

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

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STARLINGER & CO. GMBH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. _____
	§	
WINDMÖLLER & HÖLSCHER KG,	§	JURY TRIAL DEMANDED
	§	
Defendant.	§	
	§	
	§	

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**COMPLAINT FOR DECLARATORY JUDGMENT AND FOR  
MONETARY DAMAGES WITH DEMAND FOR JURY TRIAL**

Plaintiff Starlinger & Co. GmbH (“Starlinger” or “Plaintiff”) complains and alleges against Defendant Windmüller & Hölscher KG (“W & H” or “Defendant”) as follows:

**PARTIES**

1. Plaintiff Starlinger is an Austrian corporation having its principal place of business at Sonnenuhrgasse 4, 1060 Vienna, Austria.
2. On information and belief, Defendant W & H is a German corporation having its principal place of business at Münsterstraße 50, 49525 Lengerich, Germany.

**JURISDICTION AND VENUE**

3. This is a declaratory judgment action brought by Plaintiff Starlinger pursuant to 28 U.S.C. §§ 2201 and 2202 seeking a declaration that Starlinger does not infringe U.S. Patent No. 6,800,051 (“the ’051 Patent”) (attached hereto as Exhibit A), that the claims of the ’051 Patent are invalid, and/or that the ’051 Patent is unenforceable.

4. Plaintiff Starlinger also seeks monetary damages arising from Defendant W & H's violation of the Lanham Act, tortious interference with contracts, tortious interference with prospective contracts, business disparagement, and defamation, as set forth below.

5. Defendant W & H purports to be the owner of all rights, title and interests in and to the '051 Patent. W & H has raised a reasonable apprehension of the filing of a lawsuit against Plaintiff Starlinger, resulting in the establishment of a case or controversy between the parties relating to the '051 Patent as set forth below. Accordingly, this action arises under the patent laws of the United States, including 35 U.S.C. §§ 271, 281, and 283-85.

6. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. §§ 1331, 1338, 1367, 2201, and 2202.

7. On information and belief, Defendant W & H does business within the State of Texas by contracting to supply and/or actually supplying goods and/or services within the State of Texas, either directly or through subsidiaries, distributors or other intermediaries.

8. Defendant W & H has also sent, through its attorneys, written communications to at least one of Plaintiff Starlinger's customers and/or potential customers in Texas alleging infringement of the '051 Patent by Starlinger.

9. Defendant W & H has otherwise purposefully availed itself of the privileges and benefits of the laws of the State of Texas. Therefore, W & H is subject to the jurisdiction of this Court pursuant to Texas Civil Practice & Remedies Code § 17.042.

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1400(b) and 1391.

### **BACKGROUND**

11. Plaintiff Starlinger is based in Vienna, Austria, and has additional offices in China, India, Indonesia, Malaysia, Russia, Brazil, Chicago, Illinois, and Greenville, South Carolina. Starlinger is a worldwide market leader in the field of machinery and process technology for woven plastic sack production. Starlinger has over 40 years of global market experience and its product range covers all types of machinery for the production of modern woven polypropylene sacks.

12. Defendant W & H is based in Lengerich, Germany. On information and belief, W & H offers a broad range of machinery and equipment in the fields of extrusion, printing and conversion.

13. Plaintiff Starlinger and Defendant W & H are in the same fields of business and occasionally compete for the same customers. This includes competition for customers within the United States.

14. At issue in this case is machinery for producing a “pinch bottom open mouth bag,” also commonly called a “pinch bag.” Pinch bags are used frequently for products such as pet foods, fertilizer, or food products, such as flour or sugar. Pinch bags are known for being particularly strong, extremely sift proof, and having an attractive shelf display due to the large printable bottom surface.

15. W & H asserts, as shown below, that a machine owned by Starlinger, which is capable of manufacturing bags, infringes the '051 Patent.

16. On June 11, 2010, Defendant W & H, by and through its counsel, Harvey B. Jacobson, Jr. of the law firm Jacobson Holman, PLLC, sent a letter to Plaintiff Starlinger (attached hereto as Exhibit B) alleging the following:

. . . it is our opinion that use of the Starlinger pinch bag machine to manufacture such pinch bag in the United States constitutes an infringement of the '051 patent. Further, it is our opinion that the sale and offer for sale of the Starlinger pinch bag machine in the United States also constitutes an infringement of the '051 patent under 35 U.S.C. § 271(b).

