

FILED

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF VIRGINIA**

2009 FEB -4 P 12:08

CLERK OF COURT  
ALEXANDRIA, VIRGINIA

**Erik B. Cherdak**  
149 Thurgood Street  
Gaithersburg, Maryland 20878  
v. (240) 418.3341  
f. (240) 235.7128  
e. [efunds@yahoo.com](mailto:efunds@yahoo.com)

***Plaintiff,***

v.

**PAYLESS SHOESOURCE WORLDWIDE, INC.**  
**also Trading As: Payless Shoes, Payless Shoes, Inc.,**  
**Payless ShoeSource, Inc., Payless Shoes, Payless**  
3231 S.E. 6<sup>th</sup> Avenue  
Topeka, Kansas 66607

***SERVE ON:***

CT CORPORATION SYSTEM  
4701 COX RD STE 301  
GLEN ALLEN, VA 23060-6802

***Defendant.***

**Civil Action No.:** 2:09cv54

**Judge:** HCM

**COMPLAINT FOR PATENT  
INFRINGEMENT**

**JURY TRIAL DEMANDED**

**COMPLAINT**

COMES NOW, Erik B. Cherdak, Plaintiff, *Pro Se*<sup>1</sup>, and commences this civil action for Patent Infringement under the U.S. Patent Act, 35 USC § 1, *et seq.*, against Payless ShoeSource Worldwide, Inc. (a.k.a. and/or T/A Payless, Payless Shoes, Payless ShoeSource Inc., Payless), Defendant. The Plaintiff hereby Complains as follows:

<sup>1</sup> Although not licensed in Virginia, Plaintiff is a registered patent attorney (USPTO Reg. No. 39,936).

### **PARTIES**

1. The Plaintiff, Erik B. Cherdak, is an individual citizen of the U.S. who resides at 149 Thurgood Street, Gaithersburg, Maryland 20878 (USA).
2. On information and belief, the Defendant is a Missouri Corporation having a principal place of business at the address specified in the caption of this action. Defendant regularly conducts business in this judicial district and performs acts of patent infringement in relation to the patents placed in suit by way of this Complaint.

### **JURISDICTION & VENUE**

3. This is an action for patent infringement under the laws of the United States and, in particular, under Title 35 of the United States Code (Patents) (35 USC § 1, *et seq.*). Jurisdiction and venue are proper in this judicial district and in this Honorable Court based on Sections 1338(a), 1391(b) and (c), and/or 1400(b) of Title 28 of the United States Code. Jurisdiction may also be properly found under 28 USC 1332(a) in view of the diversity of citizenship among the parties and the fact that the amount in controversy far exceeds \$75,000.00.
4. At all times relevant herein, Mr. Cherdak has been and is the named inventor and owner of U.S. Patent Nos. 5,343,445 (“the ‘445 patent”) and 5,452,269 (“the ‘269 patent”) (hereinafter collectively referred to as the “Cherdak Patents”), which were duly and properly issued by the U.S. Patent and Trademark Office (USPTO) on August 30, 1994, and September 19, 1995, respectively. Thereafter, the USPTO reexamined both of the Cherdak Patents and issued corresponding Re-Examination Certificates confirming, *inter alia*, the claims of the Cherdak Patents

in November, 2007, and January, 2008, respectively. Also during said reexamination proceedings, the USPTO adopted as both reasonable and proper claim constructions proffered by Plaintiff in other litigation. See Official Reexamination Proceedings before the USPTO in connection with USPTO Reexamination Proceedings identified with USPTO Serial Nos. 90/008,246 and 90/008,269. True and accurate copies of the Cherdak Patents and Re-Examination Certificates are attached hereto at EXHIBITS 1-4.

5. At all times relevant herein Defendant owns and operates retail outlets in the U.S. and abroad, and in particular, in this Judicial District. Defendant also owns and/or operates an Internet sales channel at [www.paylessshoes.com](http://www.paylessshoes.com) which is accessible and open for business 24/7, 365 days per year in this Judicial District and Defendant actively seeks and engages in business from the citizens of Virginia, USA.

