

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

PACKLESS METAL HOSE, INC.

Plaintiff,

v.

EXTEK ENERGY EQUIPMENT
(ZHEJIANG) CO., LTD.

Defendant.

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Civil Action No. 2:09-CV-265 (TJW)

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

The Parties

1. Plaintiff Packless Metal Hose, Inc. (hereinafter "Plaintiff") is a company with a mailing address of P.O. BOX 20668, Waco, Texas 76702.
2. Upon information and belief, Defendant Extek Energy Equipment (Zhejiang) Co., Ltd. ("Extek Energy" or "Defendant") is a Chinese company with its principal place of business at #818 South of Lingfeng Road, Anji County, Zhejiang Province, China 313300.

Jurisdiction and Venue

3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1338 because this action is for patent and copyright infringement and arises under the Patent and Copyright Laws of the United States, Title 35 of the United States Code.
4. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

GENERAL AVERMENTS

Plaintiff's Patent Rights

5. Plaintiff makes and sells certain products, including water-source heat pump coils.
6. United States Patent Nos. 5,409,057 ("the '057 Patent") and 5,551,504 ("the '504 Patent") were all duly and legally issued (collectively, the "Patents").
7. Plaintiff is the owner of all rights in and to the Patents.

Plaintiff's Copyrights

8. In order to market and sell its water-source heat pump coils, Plaintiff uses certain photographs and drawings of its products (collectively, the Photographs and Drawings).
9. The Photographs and Drawings are wholly original and copyrightable subject matter under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, as amended.
10. Plaintiff has complied with the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, as amended, by filing applications to secure for itself the exclusive rights and privileges in the copyrights in and to the Photographs and Drawings. *See* United States Copyright Numbers VA0001704845, VA0001704847, VA0001705884, VA0001705881, VA0001704842, VA0001704841, and VA0001705885.

Defendants and their Infringing Activities

11. Defendant is in the business of making, having made, using, selling, offering for sale, and/or importing various types of coaxial coils.
12. Defendant offers to sell and/or sells its infringing coaxial coils in the state of Texas and this district.
13. The activities of Defendant have been without authorization from Plaintiff.

14. Additionally, Defendant has, without permission, copied certain of Plaintiff's Photographs and Drawings and reproduced, publicly displayed, created derivative works thereof, and/or distributed copies of them in its advertising and sales materials. *See, e.g.*, excerpts from Defendant's product catalog in **Exhibit A**.

15. Defendant's violation of Plaintiff's copyrights in the Photographs and Drawings can be demonstrated by viewing a comparison of Plaintiff's copyrighted Photographs and Drawings to Defendant's materials. *See Exhibit B*.

COUNT I - PATENT INFRINGEMENT

16. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 15 of this Complaint as if fully set forth herein.

17. This cause of action arises under the Patent Laws of the United States, Title 35, United States Code.

18. Defendant has infringed and continues to infringe the Patents under 35 U.S.C. § 271 *et seq.* This infringement was and is willful and intentional.

19. Defendant has, without authority, consent, right or license, and in direct infringement of the Patents, made, used, sold, offered to sell, and/or imported products in this country, and, upon information and belief, such products have been offered for sale, sold, and used in the state of Texas and this district.

20. Defendant's infringing conduct is willful, intentional, and unlawful and, upon information and belief, will continue unless enjoined by this Court.

COUNT II - INDUCEMENT OF PATENT INFRINGEMENT

21. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 20 of this Complaint as if fully set forth herein.

22. This cause of action arises under the Patent Laws of the United States, Title 35, United States Code, in particular under 35 U.S.C. § 271(b).

23. Defendant has, in this country, actively and/or intentionally induced others to use products that infringe the Patents, and, upon information and belief, has induced others to use products that infringe the Patents in the state of Texas and in this district.

24. Defendant's infringing conduct is willful, intentional, and unlawful and, upon information and belief, will continue unless enjoined by this Court.

COUNT III - CONTRIBUTORY PATENT INFRINGEMENT

25. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 24 of this Complaint as if fully set forth herein.

26. This cause of action arises under the Patent Laws of the United States, Title 35, United States Code.

27. Defendant is furthermore liable for contributory infringement, pursuant to 35 U.S.C. § 271(c), in that Defendant has made, imported and/or sold within the United States a component of a patented machine, manufacture, composition, combination, or system, and/or a material or apparatus for use in practicing a patented process, including a material part of the invention, knowing the same to be especially made or adapted for use in the infringement of the Patents and not a staple article or commodity of commerce suitable for substantial non-infringing use, and, upon information and belief, have done such activities in the state of Texas and in this district.

