UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

(TEXARKANA DIVISION)

GHJ HOLDINGS, LLC **Relator,** **vs.** **SIMMONS BEDDING COMPANY AND LOUISVILLE BEDDING COMPANY** **Defendants.**	Case No.: 5:11-cv-00033 **JURY TRIAL DEMANDED**

ORIGINAL COMPLAINT FOR FALSE PATENT MARKING

Relator GHJ Holdings, LLC ("Relator") alleges as follows:

NATURE OF THE CASE

1. This is an action for false patent marking under section 292 of the Patent Act (35 U.S.C. §292), which provides that any person may sue to recover the civil penalty for false patent marking. Relator brings this qui tam action on behalf of the United States of America.

PARTIES

2. Relator is a Texas limited liability company with its principal place of business in Texarkana, Texas.

3. Defendant Simmons Bedding Company is a corporation organized under the laws of the State of Delaware and may be served through its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

4. Defendant Louisville Bedding Company is a corporation organized under the laws of the State of Delaware and may be served with process through its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over Relator's false marking claims under Title 28 U.S.C. §§ 1331 and 1338(a).

6. This Court has personal jurisdiction over Defendants by virtue of, *inter alia*, Defendants' persistent and continuous contacts with the Eastern District of Texas, including active and regular conduct of business during the relevant time period through their sales in the Eastern District of Texas.

7. This Court has personal jurisdiction over Defendants because, *inter alia*, Defendants have violated Title 35 U.S.C. § 292, and falsely marked, advertised, distributed and sold products in the Eastern District of Texas. Further, on information and belief, Defendants have sold falsely marked products in competition with sellers of competitive products in the Eastern District of Texas. Such sales by Defendants are substantial, continuous and systematic.

8. Venue is proper in this District under Title 28 U.S.C. §§ 1391(b) and (c) and 1395(a).

FACTS

9. Defendants have marked and/or continues to mark their products, including their Beautyrest BLACK™ Luxury Collection 500 Thread Count Mattress Pad (Sizes: Twin, Double, Queen, King) (collectively, the "Falsely Marked Products") with expired or otherwise inapplicable patents, including at least U.S. Patent No. 5,249,322 (the "'322 Patent"), U.S. Patent No. 4,985,953 (the "'953 Patent"), U.S. Patent No. 5,056,441 (the "'441 Patent), and Canadian Patent No. 2062782 (the "'782 Patent"), (collectively "Expired Patents").

10. "Beautyrest" is registered trademark assigned to Defendant Simmons Bedding Company.

11. Such false marking by Defendants includes marking the Expired Patents upon, affixing the Expired Patents to, and/or using the Expired Patents in advertising in connection with the Falsely Marked Products.

12. The ’322 Patent is titled “Fitted Mattress Cover And Method of Making the Same.” Louisville Bedding Company was the original assignee of the ’322 Patent

13. The ’322 Patent issued on October 5, 1993 and expired subject to a terminal disclaimer on January 22, 2008. Nevertheless, Defendants have marked one or more of the Falsely Marked Products with the ’322 Patent after January 22, 2008.

14. The ’953 Patent titled “Fitted Mattress Cover” issued on January 22, 1991, from a patent application filed February 21, 1990. Louisville Bedding Company was the original assignee of the ’953 Patent.

15. The ’953 Patent expired on February 21, 2010. Nevertheless, Defendants have marked one or more of the Falsely Marked Products with the ’953 Patent after February 21, 2010.

16. The ’441 Patent titled “Fitted Mattress Cover And Method Of Making The Same” issued on October 15, 1991, from a divisional application filed on October 21, 1990, which claimed priority to the same application filed February 21, 1990,

which issued as the ’953 Patent. The claims of the ’441 Patent relate to a method of making a fitted mattress cover, not the mattress cover itself.