Accordingly, the purpose of this letter is to notify you and Starlinger of the above infringement and request on behalf of our client that Starlinger immediately cease and desist from further promotion, sale and/or offer for sale of the infringing Starlinger pinch bag machine in the United States. If, by chance, you are not acquainted with patents and patent litigation in the United States, we suggest that you seek the advice of a competent U.S. patent attorney who can advise you as to the legal costs involved in patent infringement controversies and your company's potential liabilities. We can tell you from first-hand experience that the legal expense of a full-scale infringement lawsuit are quite heavy, in the neighborhood of \$1,000,000 or more.

Under the circumstances, we trust that you will see the merit of Windmoeller's position in this matter and terminate further infringement of the '051 patent by immediately discontinuing the promotion, sale and offer for sale of your infringing pinch bag machine in the United States.

*See Exhibit B.*

17. On June 29, 2010, Defendant W & H, by and through its counsel, Harvey B. Jacobson, Jr. of the law firm Jacobson Holman, PLLC, sent a separate letter (attached hereto as Exhibit C) to a company named StarPak Ltd. ("StarPak"), located in Houston, Texas. StarPak is an affiliate of Polytex Fibers Corporation ("Polytex"), a long-standing customer of Plaintiff Starlinger.

18. Defendant W & H's letter to StarPak states:

. . . it is our opinion that use of the Starlinger pinch bag machine to manufacture such pinch bags in the United States will constitute an infringement of the '051 patent. We have notified Starlinger of this opinion and the infringement of the '051 patent. Further, we have requested that Starlinger terminate further infringement of the '051 patent by immediately discontinuing the promotion, sale and offer for sale of its infringing pinch bag machine in the United States.

. . . Windmoeller would appreciate your advising your well-known contact person at Windmoeller of any further attempts by Starlinger to promote, sell, or offer for sale its infringing pinch bag machines in the United States. Also, if you have any

questions, or would like further information in connection with this matter, Windmoeller asks that you advise your Windmoeller contact person.

*See Exhibit C.*

19. Neither Defendant W & H's June 11, 2010 letter, nor its June 29, 2010 letter gave any explanation as to which claim(s) of the '051 Patent may be infringed by Plaintiff Starlinger's machine. Further, W & H's letters contained no analysis concerning how the Starlinger machine may infringe the '051 Patent. Also, neither letter alleged that the '051 Patent was valid, nor did they discuss any analysis performed by W & H to confirm the validity of the '051 Patent.

20. In light of the cursory and conclusory allegations contained within these letters, coupled with the absence of any factual support or analysis, it is clear that Defendant W & H's allegations were premature, sent without adequate investigation, objectively baseless, wrongful, and meant only to intimidate, oppress, and to interfere with Plaintiff Starlinger's business relationship with Starlinger's customer(s).

21. Plaintiff Starlinger has reason to believe that other Starlinger customers have been contacted by Defendant W & H with similar communications, containing similarly baseless claims.

**FIRST CLAIM FOR RELIEF**  
**Declaratory Judgment of No Infringement**  
**of Any Claim of the '051 Patent**

22. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 21 as if fully set forth herein.

23. Plaintiff Starlinger has not infringed, does not infringe, has not induced others to infringe, and does not contribute to the infringement, directly or indirectly, of any valid claim of the '051 Patent.

24. The acts described in the foregoing paragraphs create a substantial controversy of sufficient immediacy and reality to warrant a finding of declaratory judgment of no infringement of any claim of the '051 Patent.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**SECOND CLAIM FOR RELIEF**  
**Declaratory Judgment of Invalidity  
of the Claims of the '051 Patent**

25. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 24 of this Complaint as if fully set forth herein.

26. The claims of the '051 Patent are invalid for failure to comply with the conditions of patentability set forth in 35 U.S.C. §§ 101, 102, 103 and 112.

27. The acts described in the foregoing paragraphs create a substantial controversy of sufficient immediacy and reality to warrant a finding of declaratory judgment of invalidity of each claim of the '051 Patent.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**THIRD CLAIM FOR RELIEF**  
**Declaratory Judgment of Unenforceability  
of the '051 Patent**

28. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 27 of this Complaint as if fully set forth herein.

29. On December 14, 2001, W & H filed European Patent Application No. EP 01129808.0 entitled "Verfahren zum Herstellen von Seitenfaltensäcken aus Kunststofffolie" which claims the priority date of German Patent Application No. DE 101 06 289.3 ("German priority application").

30. On February 20, 2003, the European Patent Office (“EPO”) issued the European Search Report, which listed two so-called “X” prior art documents, i.e., documents considered very relevant to the pending patent application. These documents are Canadian Patent No. CA 875,950 (“the ’950 Canadian Patent”) and U.S. Patent No. 4,008,850 (“the ’850 Patent”). The same European Search Report also listed U.S. Patent No. 5,529,396 (“the ’396 Patent”) and classified this prior art document with an “A”, i.e., a document explaining the technological background of the pending application.

