

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1)	A TO Z MACHINING SERVICE, LLC,)	
	Plaintiff,)	
)	
vs.)	Case No. CIV-09- _____
)	
(1)	ALOHA POOLS & SPAS OF JACKSON,)	
	UNION CITY, AND PADUCAH, LLC, a)	
	Tennessee Limited Liability Company, and)	
(2)	ALOHA POOLS AND SPAS, INC., a		
	Tennessee Corp.;		
	Defendant.		

COMPLAINT

ANATOMY OF THE LITIGATION

1. Plaintiff files this Complaint against the above-named Defendants for infringement of U.S. Patent No. 7,428,800 (“‘800 Patent”), attached as Exhibit 1; for copyright infringement; for infringement of trademark Reg. No. 3,268,747, attached as Exhibit 2, and Serial No. 77/588,745 (“Trademarks”), attached as Exhibit 3; and for theft of Plaintiff’s trade secrets and other protected intellectual property and for unfair competition.

PARTIES

2. Plaintiff is an Oklahoma limited liability company with its primary offices in Ponca City, Oklahoma. Plaintiff owns the ‘800 Patent, the Trademarks, and the other intellectual property referenced in ¶1, above.

3. Defendants Aloha Pools & Spas of Jackson, Union City, and Paducah, LLC, a Tennessee Limited Liability Company (“Aloha LLC”) and Aloha Pools and Spas, Inc., a Tennessee Corp. (“Aloha Inc.”) (collectively, these companies will be referred to as Defendants) have at least four separate store locations at which they sell products including, not surprisingly, pool

and spa supplies, but also including tornado shelters and installation services therefor. The four locations include Franklin, TN, 1745 Galleria Blvd. Suite 1030; Jackson, TN, 614 Carriage House Drive; Paducah, KY, 3521 Park Plaza Road; and Union City, TN, 1400 W. Reelfoot Avenue. Aloha LLC has a service agent as follows: 1400 W. Reelfoot Ave., Union City, TN 38261. Aloha Inc. Has a service agent as follows: Hugh Moak, 8566 Kings Cross Cove, Cordova, TN 38016-5193.

BACKGROUND

4. Plaintiff previously had a dealership agreement with Defendants, but after Plaintiff became members of the National Storm Shelters Association (“NSSA”), certain guidelines needed to be followed regarding sales of their shelters. In February 2008, Defendants were advised that in order for us to sell them shelters they would have to follow NSSA guidelines. Among other things, Defendants were to send to Plaintiff a copy of the sales agreement for any of Plaintiff’s shelters resold by Defendant, a concrete ticket, and NSSA paperwork for each shelter. Defendants agreed to do this. After a couple of months Plaintiffs contacted Defendants about the paperwork because they had not sent any in. Defendants promised to send in the paperwork, but they never did. Late fall of 2008 Defendants contacted Plaintiff to purchase more shelters. Plaintiffs refused to send any more shelters to Defendants because they did not send the NSSA paperwork. Defendants belatedly sent in about 15 contracts, but Plaintiffs elected not to sell any more shelters to Defendants. At the first of 2009 Defendants again contacted Plaintiffs about purchasing shelters. Plaintiff again told Defendants that they could not purchase more shelters.

5. In February 2009 Plaintiff was advised that Defendants had copied Plaintiff’s shelters. Plaintiff contacted Defendants and told them that the copies infringed the ‘800 Patent, and that if they proceeded further, Plaintiff would sue. Upon information and belief, Plaintiffs assert that

Defendants ceased further infringing activities and came up with an alternative, non-infringing design.

6. Defendants are now using the Plaintiff's shelters in their showrooms to sell their products. Using Plaintiff's shelters in their showroom, when they are selling a distinctly different product is likely to result in consumer confusion, and it amounts to using Plaintiff's patented shelters to sell their shelters in a bait and switch operation

JURISDICTION AND VENUE

7. Jurisdiction and venue of this court are properly invoked under 28 U.S.C. §§ 1331, 1332, 1337, 1338, 1367, 1391 and/or 1400 for Plaintiffs' claims arising under 17 U.S.C. § 101, and 35 U.S.C. §271 and related causes of action as more fully set forth below.

FIRST CAUSE OF ACTION **PATENT INFRINGEMENT**

8. In contravention of Plaintiff's rights under the '800 Patent, Defendants have made, used and/or sold storm shelters that infringe the '800 Patent. Plaintiff seeks damages and injunctive relief related to Defendants' direct, indirect, and willful infringement of the '800 Patent. Claims for patent infringement arise, *inter alia*, under 35 U.S.C. §§ 271 (infringement), and 281-285 (remedies for infringement). Defendants induced and/or contributed to ongoing infringement of the '800 Patent by means of use of installed shelters that Defendants copied from Plaintiff's patented design.

9. Defendants' actions have been willful. Defendants knew that Plaintiff's shelters were patent-pending and that they became subject to the '800 Patent. Nevertheless, after negotiations for a distributor agreement fell through, Defendants proceeded to copy Plaintiff's shelters and sell them

on Defendants' own account without making any payment to Plaintiff, and without giving proper notice to purchasers of the risks associated with buying shelters that were patent-pending.