17. Louisville Bedding Company was the original assignee of the ’441 Patent.

18. The ’441 Patent expired on February 21, 2010. Nevertheless, Defendants have marked one or more of the Falsely Marked Products with the ’441 Patent after February 21, 2010. Moreover, the Defendants should have never marked any of the falsely marked products with ’441 Patent because it relates solely to a method of manufacturing a product and not the product itself.

19. The Canadian ’782 Patent claims priority to the same U.S. Application the issued as the U.S. ’953 Patent.

20. The ’782 Patent expired on February 21, 2010. Nevertheless, Defendants have marked one or more of the Falsely Marked Products with the ’782 Patent after February 21, 2010.

21. Defendants have falsely marked the Falsely Marked Products after the expiration dates of the Expired Patents. For example, Defendants placed the Expired Patents on Falsely Marked Products by listing them on the packaging of their products.

22. Defendants have marked the Falsely Marked Products by printing the Expired Patents on packaging associated with the Falsely Marked Products. Such markings could have easily been updated to reflect accurate patent information. Defendants could have easily remarked their products with correct patents numbers, but decided not to.

23. It was a false statement for Defendants to mark the Falsely Marked Products with expired or otherwise inapplicable patents. Defendants knew that the patent was expired or otherwise inapplicable, but nevertheless marked them on their products after it expired in an attempt to deceive the public.

24. Defendants are large, sophisticated companies. Defendants have, and/or regularly retain, sophisticated legal counsel. Defendants have many years of experience applying for patents, obtaining patents, licensing patents, and/or litigating in patent infringement lawsuits. For example, Defendant Louisville Bedding Company is assignee to eight ("8") patents according to the United States Patent and Trademark Office. The patents that Defendants own or have licensed, including the Expired Patents, were or are important assets to Defendants and are consistently reviewed and monitored in the course of Defendants' business.

25. Defendants knew that a patent that is expired does not cover any product.

26. Defendants knew that it was a false statement to mark the Falsely Marked Products with an expired or otherwise inapplicable patent.

27. Defendants did not have, and could not have had, a reasonable belief that their products were properly marked, and Defendants knew or should have known that the aforementioned patents had expired.

INJURY IN FACT TO THE UNITED STATES

28. Defendants' practice of false marking is injurious to the United States.

29. The false marking alleged above caused injuries to the sovereignty of the United States arising from Defendants' violations of federal law, specifically, the violation of 35 U.S.C. §292(a). The United States has conferred standing on "any person," which includes Relator, as the United States' assignee of the claims in this complaint to enforce section 292.

30. The false marking alleged above caused proprietary injuries to the United States, which, together with section 292, would provide another basis to confer standing on Relator as the United States' assignee.

31. The marking and false marking statutes exist to give the public notice of patent rights. Congress intended the public to rely on marking as a ready means of

discerning the status of intellectual property embodied in an article of manufacture or design, such as the Falsely Marked Products.

32. Federal patent policy recognizes an important public interest in permitting full and free competition in the use of ideas that are, in reality, a part of the public domain—such as those described in the Expired Patents.

33. Congress's interest in preventing false marking was so great that it enacted a statute that sought to encourage private parties to enforce the statute. By permitting members of the public to bring *qui tam* suits on behalf of the government, Congress authorized private persons like Relator to help control false marking.

34. The acts of false marking alleged above deter innovation and stifle competition in the marketplace for at least the following reasons: if an article that is within the public domain is falsely marked, potential competitors may be dissuaded from entering the same market; false marks may also deter scientific research when an inventor sees a mark and decides to forego continued research to avoid possible infringement; and false marking can cause unnecessary investment in design around or costs incurred to analyze the validity or enforceability of a

patent whose number has been marked upon a product with which a competitor would like to compete.

35. The false marking alleged above misleads the public into believing that the '538 Patent gives Defendants control of the Falsely Marked Products (as well as like products), placing the risk of determining whether the Falsely Marked Products are controlled by such patents on the public, thereby increasing the cost to the public of ascertaining who, if anyone, in fact controls the intellectual property embodied in the Falsely Marked Products.

