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DISTRICT OF UTAH
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Attorneys for Plaintiff,
KROY BUILDING PRODUCTS, INC.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

KROY BUILDING PRODUCTS, INC.,)
a Delaware corporation,)
)
Plaintiff,)
)
Vs.)
)
HOMELAND VINYL PRODUCTS, INC.,)
an Alabama corporation,)
and JOHN DOES 1-100)
)
Defendants.)

AMENDED COMPLAINT
JURY TRIAL DEMANDED

Civil No.: 2:01CV0047 K
Judge: Dale A. Kimball

Plaintiff, Kroy Building Products, Inc. (hereinafter "Kroy") hereby complains and alleges against the named Defendants as follows:

1. This is an action for the following counts: patent infringement, and inducement of infringement, of United States Letters Patent No. 5,988,599, patent infringement, and inducement of infringement, of United States Letters Patent No. 6,041,486, patent infringement, and inducement of infringement, of United States Letters Patent No. 6,202,987, and unfair

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competition, pursuant to applicable federal statutes and common law principles.

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff, Kroy, is a Delaware corporation operating by virtue of the laws of the state of Delaware, with its principal place of business located at 2719 North Division Avenue York, Nebraska 68467.

3. Upon information and belief, Defendant, Homeland Vinyl Products, Inc., (hereinafter "HVP") is an Alabama corporation.

4. Upon information and belief, Defendant, HVP's principal place of business is located at 3300 Pinson Valley Parkway, Birmingham, AL 35217.

5. Defendants John does 1-100 are believed to be agents or representatives of Defendant HVP, or individuals associated with Defendant HVP, or corporations or other entities related to or formed by HVP.

6. This Court has jurisdiction of the patent infringement and unfair competition claims made herein. The counts for patent infringement arise under the patent laws of the United States including title 35 U.S.C. §§ 271 & 281, et seq., and more specifically, 35 U.S.C. §§ 271, 281, 283, 284 and 285, and the count for unfair competition also arises under the laws of the United States, including title 15 U.S.C. § 1125 (Lanham Act § 43). This Court has original jurisdiction of those counts pursuant to one or both of 28 U.S.C. §§ 1331, and 1338(a).

7. Venue is laid in the U.S. District Court for the District of Utah, Central Division, pursuant to 28 U.S.C. §§ 1391 and 1400(b).

FACTUAL BACKGROUND

8. Plaintiff Kroy is engaged in the business of developing, manufacturing and marketing vinyl fencing and railing.

9. November 23, 1999, U.S. Patent No. 5,988,599 (hereinafter "'599 patent") was granted to Plaintiff Kroy for a "Fence System." A copy of the '599 patent is attached hereto as Exhibit A.

10. On March 28, 2000, U.S. Patent No. 6,041,486 (hereinafter "'486 patent") was granted to Plaintiff Kroy for a "Method of Assembling a Fence." A copy of the '486 patent is attached hereto as Exhibit B.

11. On March 20, 2001, U.S. Patent No. 6,202,987 (hereinafter "'987 patent") was granted to Plaintiff Kroy for a "Fence System." A copy of the '987 patent is attached hereto as Exhibit C.

12. Over the years since at least 1994, Plaintiff Kroy has become widely known in the industry for its vinyl fences. Plaintiff's business has grown significantly and it now has customers throughout the United States.

13. The vinyl fences developed, manufactured, and marketed by Plaintiff Kroy have become distinctive in commerce such that consumers recognize Plaintiff Kroy as the source of the goods.

14. In particular, the shape, configuration and distinctive appearance of Plaintiff Kroy's fence rail, including the double-walled channel sides and the lower exterior recessed ridge of said rail, as shown by the drawing of Plaintiff Kroy's distinctive fence rail attached hereto as Exhibit D, have become recognizably distinctive in the minds of the relevant consumers.