31. On April 16, 2004, the EPO issued a first Examination Report. The examiner argued that the features of originally filed claims 1-3 would be known from the above cited three prior art documents, but claims 4 and 5 could be patentable, if convincing arguments could be made by the Applicant.

32. On August 19, 2004, W & H filed a reply and a new set of claims. The features of original claim 1 were all transferred into the preamble of a new claim 1, and the features of original claim 4 constituted the characterizing features of the new claim 1. In addition, W & H’s reply contained a detailed discussion of all three prior art documents cited above in paragraph 30.

33. On April 13, 2005, European Patent No. EP 1 228 857 (“the ’857 European Patent”) was granted on the basis of the amended claims.

34. Only those publications which had been cited in the prosecution of the German priority application were listed in the information disclosure statement (“IDS”) submitted to the U.S. Patent and Trademark Office (“USPTO”) during the initial prosecution of the ’051 Patent.

35. The prior art documents cited in the prosecution of the ’857 European Patent, i.e., the ’950 Canadian Patent, the ’850 Patent, and the ’396 Patent, were not cited to the USPTO in

the initial IDS, or with any supplemental IDS submitted to the USPTO during the initial prosecution of the '051 Patent.

36. On May 25, 2006, W & H filed a Request for Ex Parte Reexamination of the '051 Patent with the USPTO. In the request, the question of patentability was raised with respect to prior art documents, including the '950 Canadian Patent and newly cited Canadian Patent No. CA 775,426 ("the '426 Canadian Patent").

37. W & H again did not cite the '850 Patent or the '396 Patent ("the withheld references") which were known to W & H since at least the prosecution of the corresponding '857 European Patent.

38. The withheld references were material to the patentability of the pending claims of the '051 Patent, both during the initial prosecution and during the reexamination proceeding.

39. The '051 Patent is unenforceable because W & H intentionally and knowingly withheld information material to determining the patentability of the '051 patent. Material information was withheld not only during the initial prosecution of the '051 Patent, but also during the reexamination of the '051 Patent.

40. Due to the inequitable conduct of W & H before the USPTO, the '051 Patent is unenforceable under the doctrine of unclean hands.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**FOURTH CLAIM FOR RELIEF**  
**Unfair Competition Pursuant to the Lanham Act, 15 U.S.C § 1125(a)(1)**

41. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 38 of this Complaint as if fully set forth herein.

42. Defendant W & H's conduct, as described in this Complaint, constitutes unfair competition as set forth in the Lanham Act.



43. In connection with providing in interstate commerce its products and in communicating with Plaintiff Starlinger's customers, Defendant W & H made numerous false and/or misleading descriptions and representations of fact regarding W & H's patent rights and/or the nature, characteristics, or qualities of Starlinger's goods, including but not limited to implying that Starlinger's machines infringe W & H's patent rights where no such finding has occurred, and implying that Starlinger's customers must work through W & H to resolve any issues associated with the patent rights.

44. On information and belief, W & H made similarly damaging communications to other Starlinger customers and/or potential customers.

45. These false and/or misleading descriptions and representations of fact were likely to cause and/or did in fact cause confusion, mistake, and deception as to the infringing nature of Plaintiff Starlinger's machines, and the potential liability of Starlinger's customers in using said machines. Defendant W & H made these false and/or misleading descriptions and representations of fact willfully.

46. As a result and/or consequence of Defendant W & H's false and/or misleading descriptions and representations of fact, Plaintiff Starlinger has suffered, is presently suffering, and/or will in the future suffer substantial harm and damage, including but not necessarily limited to injury to its good will and business reputation, loss of customers, loss of potential customers, loss of profits, and/or loss of revenue. In addition, as a result and/or consequence of W & H's false and/or misleading descriptions and representations of fact, Starlinger has suffered, is presently suffering, and/or will in the future suffer irreparable harm for which there is no adequate remedy at law.

47. Pursuant to 15 U.S.C. § 1117(a), Plaintiff Starlinger is entitled to recover Defendant W & H's potential profits, the damages sustained by Starlinger, the costs of this action, treble damages, an enhanced sum in lieu of W & H's potential profits, and, because W & H's pattern of willful conduct makes this an exceptional case, reasonable attorney's fees. In addition, Starlinger is entitled to such injunctive relief as the Court may find just to prevent irreparable harm for which there is no adequate remedy at law.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**FIFTH CLAIM FOR RELIEF**  
**Tortious Interference with Contracts**

48. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 44 of this Complaint as if fully set forth herein.