#### **FACTUAL ALLEGATIONS**

6. Paragraphs 1-5 are hereby incorporated by reference.
7. On July 6, 1993, Plaintiff filed a patent application entitled "Athletic Shoe With Timing Device" that resulted in the official issuance of U.S. Patent No. 5,343,445 on August 30, 1994. On August 29, 1994, as a continuation application of the application forming the basis of the '445 patent, Mr. Cherdak filed a patent application also entitled "Athletic Shoe With Timing Device" that resulted in the issuance of U.S. Patent 5,452,269 on September 19, 1995. The Cherdak patents are directed to shoe products and, more particularly, shoes containing lighting systems which illuminate, *inter alia*, to indicate that said shoes are moving during

such activities as jumping (e.g., the shoes illuminate to provide visual indications of the amount time that the shoes are off the ground and in the air during a jump, etc.).

8. In November 2007 and in January 2008, the USPTO issued reexamination certificates confirming, *inter alia*, the patentability of many of the claims of the Cherdak patents without amendment. Said reexamination certificates are attached hereto at EXHIBITS 3 and 4.
9. Defendant Payless has in the past imported, made, distributed, sold and offered for sale and continues to import, make, distribute, sell and offer for sale, infringing light-up shoes such as those bearing the brand identifiers “POWER RANGERS OPERATION OVERDRIVE.” Such infringing light-up shoes are sold by the Defendant throughout its retail channels and have typical retail selling prices of between approximately \$10.00 (USD) and \$30.00 (USD) per pair.
10. A sample exemplary lighted shoe marketed and sold by Defendant that infringes the Cherdak Patents is the POWER RANGERS OPERATION OVERDRIVE shoe having tag-identifiers of 098-06-04, SKU number 0638332248, and “K” and which contains a lighting module (the shoe’s circuitry and electronic components maintained in a heel cavity thereof) which is marked with U.S. Patent No. 4,848,009 to Rogers.
11. On information and belief Defendant markets and sells many styles of shoes and has sold in excess of many millions of pairs of lighted shoes which contain lighting modules marked with U.S. Patent No. 4,848,009 to Rogers and/or which

are sourced from or by suppliers who are permitted to sell shoes and/or lighting sub-assemblies made in accordance with said '009 patent.

12. The lighted shoe product specified herein is merely exemplary of the many models of shoes sold by Defendant. Discovery in this case will likely reveal other shoes which are marketed and sold by Defendant including, but not limited to, in this judicial district which are covered by the patents in suit..

13. **PLAINTIFF HEREBY NOTIFIES DEFENDANT AND THIS HONORABLE COURT THAT THIS COMPLAINT AND THE INSTANT LAWSUIT COMMENCED HEREBY DOES NOT CONTEMPLATE AND PLAINTIFF SEEKS NO DAMAGES IN CONNECTION WITH SALES OF LIGHTED SHOES BY DEFENDANT WHERE SUCH SHOES HAVE BEEN SOURCED FROM BBC INTERNATIONAL, STRIDERITE CORPORATION, ESO ORIGINALS, INC., CHAMELEON, INC., AND TARGET CORPORATION. FURTHERMORE, NOTHING IN THIS COMPLAINT SHALL BE CONSTRUED AS LIMITING THE SCOPE OF THIS ACTION TO COVER ONLY THOSE LIGHTED SHOES WHICH MAY ONLY BE MARKED WITH U.S. PATENT NO. 4,848,009.**

14. In addition to the fact that the exemplary lighted shoe product specified in Paragraph 10, *supra*, infringes the patents in suit, said exemplary lighted shoe product (and possibly others sold by Defendant which Plaintiff becomes aware of after due and proper discovery in the instant action) is actually marketed for an infringing purposes such as "shoes that light up." Such shoes include an upper member mounted to a sole member; the sole member further includes a cavity

formed therein in which a lighting module (lighting technology) is maintained; the lighting module includes a battery, a pressure responsive switch configured to respond to pressure imparted to the shoe during movement such as, *inter alia*, during a jump by a person wearing said shoe, an arrangement of light emitting diodes (LEDs) configured to emit light during the time when the shoe is off the ground and in the air during said jump (i.e., during movement realized during said jump) to provide a visual indication of the time that said shoe is in the air during said jump, and a controller for controlling the illumination of said LEDs. Such illumination is controlled by causing the LEDs to become energized in a timed sequence during a jump, for example.