15. On information and belief, Defendant HVP is engaged in the business of developing, manufacturing and marketing vinyl fencing.

16. On information and belief, Defendant HVP competes with Plaintiff Kroy in the selling of vinyl fencing, and intends to continue doing so.

17. On information and belief, Defendant HVP sells a fence system including a fence rail as shown in Exhibit E attached hereto, said fence rail identified as part R10 in Exhibit E.

18. The fence rail being sold by Defendant HVP appears to be a substantially exact copy of Plaintiff Kroy's fence rail, in shape, configuration and appearance.

19. On information and belief, Defendant HVP has been offering for sale the fence system including the R10 rail product after the issue date of the '599 patent.

20. On information and belief, Defendant HVP has sold many units of the fence system including the R10 rail product after the issue date of the '599 patent.

21. On information and belief, Defendant HVP has been offering for sale the fence system including the R10 rail product after the issue date of the '486 patent.

22. On information and belief, Defendant HVP has sold many units of the fence system including the R10 rail product after the issue date of the '486 patent.

23. On information and belief, Defendant HVP has been offering for sale the fence system including the R10 rail product after the issue date of the '987 patent.

24. On information and belief, Defendant HVP has sold many units of the fence system including the R10 rail product after the issue date of the '987 patent.

25. On February 22, 2000, Plaintiff Kroy's counsel sent Defendant HVP a letter (hereinafter "demand letter"), accompanied by copies of Kroy's patents, informing Defendant

HVP that its fence system product appears to violate Kroy's patent rights, and requesting further information. A copy of the demand letter is attached hereto as Exhibit F.

26. On or about June 13, 2000, Defendant HVP's counsel sent Plaintiff Kroy's counsel a letter (hereinafter "response letter") acknowledging the demand letter, the '599 patent and the '486 patent. A copy of the response letter is attached hereto as Exhibit G.

27. On April 3, 2001, Plaintiff Kroy's counsel sent Defendant HVP an additional letter (hereinafter "second demand letter"), accompanied by a copy of Kroy's '987 patent, informing Defendant HVP that its fence system product appears to violate Kroy's patent rights, and requesting further information. A copy of the second demand letter is attached hereto as Exhibit H.

28. Defendant HVP has failed to provide all of the information requested in Plaintiff's demand letter and Plaintiff's second demand letter.

29. Defendant HVP has continued to advertise the fence system including the R10 fence rail while failing to provide the information requested in Plaintiff's demand letters.

30. On information and belief, Defendant HVP has enjoyed sales of its fence system, including the R10 fence rail device, the intellectual property rights for which rightfully belong to Plaintiff Kroy.

31. Defendant HVP's sales of at least the fence system including the R10 fence rail device constitutes unlawful infringement of the '599 patent.

32. Defendant HVP's sales of at least the fence system including the R10 fence rail device constitutes unlawful infringement of the '486 patent.

33. Defendant HVP's sales of at least the fence system including the R10 fence rail

device constitutes unlawful infringement of the '987 patent.

34. Defendant HVP's sales of at least the fence system including the R10 fence rail device constitutes a violation of Plaintiff Kroy's rights under the Lanham Act (15 U.S.C. § 1125 et seq.).

35. More than one year after sending the demand letter to Defendant HVP, and only a few weeks ago, Plaintiff Kroy obtained infringing product from an HVP outlet as shown in Exhibit I, thus establishing that Defendant HVP's liability for infringing activity continues.

36. As a result of Defendants' wrongful conduct, Plaintiff Kroy has suffered damages in an amount to be proven at trial.

37. The damage and harm to Plaintiff Kroy arising from Defendant HVP's acts of infringement of the '599 patent, the '486 patent, and the '987 patent is not fully compensable by money damages, but rather results in irreparable harm to Plaintiff Kroy.

FIRST CLAIM FOR RELIEF

(Patent Infringement of the '599 patent)

38. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in Paragraphs 1 through 37 above.