49. Defendant W & H's conduct, as described in this Complaint, constitutes tortious interference with contracts.

50. Plaintiff Starlinger has contract(s) to do business with third-party Polytex in Houston, Texas.

51. Upon information and belief, third-party StarPak is a commonly-owned and controlled affiliate of Polytex.

52. Defendant W & H's June 29, 2010 letter to StarPak constitutes a wrongful, deliberate, willful and intentional interference with the contract(s) between Plaintiff Starlinger and Polytex. This includes but is not limited to W & H's allegations that Starlinger infringes the '051 Patent, W & H's encouragement to StarPak that it not purchase the allegedly "infringing pinch bag machine" from Starlinger, and W & H's request that StarPak notify W & H of any "attempts by Starlinger to promote, sell or offer for sale [Starlinger's] infringing pinch bag machines in the United States." *See Exhibit C.*

53. Such communication between Defendant W & H and StarPak has proximately caused actual damages to Plaintiff Starlinger in an amount to be determined at trial.

54. Defendant W & H's June 11, 2010 letter to Plaintiff Starlinger, along with its June 29, 2010 letter to StarPak contain claims that are objectively baseless and were sent in bad faith.

55. On information and belief, Defendant W & H has contacted other customers of Plaintiff Starlinger, and has also made similar baseless allegations that Starlinger is infringing the '051 Patent. Such baseless allegations also constitute tortious interference with contract.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**SIXTH CLAIM FOR RELIEF**  
**Tortious Interference with Prospective Contracts**

56. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 51 of this Complaint as if fully set forth herein.

57. Defendant W & H's conduct, as described in this Complaint, constitutes tortious interference with prospective contracts.

58. There was a reasonable probability Plaintiff Starlinger was to enter into contract(s) to do business with third-party StarPak in Houston, Texas.

59. Defendant W & H's June 29, 2010 letter to StarPak constitutes a wrongful, deliberate, willful, intentional or otherwise tortious interference with prospective contracts between Plaintiff Starlinger and StarPak. This includes but is not limited to W & H's allegations that Starlinger infringes the '051 Patent, W & H's encouragement to StarPak that it not purchase the allegedly "infringing pinch bag machine" from Starlinger, and W & H's request that StarPak notify W & H of any "attempts by Starlinger to promote, sell or offer for sale [Starlinger's] infringing pinch bag machines in the United States." *See Exhibit C.*

60. Defendant W & H's June 29, 2010 letter containing baseless allegations, along with the fact that W & H and Plaintiff Starlinger both compete for StarPak's business, indicate that such communication by W & H was done with a conscious desire to prevent a continued business relationship between Starlinger and StarPak from occurring. These acts also indicate that W & H knew such interference was certain or substantially certain to occur as a result of Defendant W & H's conduct.

61. Such communication between Defendant W & H and StarPak has proximately caused actual damages to Plaintiff Starlinger in an amount to be determined at trial.

62. Defendant W & H's June 11, 2010 letter to Plaintiff Starlinger, along with its June 29, 2010 letter to StarPak, contain claims that are objectively baseless and were sent in bad faith.

63. On information and belief, Defendant W & H has contacted other potential customers of Plaintiff Starlinger other than StarPak, and has made similar baseless allegations that Starlinger is infringing the '051 Patent. Such baseless allegations also constitute tortious interference with prospective contracts.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**SEVENTH CLAIM FOR RELIEF**  
**Business Disparagement**

64. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 59 of this Complaint as if fully set forth herein.

65. Defendant W & H's conduct, as described in this Complaint, constitutes business disparagement.

66. In W & H's June 29, 2010 letter to StarPak, W & H published false and disparaging information regarding Starlinger and Starlinger's product.

67. The false and disparaging comments by W & H include but are not limited to the following statements accusing Starlinger of infringing the '051 Patent:

- “We have notified Starlinger of this opinion and the infringement of the '051 patent.”
- “We have requested that Starlinger terminate further infringement of the '051 patent by immediately discontinuing the promotion, sale and offer for sale of its infringing pinch bag machine in the United States.”
- “Windmoeller would appreciate your advising your well-known contact person at Windmoeller of any further attempts by Starlinger to promote, sell, or offer for sale its infringing pinch bag machines in the United States.”

*See Exhibit C.*

68. Such false and disparaging statements by W & H to StarPak regarding Starlinger and Starlinger's machine were made with malice and without privilege.

