

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

(Electronically Filed)

HILLERICH & BRADSBY CO.,)	
INC.)	
)	
)	
Plaintiff,)	CASE No.: 3:09cv-649-S
)	
v.)	
)	
SPORTWAVES UNLIMITED,)	JURY TRIAL DEMANDED
INC.)	
)	
Defendant.)	

COMPLAINT FOR PATENT INFRINGEMENT

1. Plaintiff, Hillerich & Bradsby Co., Inc. ("H&B"), a Kentucky corporation by and through its attorneys, hereby demands a jury trial and complains of the Defendant, Sportwaves Unlimited, Inc. ("Sportwaves"), a Colorado corporation, as follows:

NATURE OF THE ACTION

2. This is a civil action for patent infringement, injunctive relief, and damages arising under the United States Patent Act, 35 U.S.C. §§ 1, et seq., to enjoin infringement and obtain damages resulting from Defendant's unauthorized manufacture, use, sale, offer to sell and/or importation into the United States for subsequent use or sale of products, methods, processes, services and/or systems that infringe one of more claims of the following United States Patents: U.S. Pat. No. 5,588,529, (the '529 Patent')(attached as Exhibit A) entitled "Baseball/Softball Equipment Bag"; U.S. Pat. No. 6,009,995, (the '995 Patent')(attached as Exhibit B) entitled "Baseball/Softball Equipment Bag"; U.S. Pat. No. 6,595,358, (the '358 Patent')(attached as Exhibit C) entitled "Baseball/Softball Equipment Bag"; and US. Pat. No.

6,732,863, (the '863 Patent")(attached as Exhibit D) entitled "Baseball/Softball Equipment Bag", collectively the "H&B patents" or "patents-in-suit." H&B seeks injunctive relief to prevent Defendant from continuing to infringe the H&B patents. In addition, Plaintiff seeks to recover monetary damages resulting from Defendant's past infringement of the H&B patents.

3. This action for patent infringement involves Defendant's manufacture, use, sale, offer to sell and/or importation into the United States of products and/or systems that are primarily used or primarily adapted for use as an equipment bag, including equipment bag products that infringe the H&B patents ("infringing products"). Examples of infringement are discussed and shown below.

THE PARTIES

4. Plaintiff H&B is a corporation organized and existing under the laws of Kentucky, with a principal place of business located at 800 West Main Street, Louisville, Kentucky 40204, within the Western District of Kentucky.

5. Plaintiff H&B is the lawful assignee of all right, title and interest in and to the H&B Patents, including rights to sue for acts of past and future infringement.

6. Plaintiff H&B is a leading manufacturer of sporting goods and equipment in the fields of baseball, softball, golf, and hockey, among others, throughout the United States and abroad. Specifically, H&B manufactures, sells and distributes baseball/softball equipment bag products ("H&B products") covered by the H&B patents throughout the United States, including in Kentucky and in this judicial district. Sales of H&B products, e.g., Louisville Slugger Deluxe Locker Bag — shown below, occur both online and through brick and mortar distribution and retail channels including major sporting goods chains.

7. On information and belief, H&B alleges as follows. Sportwaves Unlimited, Inc. (“Sportwaves”) is a privately held corporation in good standing and incorporated under the laws of Colorado with its principal place of business located at 404 W. Baseline Road, Lafayette, Colorado 80026. On information and belief, Sportwaves has and continues to market, offer to sell, and sell sporting goods products, including equipment bag products that infringe the patents-in-suit, throughout the United States, including Kentucky and in this district at least via its commercial website. Sportwaves is the registrant of the domain www.sportwaves.com and uses this website as a core function of its commercial operations, including the marketing, offer for sale, and sale of infringing products.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this patent infringement action pursuant to the United States Patent Act, 35 U.S.C. §§ 1, et seq., particularly including § 271 et seq., and pursuant to 28 U.S.C. §§ 1331 and 1338(a).

