication No. 2006/0079344 and/or the '344 Patent. This information would have been material to the patentability of the '236 Application and yet this information was withheld. The

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the entire patent prosecution process for the '344 Patent in the time that the Defendants delayed the '236 Application.

withholding of this material information is a fraud on the USPTO and a violation of 37 C.F.R. §1.56.

89. Despite the fact that the Defendants knew or should have known that the Celone patent was unenforceable due to fraud, the Defendants nonetheless continued to advertise heavily, relying repeatedly on the fact that their product was "patented," and attempted to enforce the unenforceable Celone patent.

90. Throughout its marketing material, Powerchute Sports emphasizes the "patented" quality of its invention. For example, on its homepage, the very first description of the product is a reference to "Powerchute's patented design . . . ." (*See* *www.powerchutesports.com*, last visited Aug. 17, 2010, Ex. V.) Similarly, the webpage titled "What is Powerchute?", contains no fewer than four different references to the "patented" nature of the product. (*See* *http://www.powerchutesports.com/what-is-powerchute.html*, last visited Aug. 17, 2010, Ex. W; *see also* Exs. X-Y (providing additional examples where Powerchute Sports stresses the "patented" nature of the invention).)

91. As a result of the Defendants attempts to enforce a patent that is unenforceable due to fraud, they have attempted to monopolize the market for portable, resistance-based training aids for golfers.

92. Mr. Aguirre as a manufacturer of these products has suffered damages due to Defendants anti-competitive activities.

COUNT III: COMMON LAW FRAUD

93. Mr. Aguirre incorporates by reference Paragraphs 1-92 as set forth fully herein.

94. As noted above, the Defendants made numerous fraudulent representations to the USPTO regarding their abandonment of the '236 Application. First, the Defendants fraudulently represented to the USPTO that the abandonment of the application from April 25, 2005 until April 8, 2008 was unintentional. The statement was fraudulent for two reasons.

95. First, the abandonment from April 25, 2005 until November 9, 2006 was intentional despite Smith & Hogan's averment to the contrary—an averment made on behalf of James Sowerwine and Sowerwine Golf, Inc. and to the benefit of Powerchute Sports and TC Trust. Smith & Hogen had no basis to claim that this abandonment was unintentional. On information and belief, Smith & Hogen had only been engaged to shortly prior to November 9, 2006. Prior to that time the only person involved in the '236 Application had been the Sierra Patent Group and Mr. Celone, the inventor. The Sierra Patent Group withdrew from representation due to Mr. Celone's failure to pay his attorneys' fees. This is evidence of an intentional abandonment.

96. Second, Smith & Hogen, on behalf of James Sowerwine and Sowerwine Golf, Inc. and to the benefit of Powerchute Sports and TC Trust, were hired for the specific purpose of pursuing the prosecution of a newly acquired patent application. Nevertheless, following the USPTO acceptance of Smith & Hogen's Power

of Attorney, they filed nothing with the USPTO from November 9, 2006 until April 8, 2008. That they failed to pursue this application is evidence of intentional abandonment.

97. Finally, Smith & Hogen, on behalf of James Sowerwine, Sowerwine Golf, Inc., Powerchute Sports and TC Trust, made a final statement that an abandonment that occurred from January 17, 2010 until March 10, 2010 was unintentional. Again, this abandonment was intentional. As noted above, as late as January 15, 2010, Sowerwine Golf, Inc., Powerchute Sports and TC Trust were assigning between each other the rights, or portions thereof, as they relate to the '236 Application, which had already been allowed. This failure to pay the necessary fees was intentional.

98. The fraudulent representations made by Smith & Hogen were material. As noted, each time Smith & Hogen made these false representations on behalf of or to the benefit of the Defendants, the false representation was made under the penalty of perjury and with the express acknowledgement that "such willful false statement may jeopardize the validity of this application or document and any registration resulting therefrom." (Ex. J.)

99. When Smith & Hogen made these fraudulent representations to the USPTO on behalf of and/or to the benefit of the Defendants, Smith & Hogen made these fraudulent representations indirectly to Mr. Aguirre. In fact, although the fraudulent representations were made to the people of the United States as a whole, they were specifically directed at Mr. Aguirre, whose competing patent application had been published and/or whose patent had already been issued.

100. Further, when Smith & Hogen made these fraudulent representations to the USPTO on behalf of and/or to the benefit of the Defendants, Smith & Hogen had reasonable reason to expect that Mr. Aguirre, a carpenter with a 7th grade education, would rely on this representation and along with the actions of the USPTO would believe that the Powerchute product was properly patented. Mr. Aguirre relied on these representations and believed that the Powerchute product was properly patented.

101. Mr. Aguirre has been damaged by the Defendants false claim to patent protection by the Defendants. This damages includes but is not limited to loss of prospective business, loss of his own monopoly on portable, resistance-based training aids for golfers, and other damages.

COUNT IV: TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS AND ECONOMIC ADVANTAGE

102. Mr. Aguirre incorporates by reference Paragraphs 1-101 as set forth fully herein.

103. As noted above, the Defendants have repeatedly committed fraud when they or their predecessors made false or misleading statements to the USPTO. (*See supra* ¶¶ 93-101.)

104. These fraudulent misstatements have prevented Mr. Aguirre from being able to fully take the economic and business advantage of the '344 Patent as well as his own company, Zswinger, Inc.

105. The Defendants, its agents and/or predecessors committed the fraud on the USPTO with a conscious desire not only to prevent Mr. Aguirre personally, but to

prevent any other persons from fully realizing the value of their patent or going concern relating to portable, resistance-based training aids for golfers.