69. Such communication between Defendant W & H and StarPak has proximately caused actual damages to Plaintiff Starlinger in an amount to be determined at trial.

70. Defendant W & H's June 11, 2010 letter to Plaintiff Starlinger, along with its June 29, 2010 letter to StarPak, contain claims that are objectively baseless and were sent in bad faith.

71. On information and belief, Defendant W & H has contacted other customers and potential customers of Plaintiff Starlinger other than StarPak, and has made similar baseless allegations that Starlinger is infringing the '051 Patent. Such baseless allegations also constitute business disparagement.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**EIGHTH CLAIM FOR RELIEF**

**Defamation**

72. Plaintiff Starlinger restates, realleges and incorporates by reference the allegations contained in paragraphs 1 through 67 of this Complaint as if fully set forth herein.

73. Defendant W & H's conduct, as described in this Complaint, constitutes defamation.

74. In W & H's June 29, 2010 letter to StarPak, W & H published false and defamatory information regarding Starlinger and Starlinger's product.

75. The false and defamatory comments by W & H include but are not limited to the following statements accusing Starlinger of infringing the '051 Patent:

- "We have notified Starlinger of this opinion and the infringement of the '051 patent."
- "We have requested that Starlinger terminate further infringement of the '051 patent by immediately discontinuing the promotion, sale and offer for sale of its infringing pinch bag machine in the United States."
- "Windmoeller would appreciate your advising your well-known contact person at Windmoeller of any further attempts by Starlinger to promote, sell, or offer for sale its infringing pinch bag machines in the United States."

*See Exhibit C.*

76. Such false and defamatory statements by W & H to StarPak regarding Starlinger and Starlinger's machine were made with negligence as to their truth. For example, as discussed above, neither Defendant W & H's June 11, 2010 letter, nor its June 29, 2010 letter gave any explanation as to which claim(s) of the '051 Patent may be infringed by Plaintiff Starlinger's machine. Further, W & H's letters contained no analysis concerning how the Starlinger machine

may infringe the '051 Patent. Also, neither letter alleged that the '051 Patent was valid, nor did they discuss any analysis performed by W & H to confirm the validity of the '051 Patent.

77. In light of the cursory and conclusory allegations contained within these letters, coupled with the absence of any factual support or analysis, it is clear that Defendant W & H's allegations were premature, sent without adequate investigation, wrongful, and meant only to intimidate, oppress, and to interfere with Plaintiff Starlinger's business relationship with Starlinger's customer(s).

78. Such communication between Defendant W & H and StarPak has proximately caused actual damages to Plaintiff Starlinger in an amount to be determined at trial.

79. Defendant W & H's June 11, 2010 letter to Plaintiff Starlinger, along with its June 29, 2010 letter to StarPak, contain claims that are objectively baseless and were sent in bad faith.

80. On information and belief, Defendant W & H has contacted other customers and potential customers of Plaintiff Starlinger other than StarPak, and has made similar baseless allegations that Starlinger is infringing the '051 Patent. Such baseless allegations also constitute defamation.

WHEREFORE, Plaintiff Starlinger prays for judgment as set forth hereinafter.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Starlinger prays for the following relief:

1. For a declaratory judgment that Plaintiff Starlinger's products do not infringe any claim of U.S. Patent No. 6,800,051;
2. For a declaratory judgment that the claims of U.S. Patent No. 6,800,051 are invalid;

3. For a declaratory judgment that the claims of U.S. Patent No. 6,800,051 are unenforceable;

4. An Order from this Court preliminarily and permanently enjoining Defendant W & H, its agents and servants, and any and all parties acting in concert with any of them from alleging that Plaintiff Starlinger infringes any valid claim of U.S. Patent No. 6,800,051;

5. That this be declared an exceptional case and that Plaintiff Starlinger be awarded its attorneys' fees against Defendant W & H pursuant to 35 U.S.C. § 285;

6. Damages to be determined at trial for Defendant W & H's unfair competition pursuant to the Lanham Act, including treble damages;

7. Damages to be determined at trial for Defendant W & H's tortious interference with contract;

8. Damages to be determined at trial for Defendant W & H's tortious interference with prospective contracts;

9. Damages to be determined at trial for Defendant W & H's business disparagement;

10. Damages to be determined at trial for Defendant W & H's defamation;

11. Prejudgment and postjudgment interest;

12. Costs of suit; and


13. For such other and further relief as the Court in its discretion deems appropriate.

**JURY DEMAND**

Plaintiff Starlinger hereby demands a trial by jury on all issues triable to a jury as a matter of right.



DATED this 20th day of August, 2010.

 by permission  
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