28. Defendant's infringing conduct is willful, intentional, and unlawful and, upon information and belief, will continue unless enjoined by this Court.

COUNT IV – WILLFUL COPYRIGHT INFRINGEMENT

29. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 28 of this Complaint as if fully set forth herein.

30. Plaintiff's cause of action for copyright infringement arises under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, as amended, particularly 17 U.S.C. §§ 106(1)-(3), 501, and 602.

31. Defendant has willfully, deliberately, and unlawfully copied Plaintiff's Photographs and Drawings in the creation of Defendant's advertising and sales materials. Defendant has impermissibly reproduced, publicly displayed, created derivative works thereof, and/or distributed Plaintiff's Photographs and Drawings. Such acts have been without the permission of Plaintiff and constitute willful and deliberate infringements of Plaintiff's copyrights in Plaintiff's Photographs and Drawings in derogation of 17 U.S.C. §§ 106(1)-(3), 501, and 602.

DAMAGES

32. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 31 of this Complaint as if fully set forth herein. Plaintiff has suffered, is suffering, and will continue to suffer irreparable harm and injury as a result of Defendant's aforesaid activities. Defendant will, unless restrained and enjoined, continue to act in the unlawful manner complained of herein, all to Plaintiff's irreparable damage. Plaintiff's remedy at law is not adequate to compensate it for the injuries suffered and threatened. By reason of Defendant's acts complained of herein, Plaintiff has suffered monetary damages in an amount that has not yet been determined.

REQUEST FOR JURY TRIAL

33. Plaintiff hereby demands that this cause be tried by a jury.

PRAYER

34. WHEREFORE, Plaintiff demands:

A. That Defendant and its agents, officers, directors, employees, servants, representatives, customers, privies, successors and assigns, and all holding by, through or under Defendant, and all those acting for or on the behalf of Defendant, or in active concert, participation, or combination with Defendant, be enjoined and restrained, immediately and preliminarily (*i.e.*, a temporary restraining order, preliminary injunction, and/or permanent injunction as deemed appropriate by the Court), during the pendency of this action and permanently thereafter from, in the United States:

- (1) making, using, offering to sell, selling and/or importing the infringing products, or any colorable imitation thereof,
- (2) inducing others from infringing the Patents, and/or contributing to the infringement of the Patents by others;
 - a. otherwise infringing upon the Patents;
 - b. reproducing, publicly displaying, creating derivative works thereof, and/or distributing Plaintiff's copyrighted material, and
 - c. otherwise violating Plaintiff's copyrights.

B. That this Court order Defendant and its agents, officers, directors, employees, servants, representatives, customers, privies, successors and assigns, and all holding by, through or under Defendant, and all those acting for or on the behalf of Defendant, or in active concert, participation, or combination with Defendant, to deliver up to this Court, and to permit the seizure by Officers appointed by the Court of all articles and materials infringing upon the rights of Plaintiff, and particularly, without limitation, all products and materials which

embodies or includes the infringing products and materials, and to be delivered up for destruction on the issuance of a final Order in this action, including all infringing products and materials, and Defendant submit in writing, under oath, a description of all actions taken to comply with this portion of the Order.

C. That Defendant be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendant's infringement of the Patents.

D. That, in the alternative, a reasonable royalty be awarded to Plaintiff pursuant to 35 U.S.C. § 284.

E. That Defendant be ordered to account for and pay over to Plaintiff all its respective gains, profits and advantages derived from the infringement of the Patents or such damages as to the Court shall appear proper within the patent laws.

F. That Defendant be ordered to pay Plaintiff enhanced damages (*e.g.*, treble damages).

G. An accounting for and an award of the profits earned by Defendant as a result of its illegal acts related to Plaintiff's copyrights and the damages suffered by Plaintiff as a result of Defendant's illegal acts related to Plaintiff's copyrights or, if so elected by Plaintiff at any time prior to final judgment, an award of the maximum statutory damages of \$150,000 per copyrighted work infringed, or such other amount of statutory damages the Court deems just.

H. That Defendant be ordered to pay to Plaintiff the costs of this action, prejudgment interest, and post-judgment interest.

I. That this case be found to be exceptional.

J. That Defendant be ordered to pay Plaintiff's reasonable attorneys' fees, experts' fees, and costs.

K. That Plaintiff be awarded such other and further relief as the Court may deem just and proper.

Respectfully submitted,

s/ Ryan T. Beard

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**ATTORNEYS FOR PLAINTIFF
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