**COUNT I – PATENT INFRINGEMENT – U.S. Pat. 5,343,445**

15. Paragraphs 1-14 are hereby incorporated by reference.
16. Defendant has imported, made, distributed, sold and offered for sale lighted shoe products which infringe U.S. Patent No. 5,343,445 to Cherdak (as reexamined by the USPTO) in violation of 35 USC § 271.
17. In particular, Defendant has infringed, contributed to the infringement of and/or has induced the infringement of U.S. Patent No. 5,343,445 in violation of 35 USC § 271 (a), (b) and (c) by Defendant's manufacture, importation, distribution, sales and offers for sale of infringing light up shoe products including, but not limited to, the exemplary light up shoe products specified in this Complaint.
18. Defendant has further violated section 271 of Title 35 of the United States Code by having induced its distributors, customers and or retailer outlets to infringe U.S. Patent No. 5,343,445 under 35 USC § 271(b).

19. Because of Defendant's infringing activities, Plaintiff has suffered pecuniary losses and is at least entitled to damages as set forth in the U.S. Patent Act (35 USC § 1, *et seq.*).

20. Because of the subjectively willful nature of Defendant's infringing activities in violation of 35 USC § 271, Plaintiff is entitled to enhanced damages as permitted by the U.S. Patent Act (35 USC § 1, *et seq.*).

**COUNT II – PATENT INFRINGEMENT – U.S. Pat. 5,452,269**

21. Paragraphs 1-20 are hereby incorporated by reference.

22. Defendant has imported, made, distributed, sold and offered for sale lighted shoe products which infringe U.S. Patent No. 5,452,269 to Cherdak (as reexamined by the USPTO) in violation of 35 USC § 271.

23. In particular, Defendant has infringed, contributed to the infringement of and/or has induced the infringement of U.S. Patent No. 5,452,269 in violation of 35 USC § 271 (a), (b) and (c) by Defendant's manufacture, importation, distribution, sales and offers for sale of infringing light up shoe products including, but not limited to, the exemplary light up shoe products specified in this Complaint.

24. Defendant has further violated section 271 of Title 35 of the United States Code by having induced its distributors, customers and or retailer outlets to infringe U.S. Patent No. 5,452,269 under 35 USC § 271(b).

25. Because of Defendant's infringing activities, Plaintiff has suffered pecuniary losses and is at least entitled to damages as set forth in the U.S. Patent Act (35 USC § 1, *et seq.*).

26. Because of the subjectively willful nature of Defendant's infringing activities in violation of 35 USC § 271, Plaintiff is entitled to enhanced damages as permitted by the U.S. Patent Act (35 USC § 1, *et seq.*).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment and relief against Defendant as follows:

- A. For a judgment that the Cherdak patents are valid and infringed by Defendant including, but not limited to, its subsidiaries, predecessors-in-interest and business units however and wherever formed;
- B. For a permanent injunction to be issued to stop continued infringement the Cherdak patents by Defendant and its parents, subsidiaries, officers, directors, employees, affiliates, representatives and agents, and all those acting in concert with or through Defendant, directly or indirectly, including, but not limited to, distributors, customers and retailers;
- C. For an accounting to be ordered so that damages caused to Plaintiff by Defendant's infringement of the Cherdak Patents, together with pre-judgment and post-judgment interest; and
- D. Such other relief that this Honorable Court deems just and proper.

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**DEMAND FOR TRIAL BY JURY**

Plaintiff hereby demands trial by jury on all issues so triable.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several loops and flourishes.

Erik B. Cherdak  
Plaintiff, *Pro Se*

Date:

2/4/2009

**EXHIBITS:**

1. U.S. Patent No. 5,343,445 to Cherdak
2. U.S. Patent No. 5,452,269 to Cherdak
3. USPTO Re-Examination Certificate No. 5,343,445 C1 to Cherdak
4. USPTO Re-Examination Certificate No. 5,452,269 C1 to Cherdak