9. Sportwaves is subject to personal jurisdiction in Kentucky and requiring it to respond to this action will not violate due process. Sportwaves has committed acts of direct infringement, contributory infringement, and/or inducement of infringement, of one or more of the claims of each of the H&B Patents resulting in injury in this judicial district and division. Defendant is subject to the personal jurisdiction of this Court and is amenable to service of process pursuant to Kentucky's long-arm statute, Ky. Rev. St. § 454.210.

10. Defendant is subject to personal jurisdiction in Kentucky because it regularly transacts business in this Commonwealth, offers products and services and/or contracts to supply services or goods to customers, business affiliates and partners located in the

Commonwealth and in this judicial district. Defendant has caused infringing products to be made and imported into the United States for offer for sale, sale, and/or delivery into and for use in this Commonwealth thereby causing infringement of the H&B patents in this Commonwealth. Requiring Sportwaves to respond to this action will not violate due process. Defendant has committed acts of direct infringement, contributory infringement, and/or inducement of infringement, of one or more of the claims of the H&B Patents in this judicial district.

11. Venue lies in this district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1400(b) at least because Defendant is subject to personal jurisdiction in this district and has infringed the H&B Patents in this district.

GENERAL ALLEGATIONS

12. H&B is the exclusive owner of all right, title, and interest in and to the H&B Patents, which are valid and subsisting. The patents-in-suit are directed to equipment bags used to store and transport sports equipment and other belongings. The bags include compartments and shelves for receiving and supporting baseball bats, gloves, helmets, hats, drinks, uniforms, clothing, and other objects. In addition, the bags include carrying straps and hooks for hanging the bags on a fence or other vertical support.

13. The '529 Patent was duly and legally issued on December 31, 1996.

14. The '995 Patent was duly and legally issued on January 4, 2000.

15. The '358 Patent was duly and legally issued on July 22, 2003.

16. The '863 Patent was duly and legally issued on May 11, 2004.

17. H&B has the legal right to enforce the patents-in-suit against all including Defendant.

18. H&B has spent considerable time, effort, and resources developing and promoting products embodying the inventions of the patents-in-suit. H&B and/or its licensees have marked as patent pending or with one or more of the issued H&B patent numbers commercial products covered by the claims of one or more of the patents-in-suit since no later than January of 1997.

DEFENDANT'S ACTS INFRINGE H&B'S PATENTS

19. Upon information and belief, Defendant makes, uses, imports, exports, distributes, sells and/or offers for sale products that directly infringe, contributorily infringe, and/or induce others to infringe one or more claims of each of the H&B Patents. The infringing products include, by way of example but not limitation, equipment bag products identified as "Rocket"; "Rocket II"; "Rocket Catcher"; "Galaxy Bat Bag"; "Rocket Cruiser"; "Galaxy Cruiser"; and "Coaches Choice." One exemplary infringing bag, the Galaxy Bat Bag, made for or by Sportwaves and marketed and sold by Sportwaves in and across the U.S. is shown below alongside an exemplary Louisville Slugger competing equipment bag.



Louisville Slugger Equipment Bag



Exemplary Sportswaves Equipment Bag

20. H&B, by certified letter dated April 11, 2007, from H&B General Counsel Steven Lyverse to Sportswaves President Herbert Riehl and signed for by Mr. Riehl on April 16, 2007, placed Sportswaves on actual notice of H&B, the patents-in-suit, H&B products covered by the H&B patents, and Sportswaves infringement of the patents-in-suit. Moreover, Sportswaves has had constructive notice of the H&B patents through H&B's and its licensees' marking of equipment bag products with the H&B patents. Since April 2007, H&B has had continuing communications, including letters, electronic mail, and phone conversations, with Defendant and/or counsel for Defendant concerning the infringing activities. Sportswaves has continued and expanded the infringing conduct uninterrupted since at least as early as 2003.

21. Upon information and belief, Defendant has had ongoing and systematic contacts with Kentucky and within this judicial district. Defendant has caused infringing products to be placed in the stream of commerce, knowing and expecting that such products would end up in

this judicial district. Specifically, Defendant has taken orders originating in Kentucky and in this District for infringing products and has sold infringing products for delivery into Kentucky and this District.