36. Thus, in each instance where a representation is made that the Falsely Marked Products are protected by the Expired Patents, a member of the public desiring to participate in the market for products like the Falsely Marked Products must incur the cost of determining whether the involved patents are valid and enforceable. Failure to take on the costs of a reasonably competent search for information necessary to interpret each patent, investigation into prior art and other information bearing on the quality of the patents, and analysis thereof can result in a finding of willful infringement, which may treble the damages an infringer would otherwise have to pay.

37. The false marking alleged in this case also creates a misleading impression that the Falsely Marked Products are technologically superior to previously available products, as articles bearing the term "patent" may be presumed to be novel, useful, and innovative.

38. Every person or company in the United States is a potential entrepreneur with respect to the process, machine, manufacture, or composition of matter described in the Expired Patents. Moreover, every person or company in the United States is a potential competitor with respect to the Falsely Marked Products marked with the Expired Patents.

39. Each Falsely Marked Product or advertisement thereof, because it is marked with or displays the Expired Patents, is likely to, or at least has the potential to, discourage or deter each person or company (itself or by its representatives), which views such marking from commercializing a competing product, even though the Expired Patents nothing to prevent any person or company in the United States from competing in commercializing such products.

40. The false marking alleged in this case and/or advertising thereof has quelled competition with respect to similar products to an immeasurable extent, thereby causing harm to the United States in an amount that cannot be readily determined.

41. The false marking alleged in this case constitutes wrongful and illegal advertisement of a patent monopoly that does not exists and, as a result, has resulted in increasing, or at least maintaining, the market power or commercial success with respect to the Falsely Marked Products.

42. Each individual false marking (including each time an advertisement with such marking is accessed on the Internet) is likely to harm, or at least potentially harms, the public. Thus, each such false marking is a separate offense under 35 U.S.C. §292(a).

43. Each offense of false marking creates a proprietary interest of the United States in the penalty that may be recovered under 35 U.S.C. §292(b).

44. For at least the reasons stated in paragraphs 2 to 43 above, the false marking alleged in this case caused injuries to the sovereignty of the United States arising from violations of federal law and has caused proprietary injuries to the United States.

CLAIM

45. For the reasons stated in paragraphs 2 to 44 above, Defendants have violated section 292 of the Patent Act by falsely marking the Falsely Marked Products with intent to deceive the public.

PRAYER FOR RELIEF

46. Relator thus requests this Court, pursuant to 35 U.S.C. §292, to do the following:

A. enter a judgment against Defendants and in favor of Relator that Defendants have violated 35 U.S.C. §292 by falsely marking products with knowledge that the patents have expired and/or are not applicable for the purpose of deceiving the public;

B. order Defendants to pay a civil monetary fine of $500 per false marking offense, or an alternative reasonable amount determined by the Court taking into consideration the total revenue and gross profit derived from the sale of falsely marked products and the degree of intent to falsely mark the products, one-half of which shall be paid to the United States and the other half to Relator;

C. enter a judgment declaring that this case is "exceptional," under 35 U.S.C. §285 and award in favor of Relator, and against Defendants, the costs incurred by Relator in bringing and maintaining this action, including reasonable attorneys' fees;

D. order that Defendants, their officers, agents, servants, employees, contractors, suppliers, and attorneys be enjoined from committing new acts of false patent marking and be required to cease all existing acts of false patent marking within 90 days; and

E. grant Relator such other and further relief as the Court may deem just and equitable.

JURY DEMAND

47. Relator demands a jury trial on all issues so triable.

Dated: February 11, 2011

Respectfully submitted,

/s/ Randall T. Garteiser
Randall T. Garteiser
Texas Bar No. 24038912
randall@glgnow.com
Christopher Johns
Texas Bar No. 24044849
chris.johns@glgnow.com
GARTEISER LAW GROUP
44 North San Pedro Road
San Rafael, California 94903
[Tel.] (415)785-3762
[Fax] (415)785-3805

ATTORNEYS FOR GHJ HOLDINGS, LLC