

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

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SPECTRUM PACK, INC.,

Plaintiff,

v.

KALLE GMBH & CO. KG,

Defendant.
-----X

Civil Action No.: 04-CV-281
(WGB)

**AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT**

Document Electronically Filed

Plaintiff Spectrum Pack, Inc. (“plaintiff” or “Spectrum Pack”), by and through its undersigned attorneys, as and for its Amended Complaint against defendant Kalle GmbH & Co. KG (“defendant” or “Kalle”), hereby alleges as follows:

1. This is an action for a declaratory judgment that the Spektan BS-M biaxially stretched multilayer film sold by Spectrum Pack as a sausage casing (the “Product at Issue”) does not infringe Kalle’s United States Patent No. 5,185,189 (“the ‘189 Patent”) and that the ‘189 Patent is invalid.

PARTIES

2. Plaintiff Spectrum Pack is a New Jersey corporation having its principal place of business at 50 Amity Street, Jersey City, New Jersey 07304.

3. Upon information and belief, Defendant Kalle is a corporation formed and existing under the laws of the Federal Republic of Germany, with its principal place of business at Rheingaustrabe 190-196, D-65203 Wiesbaden, Germany.

4. Upon information and belief, Kalle regularly does or solicits business in the State of New Jersey engages in a persistent course of conduct in the State of New Jersey, or derives substantial revenue from products its sells and/or distributes in the State of New Jersey.

5. Upon information and belief, Kalle and/or its wholly-owned subsidiary, Kalle USA Inc, maintains an office at 8 Bartles Corner Road, Suite 102, Flemington, New Jersey.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § § 1331, 1338(a), 2201(a) and 2202 in that, as detailed below, (a) Spectrum Pack imports, sells and distributes, *inter alia*, the Product at Issue which Kalle contends infringes the ‘189 Patent, and (b) Kalle has created a reasonable apprehension on the part of Spectrum Pack that it will commence a suit for patent infringement against Spectrum Pack.

7. This Court has personal jurisdiction over Kalle pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.

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

FACTS

9. The Product at Issue is manufactured and sold to Spectrum Pack by Spektar, a company organized under the laws of the Federal Republic of Yugoslavia, with its offices at Gornji Milanovac.

10. Upon information and belief, Kalle is the assignee of ‘189 Patent. The ‘189 Patent is entitled “Multilayered Tubular Packaging Casing.” A copy of the ‘189 Patent is annexed hereto as Exhibit A.

11. On or about May 12, 2003, Spectrum Pack received a May 7, 2003 letter from Kalle's Executive Vice President, Dr. Gerhard Grolig, informing Spectrum Pack that Kalle believes that the Product at Issue infringes the '189 Patent. Among other things, Dr. Grolig's May 7, 2003 letter demanded that Spectrum Pack either cease its sale of the product at issue or contact Kalle "immediately to discuss licensing terms." Dr. Grolig's May 7, 2003 letter further threatened that if Kalle did "not receive an acceptable response . . . we will hand the case to US litigators without further notice." A copy of Dr. Grolig's May 7, 2003 letter is annexed as Exhibit B.

12. By letter dated June 2, 2003, Spectrum Pack's President, John C. Marcum, offered to explore entering into a license agreement with Kalle, although that letter specifically noted that Spectrum Pack did not then know whether the Product at Issue potentially infringed the '189 Patent. A copy of Mr. Marcum's June 2, 2003 letter is annexed as Exhibit C.

13. Kalle did not respond to Mr. Marcum's June 2, 2003 letter until Kalle's outside counsel, Dr. Jurgen Plate, of the Patent Law Office Zounnek, Postfach 3540, D-65174 Wiesbaden, Germany, responded by letter dated September 19, 2003 that Kalle will not consider entering into a license agreement with Spectrum Pack (contrary to what was stated in Kalle's May 7, 2003 letter) and that Kalle demands that Spectrum Pack pay it damages for "past patent infringement liability." A copy of Dr. Plate's letter is annexed as Exhibit D.

14. Kalle has retained a Wilmington, Delaware law firm as United States litigation counsel in connection with this matter.

15. In July 2003 Kalle's Wilmington, Delaware law firm commenced a patent infringement action in the United States District Court of Delaware on behalf of Kalle against Vista International Packaging, Inc., Hormel Foods Corp. and Nova Casing AB (the "Delaware

Defendants”) alleging, *inter alia*, infringement of the ‘189 Patent (the “Delaware Infringement Action”) on account of the Delaware Defendants’ alleged “manufacture, use, sales, and marketing of packaging casings” which purportedly infringe the ‘189 Patent.

16. Kalle’s Wilmington, Delaware law firm has refused to withdraw Kalle’s claims against Spectrum Pack (notwithstanding the information that has been provided by Spectrum Pack in response to Kalle’s inquiries) and has reiterated Kalle’s refusal to consider a license agreement with Spectrum Pack to avoid litigation.

CLAIM FOR RELIEF

(Patent Infringement -- Declaratory Judgment
of Non-Infringement and Invalidity)

17. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 16 above as if fully set forth at length herein.

18. As a result of, Kalle’s May 7 and September 19, 2003 letters and of Kalle’s filing of the Delaware Action against other food packaging companies alleging violation of the ‘189 Patent, Spectrum Pack has a reasonable apprehension of being sued by Kalle for infringement of the ‘189 Patent.

19. Spectrum Pack contends that the Product at Issue does not infringe any valid claim of the ‘189 Patent.

20. Spectrum Pack further contends that the ‘189 Patent is invalid for failing to meet the statutory requirements of patentability, for at least the following reasons:

- (a) pursuant to 35 U.S.C. §102 because the purported invention described in the ‘189 Patent was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the

invention thereof by the applicant for the '189 Patent, or because the purported invention described in the '189 Patent was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States; and/or

(b) pursuant to 35 U.S.C. §103 because any differences between the purported invention described in the '189 Patent and such prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

21. By reason of the foregoing, an actual controversy exists between the parties hereto as to whether (a) the Product at Issue infringes the '189 Patent, and (b) the '189 Patent is valid.

22. By reason of the foregoing, Spectrum Pack is entitled to a declaratory judgment that (a) the Product at Issue does not infringe the '189 Patent, and (b) the '189 Patent is invalid.

WHEREFORE, Spectrum Pack requests that this Court grant it the following relief:

1. a declaration that the Product at Issue does not infringe the '189 Patent;
2. a declaration that the '189 Patent is invalid;
3. A judgment permanently enjoining, restraining and prohibiting, Kalle, its officers, members, employees, agents, servants and affiliates, and all persons and entities acting in concert or in privity with them from charging Spectrum Pack or any of its customers with infringing the '189 Patent.

4. that this case be deemed exceptional pursuant to 35 U.S.C. 285 warranting further relief including but not limited to an award of Spectrum Pack's attorneys' fees, costs and disbursements; and
5. such other and further relief as the Court may deem just and proper.

Dated: September 8, 2004

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