DEFENDANT'S INFRINGEMENT IRREPARABLY HARMS H&B

22. Defendant's infringement of H&B's valuable patent rights has irreparably harmed H&B. Moreover, Defendant's unauthorized, infringing manufacture and/or importation of infringing goods incorporating Plaintiff's patented inventions threatens the value of the H&B patents by diminishing Plaintiff's lawful patent rights to exclude others from making, using, selling, offering to sell and/or importing the patented inventions.

23. Defendant's disregard for H&B's property rights similarly threatens Plaintiff's relationships with potential and existing customers and licensees of the H&B patents. Defendant has enjoyed and continues to derive a competitive advantage over Plaintiff's existing licensees and will derive a competitive advantage over Plaintiff's future licensees from using Plaintiff's patented technology without paying compensation for such use. Accordingly, unless and until Defendant's acts of infringement are enjoined, Plaintiff will suffer irreparable harm for which there is no adequate remedy at law.

COUNT I

(Infringement of United States Patent No. 5,588,529)

24. Plaintiff hereby incorporates by reference paragraphs 1 through 23 as if fully restated herein.

25. H&B is the lawful owner of and continues to maintain all right, title and interest

in and to the '529 Patent, including the right to sue thereon and the right to recover for infringement thereof.

26. Defendant makes, uses, sells, offers to sell and/or imports into the United States for subsequent sale or use products that infringe, directly and/or indirectly one or more of the claims of the '529 Patent.

27. Defendant has been and continues infringing one or more of the claims of the '529 Patent through the aforesaid acts, and will continue to do so unless enjoined by this Court. Defendant's wrongful conduct has caused Plaintiff to suffer irreparable harm resulting from the loss of its lawful patent rights to exclude others from making, using, selling, offering to sell and importing the patented inventions.

28. Defendant's infringement of the '529 Patent is knowing, willful and deliberate.

29. H&B is entitled to recover damages adequate to compensate H&B for Defendant's infringement.

COUNT II

(Infringement of United States Patent No. 6,009,995)

30. Plaintiff hereby incorporates by reference paragraphs 1 through 29 as if fully restated herein.

31. H&B is the lawful owner of and continues to maintain all right, title and interest in and to the '995 Patent, including the right to sue thereon and the right to recover

for infringement thereof.

32. Defendant makes, uses, sells, offers to sell and/or imports into the United States for subsequent sale or use products that infringe, directly and/or indirectly one or more of the claims of the '995 Patent.

33. Defendant has been and continues infringing one or more of the claims of the '995 Patent through the aforesaid acts, and will continue to do so unless enjoined by this Court. Defendant's wrongful conduct has caused Plaintiff to suffer irreparable harm resulting from the loss of its lawful patent rights to exclude others from making, using, selling, offering to sell and importing the patented inventions.

34. Defendant's infringement of the '995 Patent is knowing, willful and deliberate.

35. H&B is entitled to recover damages adequate to compensate H&B for Defendant's infringement.

COUNT III

(Infringement of United States Patent No. 6,595,358)

36. Plaintiff hereby incorporates by reference paragraphs 1 through 35 as if fully restated herein.

37. H&B is the lawful owner of and continues to maintain all right, title and interest in and to the '358 Patent, including the right to sue thereon and the right to recover for infringement thereof

38. Defendant makes, uses, sells, offers to sell and/or imports into the United States for subsequent sale or use products that infringe, directly and/or indirectly one or more of the claims of the '358 Patent.

39. Defendant has been and continues infringing one or more of the claims of the '358 Patent through the aforesaid acts, and will continue to do so unless enjoined by this Court. Defendant's wrongful conduct has caused Plaintiff to suffer irreparable harm resulting from the loss of its lawful patent rights to exclude others from making, using, selling, offering to sell and importing the patented inventions.

40. Defendant's infringement of the '358 Patent is knowing, willful and deliberate.

41. H&B is entitled to recover damages adequate to compensate H&B for Defendant's infringement.

COUNT IV

(Infringement of United States Patent No. 6,723,863)

42. Plaintiff hereby incorporates by reference paragraphs 1 through 41 as if fully restated herein.

43. H&B is the lawful owner of and continues to maintain all right, title and interest in and to the '863 Patent, including the right to sue thereon and the right to recover for infringement thereof.