39. Plaintiff Kroy is the owner of the '599 patent by assignment from the inventor named in the '599 patent.

40. Plaintiff Kroy, as the owner of the '599 patent, is entitled to bring this action for infringement of that patent.

41. On information and belief, subsequent to the issue date of the '599 patent, and

prior to commencement of this action, Defendant HVP has infringed the '599 patent by selling to customers devices which embody each and every element, or the equivalent thereof, of at least one claim of the '599 patent.

42. Plaintiff Kroy has given written notice to HVP of its infringement of the '599 patent as explained above, and as illustrated by the copy of the demand letter in Exhibit F.

43. By reason of the actions of HVP, Kroy has been and will continue to be, seriously damaged and irreparably harmed unless Defendants are enjoined by this court from the actions complained of herein. Kroy has suffered money damages due to Defendants' acts of patent infringement in an amount which cannot be determined without an accounting, and is thus subject to proof at trial. Further, the damage and harm to Kroy arising from the Defendants' acts of infringement of the '599 patent is not fully compensable by money damages, but rather results in irreparable harm to Kroy.

44. On information and belief, such infringement by HVP was preconceived and with actual knowledge of the existence of the '599 patent, and is unlawful, deliberate, and willful, making this an exceptional case within the meaning of 35 U.S.C. § 285. Thus, Plaintiff Kroy is entitled to recover its attorney fees.

SECOND CLAIM FOR RELIEF

(Inducing Infringement of the '599 Patent)

45. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in paragraphs 1 through 44 above.

46. On information and belief, subsequent to the issue date of the '599 patent, and

prior to commencement of this action, Defendant HVP has induced and is now inducing infringement of the '599 patent by selling to customers fence system devices, including the R10 fence rail product, that infringe the '599 patent and furnishing to said customers instructional information by which said devices can be used to infringe the '599 patent.

47. On information and belief, HVP will continue to induce others to infringe the '599 patent unless enjoined by this court.

THIRD CLAIM FOR RELIEF

(Patent Infringement of the '486 patent)

48. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in Paragraphs 1 through 47 above.

49. Plaintiff Kroy is the owner of the '486 patent by assignment from the inventor named in the '486 patent.

50. Plaintiff Kroy, as the owner of the '486 patent, is entitled to bring this action for infringement of that patent.

51. On information and belief, subsequent to the issue date of the '486 patent, and prior to commencement of this action, Defendant HVP has infringed the '486 patent by selling to customers devices which embody each and every element, or the equivalent thereof, for practicing the method of at least one claim of the '486 patent.

52. Defendant HVP is aware of the '486 patent as explained above, and as illustrated by the copy of the response letter in Exhibit G.

53. By reason of the actions of HVP, Kroy has been and will continue to be, seriously

damaged and irreparably harmed unless Defendants are enjoined by this court from the actions complained of herein. Kroy has suffered money damages due to Defendants' acts of patent infringement in an amount which cannot be determined without an accounting, and is thus subject to proof at trial. Further, the damage and harm to Kroy arising from the Defendants' acts of infringement of the '486 patent is not fully compensable by money damages, but rather results in irreparable harm to Kroy.

54. On information and belief, such infringement by HVP was preconceived and with actual knowledge of the existence of the '486 patent, and is unlawful, deliberate, and willful, making this an exceptional case within the meaning of 35 U.S.C. § 285. Thus, Plaintiff Kroy is entitled to recover its attorney fees.

FOURTH CLAIM FOR RELIEF

(Inducing Infringement of the '486 Patent)

55. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in paragraphs 1 through 54 above.

56. On information and belief, subsequent to the issue date of the '486 patent, and prior to commencement of this action, Defendant HVP has induced and is now inducing infringement of the '486 patent by selling to customers fence-related devices, including the R10 fence rail product, and furnishing to said customers instructional information by which said devices can be used to infringe the '486 patent.