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

- a. That Defendants be held to have infringed the '800 Patent.
- b. That Defendants, their subsidiaries, affiliates, parents, successors, assigns, officers, agents, servants, employees, attorneys, and all persons acting in concert or in participation with them, or any of them, 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 '800 Patent, and specifically from directly or indirectly making, using, selling, or offering for sale, any products or services embodying the inventions of the patent-in-suit during the life of the '800 Patent, without the express written authority of Plaintiffs.
- c. That Defendants be directed to fully compensate Plaintiff for all damages attributable to Defendants' infringement of the '800 Patent in an amount according to proof at trial.
- d. That this case be deemed exceptional.
- e. That all damages awarded be trebled.
- f. That Defendants be ordered to deliver to Plaintiff, for destruction at Plaintiffs' option, all products that infringe the '800 Patent.
- g. That Defendants be required to account for all gains, profits, advantages, and unjust enrichment derived from their violations of law.
- h. That Plaintiff be awarded reasonable attorney's fees.
- i. That Plaintiff be awarded the costs of suit, and an assessment of interest.

j. That Plaintiff have such other, further, and different relief as the court deems proper under the circumstances.

SECOND CAUSE OF ACTION
MISAPPROPRIATION / UNFAIR COMPETITION

11. Plaintiff incorporates by reference the foregoing and subsequent allegations of this Complaint.

12. Defendant's actions amount to misappropriation and unfair competition by using Plaintiff's patented shelters in their show room, when Defendants no longer sell such shelters.

13. WHEREFORE, Plaintiff prays for judgment against Defendants as follows and for the following relief:

a. That Defendants be directed to fully compensate Plaintiff for all damages attributable to Defendants' wrongful conduct in an amount according to proof at trial.

b. That Defendants be directed to fully compensate Plaintiff for all damages attributable to Defendants' misappropriation in an amount according to proof at trial.

c. That Defendants be ordered to deliver to Plaintiff, for destruction at Plaintiff's option, all products or systems that result from Defendants' breaches.

d. That Defendants be required to account for all gains, profits, advantages, and unjust enrichment derived from their violations of law.

e. That Plaintiff be awarded punitive damages.

f. That Plaintiff be awarded reasonable attorney's fees.

g. That Plaintiff be awarded the costs of suit, and an assessment of interest.

h. That Plaintiff have such other, further, and different relief as the court deems proper under the circumstances.

THIRD CAUSE OF ACTION
COPYRIGHT VIOLATION

14. This cause of action is for copyright infringement under 17 U.S.C.A. § 501 to protect and enforce the exclusive rights of authorship and ownership conferred by 17 U.S.C.A. § 106, to wit, the exclusive rights of a copyright owner to copy, reproduce, distribute, display, and to prepare derivative works, of original works of authorship claimed by the copyright owner.

15. Plaintiff creates (or causes to be created) and sells for financial gain storm shelters. As a part of its business, Plaintiff has created marketing materials that it uses to publicize its products and to encourage their sale. A copyright application has been filed for one of those materials, and Plaintiff is the owner of that putative copyright. *See* Exhibit 4, copyrighted marketing brochure.

16. Defendants had access to Plaintiffs' works in three ways: first, Plaintiffs' works are open to the public on their web site (<http://www.flatsafe.com/>); second, products and materials were provided to Defendants by Plaintiff pursuant to a distributorship.

17. Defendants' copying, reproduction, distribution and selling of Plaintiffs' works resulted in a financial gain for Defendants and a financial loss to Plaintiffs.

18. Plaintiffs' artwork consists of original works of authorship fixed in a tangible medium of expression.

19. Plaintiffs' works are pending registration with the United States Copyright Office, and, as an entity with exclusive rights granted by the owner and holder of copyright protection,

Plaintiffs have the exclusive rights of reproduction, preparation of derivative works, distribution, and display of same consistent with the license it holds. 17 U.S.C. § 106.

20. Defendants copied, distributed and sold, without Plaintiffs' knowledge, consent or permission, Plaintiffs' works for Defendants' commercial use and benefit, including without limitation, for the purpose of financial gain and obtaining a competitive edge over Plaintiffs.

21. WHEREFORE, Plaintiff prays for judgment against Defendants as follows and for the following relief:

a. That Defendants, their subsidiaries, affiliates, parents, successors, assigns, officers, agents, servants, employees, attorneys, and all persons acting in concert or in participation with them, or any of them, be temporarily and preliminarily enjoined during the pendency of this action, and permanently enjoined thereafter from further infringing Plaintiff's works.

b. That Defendants be directed to fully compensate Plaintiff for all damages attributable to Defendants' copyright infringement in an amount according to proof at trial.

c. That Defendants be ordered to deliver to Plaintiff, for destruction at Plaintiff's option, all products or systems that result from Defendants' copyright infringement.

d. That Defendants be required to account for all gains, profits, advantages, and unjust enrichment derived from their violations of copyright law.

e. That Plaintiff be awarded punitive damages.

f. That Plaintiff be awarded reasonable attorney's fees.

g. That Plaintiff be awarded the costs of suit, and an assessment of interest.

h. That Plaintiff have such other, further, and different relief as the court deems proper under the circumstances.

PRELIMINARY AND PERMANENT INJUNCTION

22. More particularly Plaintiffs ask for injunctive relief. It is still possible to mitigate the some of the damages that will ensue from Defendants' ongoing infringement. Injunction may be available for infringement of Plaintiff's patent and copyright. Therefore, Plaintiffs ask the Court to enjoin Defendants' ongoing infringements pending the Court hearing from the parties on the propriety of injunctive relief. Plaintiffs seek this injunctive relief on a preliminary and emergency basis while the litigation is ongoing. A hearing is sought on this matter as soon as possible. Plaintiff also seeks a permanent injunction.

Respectfully Submitted,
EDWARD L. WHITE, P.C.

s/ Edward L. White

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