44. Defendant makes, uses, sells, offers to sell and/or imports into the United

States for subsequent sale or use products that infringe, directly and/or indirectly one or more of the claims of the '863 Patent.

45. Defendant has been and continues infringing one or more of the claims of the '863 Patent through the aforesaid acts, and will continue to do so unless enjoined by this Court. Defendant's wrongful conduct has caused Plaintiff to suffer irreparable harm resulting from the loss of its lawful patent rights to exclude others from making, using, selling, offering to sell and importing the patented inventions.

46. Defendant's infringement of the '863 Patent is knowing, willful and deliberate.

47. H&B is entitled to recover damages adequate to compensate H&B for Defendant's infringement.

COUNT V

(Willful Infringement of the H&B Patents)

48. Plaintiff hereby incorporates by reference paragraphs 1 through 47 as if fully restated herein.

49. Defendant has had constructive knowledge of one or more of the patents-in-suit since no later than 2002, prior to which time (beginning January of 1997) H&B and its licensees have continuously marked their respective commercial products covered by the H&B Patents pursuant to 35 U.S.C. §287(a). Defendants have had actual knowledge of the patents-in-suit since no later than April 16, 2007.

50. Defendant's past and continuing infringement with actual knowledge of and in conscious and reckless disregard of the patents-in-suit is willful and deliberate under 35 U.S.C. §284 and at least for these reasons makes this an exceptional case under 35 U.S.C. §285.

51. H&B is entitled to enhanced damages and reasonable attorneys fees adequate to compensate for Defendant's willful infringement and other conduct.

PRAYER FOR RELIEF

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

(A) That this Court adjudge and decree that the '529 Patent is valid and enforceable against Defendant;

(B) That this Court adjudge and decree that the '995 Patent is valid and enforceable against Defendant;

(C) That this Court adjudge and decree that the '358 Patent is valid and enforceable against Defendant;

(D) That this Court adjudge and decree that the '863 Patent is valid and enforceable against Defendant;

(E) That Defendant be held to have infringed each of the H&B Patents;

(F) That Defendant and any subsidiaries, affiliates, parents, successors, assigns,

officers, agents, servants, employees, attorneys, and all persons acting in concert or in participation therewith, be temporarily and preliminarily enjoined during the pendency of this action, and permanently enjoined thereafter from infringing, contributing to the infringement of, and inducing infringement of the patent-in-suit, and specifically from directly or indirectly making, using, selling, importing or offering for sale, any products embodying the inventions of the patents-in-suit during the life of the claims of the patents-in-suit, without the express written authority of Plaintiff;

(G) That Defendant be directed to give a full accounting, including post verdict accounting, to determine an award to fully compensate H&B for all damages attributable to Defendant's infringement of the patents-in-suit in an amount consistent with proof at trial and in no event less than a reasonable royalty;

(H) That this case be deemed exceptional and that Plaintiff be awarded reasonable attorney's fees in accordance with 35 U.S.C. §285;

(I) That Defendant's infringement be found to be willful and that all damages awarded be trebled in accordance with 35 U.S.C. §284;

(J) That Defendant be ordered to deliver to Plaintiff, for destruction at Plaintiff's option, any and all molds and other machines or devices fabricated for manufacture of the infringing products and all products that infringe the patents-in-suit;

(K) That Defendant be required to account for all gains, profits, advantages, and unjust enrichment derived from its violations of law;

(L) That this Court assess pre-judgment and post-judgment interests and costs against Defendant, together with an award of such interest and costs, in accordance with 35 U.S.C. §284;

and

(M) That Plaintiff have such other, further, and different relief as this Court deems proper under the circumstances.

DEMAND FOR JURY TRIAL

H&B demands a trial by jury of all matters to which it is entitled to trial by jury pursuant to Fed. R. Civ. P. 38.

Respectfully submitted,
VALENTI HANLEY & ROBINSON, PLLC

Dated: August 26, 2009

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