57. On information and belief, HVP will continue to induce others to infringe the '486 patent unless enjoined by this court.

FIFTH CLAIM FOR RELIEF

(Patent Infringement of the '987 patent)

58. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in Paragraphs 1 through 57 above.

59. Plaintiff Kroy is the owner of the '987 patent by assignment from the inventor named in the '987 patent.

60. Plaintiff Kroy, as the owner of the '987 patent, is entitled to bring this action for infringement of that patent.

61. On information and belief, subsequent to the issue date of the '987 patent, and prior to commencement of this amended action, Defendant HVP has infringed the '987 patent by selling to customers devices which embody each and every element, or the equivalent thereof, of at least one claim of the '987 patent.

62. Defendant HVP is aware of the '987 patent as explained above, and as illustrated by the copy of the second demand letter in Exhibit H.

63. By reason of the actions of HVP, Kroy has been and will continue to be, seriously damaged and irreparably harmed unless Defendants are enjoined by this court from the actions complained of herein. Kroy has suffered money damages due to Defendants' acts of patent infringement in an amount which cannot be determined without an accounting, and is thus subject to proof at trial. Further, the damage and harm to Kroy arising from the Defendants' acts of infringement of the '987 patent is not fully compensable by money damages, but rather results in irreparable harm to Kroy.

64. On information and belief, such infringement by HVP was preconceived and with actual knowledge of the existence of the '987 patent, and is unlawful, deliberate, and willful, making this an exceptional case within the meaning of 35 U.S.C. § 285. Thus, Plaintiff Kroy is entitled to recover its attorney fees.

SIXTH CLAIM FOR RELIEF

(Inducing Infringement of the '987 Patent)

65. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in paragraphs 1 through 64 above.

66. On information and belief, subsequent to the issue date of the '987 patent, and prior to commencement of this amended action, Defendant HVP has induced and is now inducing infringement of the '987 patent by selling to customers fence-related devices, including the R10 fence rail product, and furnishing to said customers instructional information by which said devices can be used to infringe the '987 patent.

67. On information and belief, HVP will continue to induce others to infringe the '987 patent unless enjoined by this court.

SEVENTH CLAIM FOR RELIEF

(Unfair Competition)

68. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in paragraphs 1 through 67 above.

69. The shape, configuration and appearance of Plaintiff Kroy's fencing products have

acquired distinctiveness and recognition value as a trademark symbol in the mind of purchasers in Plaintiff's and Defendants' trade area, as a result of Plaintiff Kroy's promotion and sales of its fencing products.

70. Plaintiff Kroy's fence rail (Exhibit D) has acquired distinctiveness and recognition value as a trademark symbol, and has come to designate to the relevant purchasers an indication of source originating only with Plaintiff Kroy.

71. Defendants have engaged in unfair competition prohibited by the Lanham Act § 43(a) [Title 15 of the United States Code §§1125(a)] in that Defendants have used Plaintiff's fence rail trademark symbol in connection with Defendants' fence-related goods as a false designation of origin, a false or misleading description and representation of fact which is likely to cause confusion, and to cause mistake, and to deceive as to the affiliation, connection or association of Defendants with Plaintiff Kroy and a false suggestion of origin, sponsorship, and/or approval of Defendants' fence-related goods, services and commercial activities by Plaintiff Kroy.

72. Plaintiff Kroy has suffered damage and irreparable harm to the goodwill and recognition value in its fence rail trademark symbol by the false designation of origin caused by the public presentation of Defendants' fence-related goods.

73. Pursuant to Lanham Act §§ 34 and 35 [15 U.S.C. §§ 1116 and 1117], Plaintiff Kroy is entitled to injunctive relief to prohibit any further use by Defendants of Plaintiff Kroy's fence rail trademark symbol. Additionally, Plaintiff Kroy is entitled to an order directing the Defendants to file with the court and serve on the Plaintiff a report in writing under oath setting forth in detail the manner and form in which the Defendants have complied with the injunction.