106. Alternatively, the Defendants, their agents and/or predecessors acted with knowledge that the fraud committed on the USPTO was certain or substantially certain to result in the prevention of Mr. Aguirre as well as any other person from fully realizing the value of their patent or going concern relating to portable, resistance-based training aids for golfers.

107. Mr. Aguirre has suffered actual harm and damage as a result of the Defendants, their agents and/or predecessors fraud on the USPTO including, but not limited to, a diminution in the value of his own, legitimately obtained patent; the value of his company, Zswinger, Inc.; a loss in sales due to the Defendants improper use of the patent mark for a fraudulently obtained patent, and other damages that will be proven.

COUNT V: UNJUST ENRICHMENT

108. Mr. Aguirre incorporates by reference Paragraphs 1-107 as set forth fully herein.

109. The Defendants have been unjustly enriched by the commission of fraud on the USPTO by the Defendants, their agents and/or predecessors. (*See* ¶¶ 93-107.)

110. The Defendants have wrongfully secured the benefit of the Celone patent due to the Defendants, their agents and/or predecessors' fraud on the USPTO and it is unconscionable that they should retain the benefit of this fraud.

111. Alternatively, to the extent that certain Defendants were not actively engaged in the commission of fraud on the USPTO, whether directly, through their agents or through their predecessors, it unconscionable that these Defendants passively retain the benefits of the active Defendants' fraud.

112. As another alternative, by delaying the prosecution of the '236 Application for 1079 days, even if not fraudulent, the Defendants, their agents and/or predecessors have taken undue advantage of the patent system and, as a direct result, harmed Mr. Aguirre who completed his patent application for the '344 Patent in 1000 days.

113. The Defendants must make restitution to Mr. Aguirre for the benefits they received by the inequitable actions before the USPTO committed by the Defendants, their agents and/or predecessors.

JURY TRIAL DEMAND

Mr. Aguirre demands a jury trial for all issues so triable, pursuant to Federal Rule of Civil Procedure 38 and Local Rule 38.1.

PRAYER FOR RELIEF

WHEREFORE, Mr. Aguirre respectfully requests that this Court enter:

1. A judgment in favor of Mr. Aguirre that Defendants have infringed, directly, jointly, and/or indirectly, by way of inducing and/or contributing to the infringement of the '344 Patent, and that such infringement was willful;

2. A judgment and order requiring Defendants to pay Mr. Aguirre his damages, costs, expenses, and prejudgment and post-judgment interest for Defendants' infringement of the '344 Patent as provided under 35 U.S.C. § 284;
3. A preliminary injunction enjoining Defendants and their officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert therewith from infringement, inducing the infringement of, or contributing to the infringement of the '344 Patent prior to trial;
4. A permanent injunction enjoining Defendants and their officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert therewith from infringement, inducing the infringement of, or contributing to the infringement of the '344 Patent;
5. A preliminary injunction enjoining Defendants and their officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert therewith from attempting to monopolize the market for portable, resistance-based training aids for golfers due to the Defendants' use of the fraudulently obtained Celone patent number, accusations of infringement of the Celone patent, actions of infringement relating to the fraudulently obtained Celone patent and any other matters related to the fraudulently obtained Celone patent;

6. A permanent injunction enjoining Defendants and their officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert therewith from attempting to monopolize the market for portable, resistance-based training aids for golfers due to the Defendants' use of, or marking of products with, the fraudulently obtained Celone patent number, accusations of infringement of the Celone patent, actions of infringement relating to the fraudulently obtained Celone patent and any other matters related to the fraudulently obtained Celone patent;
7. A preliminary injunction enjoining Defendants and their officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert therewith from intentionally interfering with Mr. Aguirre's business relations and prospective economic advantage by, among other things, the Defendants' use of the fraudulently obtained Celone patent number, accusations of infringement of the Celone patent, actions of infringement relating to the fraudulently obtained Celone patent and any other matters related to the fraudulently obtained Celone patent;
8. A permanent injunction enjoining Defendants and their officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert therewith from intentionally interfering with Mr. Aguirre's business relations and prospective economic advantage by, among other things, the

Defendants' use of, or marking of products with, the fraudulently obtained Celone patent number, accusations of infringement of the Celone patent, actions of infringement relating to the fraudulently obtained Celone patent and any other matters related to the fraudulently obtained Celone patent;

9. A judgment and order requiring Defendants to pay Mr. Aguirre its damages, enhanced damages, costs, expenses, and prejudgment and post-judgment interest for Defendants' infringement of the '344 Patent;
10. A judgment ordering damages for the Defendants' violation of the Sherman Antitrust Act §2;
11. A judgment ordering damages for the Defendants' fraud before the USPTO and the damages suffered by Mr. Aguirre;
12. A judgment ordering damages for the Defendants' intentional interference with business relations and prospective business advantage;
13. A judgment ordering restitution for the benefits of which Mr. Aguirre was wrongfully deprived by the Defendants due to their commission of fraud on the USPTO;
14. Alternatively, a judgment ordering restitution for the benefits that Mr. Aguirre was wrongfully deprived to Defendants wrongful delay in the prosecution of the Celone patent;

15. A judgment and order finding that this is an exceptional case within the meaning of 35 U.S.C. § 285 and awarding to Mr. Aguirre his reasonable attorneys' fees; and
16. Any and all other relief to which Mr. Aguirre may show himself to be entitled.

Dated: September 17, 2010

Respectfully submitted,

BUSTAMANTE, P.C.

By: \s\ John M. Bustamante

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