Additionally, Plaintiff is entitled to recover all of Defendants' profits in conjunction with the use of Plaintiff's fence rail trademark symbol in addition to its actual damages.

ALLEGATION OF DAMAGE

74. Plaintiff Kroy realleges and incorporates by reference, as if fully set forth herein, the allegations contained in paragraphs 1 through 72 above.

75. On information and belief, Defendant HVP has unlawfully derived, and will continue to unlawfully derive, profits by infringing the '599 patent, the '486 patent, and the '987 patent.

76. By reason of the actions of Defendant HVP, Plaintiff Kroy has been, and will continue to be, seriously damaged and irreparably harmed unless defendant HVP is enjoined by this court from the actions complained of herein.

77. Plaintiff Kroy has suffered money damages due to Defendant HVP's acts of patent infringement in an amount that cannot be determined without an accounting, and is thus subject to proof at trial.

78. The damage and harm to Plaintiff Kroy arising from Defendant HVP's acts of infringement of the '599 patent, the '486 patent, and the '987 patent is not fully compensable by money damages, but rather results in irreparable harm to Plaintiff Kroy.

79. By reason of Defendants' acts alleged herein, Plaintiff Kroy has suffered and will continue to suffer damage to its business, reputation and to the good will and recognition value of its fence rail trademark symbol for its fence system.

PRAYER FOR RELIEF

80. WHEREFORE, Plaintiff Kroy prays for judgement of this Court Against Defendants as follows:

81. That the Court adjudge the '599 patent valid and infringed by Defendant HVP;
82. That the Court adjudge the '486 patent valid and infringed by Defendant HVP;
83. That the Court adjudge the '987 patent valid and infringed by Defendant HVP;
84. That the Court adjudge Plaintiff Kroy's rights under the Lanham Act § 43(a) [Title 15 of the United States Code §§1125(a)] to be violated by Defendant HVP;

85. That Defendants and all of Defendants' agents, servants, employees, attorneys, directors, and those persons in active concert or participation with them, be preliminarily and permanently enjoined under applicable authority from (i) violating Plaintiff Kroy's patent rights, or causing others to violate said patent rights, on such terms as the Court deems reasonable, (ii) continuing any and all acts of unfair competition as herein alleged, or causing others to commit such acts, and (iii) further violation of Plaintiff's rights on such terms as the Court deems reasonable;

86. That Defendants be ordered to deliver up to this Court, for such disposition as it sees fit, all infringing products and related devices and materials in its possession or control, all means for making the infringing products, and all labels, packages, receptacles, wrappers, advertisements, literature, documents or other things in its possession or control bearing any designation, description or representation pertaining to the infringement of the '599 patent, the '486 patent, or the '987 patent, or to Defendants' violation of Plaintiff Kroy's rights under the Lanham Act;

87. That Defendants be ordered to file with this Court and serve on Plaintiff Kroy within twenty (20) days after service on Defendants of the injunction granted herein, or such extended period as the Court may direct, a report in writing, under oath, setting forth in detail the manner and form in which Defendants have complied with the injunction and order of the Court;

88. That Defendants each be required to account to Plaintiff for any and all profits, gains, and advantages derived by Defendants and for all damages sustained by Plaintiff Kroy by reason of the infringements and unfair competition complained of herein, and that the Court award Plaintiff Kroy the amount of actual damages suffered by Plaintiff;

89. That Defendants be required to pay prejudgment and postjudgment interest until such awards are paid;

90. That Defendants be assessed treble damages due to the deliberate and willful nature of its infringement of the '599 patent, the '486 patent; and the '987 patent;

91. That, if warranted, this case be deemed an exceptional case and that Defendants be assessed Plaintiff Kroy's reasonable attorneys fees for this action;

92. That the Court grant such other and further relief as it shall deem equitable and just.