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POLYMER PRODUCTS USA, LLC and
WATERTON POLYMER PRODUCTS, LTD.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

WATERTON POLYMER PRODUCTS USA, LLC; WATERTON POLYMER PRODUCTS, LTD., Plaintiffs, v. EDIZONE, LLC, Defendant.	Case No. __________ **COMPLAINT FOR DECLARATORY JUDGMENT** DEMAND FOR A JURY TRIAL

COME NOW plaintiffs Waterton Polymer Products USA, LLC and Waterton Polymer Products, Ltd. (collectively and severally referred to as "Plaintiffs"), by and through their undersigned counsel of record, and for their complaint against defendant Edizone, LLC, hereby plead and allege as follows:

PARTIES

1. At all times material hereto, plaintiff Waterton Polymer Products USA, LLC ("Waterton USA") is and was an Idaho limited liability corporation authorized to do business in the state of Idaho, with its principal place of business located at 702 W. Idaho Street, Suite 1100, Boise, Idaho 83702.

2. At all times material hereto, plaintiff Waterton Polymer Products, Ltd. ("Waterton Ltd.") is and was a Canadian corporation authorized to do business in the state of Utah as Waterton Polymer Products, Inc., with its principal place of business located at 4500, 855 – 2nd Street S.W., Calgary, Alberta T2P 4K7, Canada.

3. Upon information and belief, at all times material hereto, defendant Edizone, LLC ("Edizone") is and was a Delaware limited liability corporation authorized to do business in the state of Utah, with its principal place of business located at 123 East 200 North, Alpine, Utah 84004.

JURISDICTION AND VENUE

4. Jurisdiction over this action arises under the patent laws of the United States, Title 35, United States Code, and pursuant to the provisions of 28 U.S.C. §§ 1331 and 1338

5. Venue is proper in this action pursuant to 28 U.S.C. §§ 1391 and 1400.

GENERAL ALLEGATIONS

6. This is an action for a declaratory judgment of patent non-infringement. Jurisdiction over this action arises under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. There is a justiciable controversy within the meaning of 28 U.S.C. §§ 2201 and 2202 between Plaintiffs, on the one hand, and Edizone, on the other hand, regarding whether Plaintiffs' products infringe upon U.S. Patents Nos. 5,749,111 (which issued May 12, 1998) (the "'111 Patent") and 6,026,527 (which issued February 22, 2000) (the "'527 Patent").

BACKGROUND

7. Plaintiffs manufacture and sell polymer gel matrix products ("Tempergel") typically consisting of a number of hollow cells which share flexible gel-based walls. The buyers of these products can incorporate them into other products such as seat cushions or mattresses offering a cooler and more durable alternative to traditional spring-, foam-, and silicon-based cushions.

8. As of the filing of this suit, Waterton Ltd. has supplied gel-based Tempergel products in the United States on one occasion, to RumbleGel, LLC ("RumbleGel"). Waterton USA has taken significant preparatory steps to import, sell, and offer to sell such products.

9. The '111 Patent was filed on February 14, 1996 and issued on May 12, 1998. A request for *ex parte* reexamination of the '111 Patent was filed on August 5, 2005 (Reexamination Application No. 90/007,656 (the "'656 Reexamination")). While no amendments to the claims of the '111 Patent were made during the '656 Reexamination, the patent holder made several representations to the United States Patent and Trademark Office that are material in construing the scope and breadth of the claims of the '111 Patent.

10. A second request for *ex parte* reexamination was filed on January 25, 2008 (Reexamination Application No. 90/009,026 (the "'026 Reexamination")). Based on the references before him, the Examiner issued a first Office Action on April 6, 2009, rejecting all of the claims. In response, the patent holder amended claims 1-4, 6, 9, 10, 34, 38, 41, 49, 66, 70, 99, 102, 103, 105, and 108-119, cancelled claims 25, 57, 90, 122, and 123, and added new claims 121, 124, and 125. The patent emerged from the '026 Reexamination on May 4, 2010.

11. The '527 Patent was filed on August 13, 1997 and issued as a patent on February 22, 2000. A first request for *ex parte* reexamination of the '527 Patent was filed on August 5, 2005 (Reexamination Application No. 90/007,659 (the "'659 Reexamination")). While no

amendments to the claims of the '527 Patent were made during the '659 Reexamination, as was the case in the '656 Reexamination, the patent holder made several representations to the United States Patent and Trademark Office that are material in construing the scope and breadth of the claims of the '527 Patent.

12. A second request for *ex parte* reexamination was filed on January 25, 2008 (Reexamination Application No. 90/009,003 (the "'003 Reexamination")). During the '003 Reexamination, the Examiner rejected all of the claims. In response, the patent holder amended claims 1, 2, and 32-37, and added new claims 39-41. The patent emerged from the '003 Reexamination on April 13, 2010.

13. Therefore, all of the current claims of the '111 and '527 patents are new or amended since the original issuance of those patents.

COMMON ALLEGATIONS

14. Edizone holds and enforces rights related to the '111 Patent and the '527 Patent (collectively, the "Patents"). Edizone does not manufacture any products incorporating features covered by the foregoing patents. However, Edizone has filed approximately ten (10) suits in this District alleging infringement of the '111 and '527 Patents, including seven (7) actions filed since August 31, 2010.

Edizone's Conduct As to Plaintiffs

15. In recent years, Edizone has acted to disrupt Plaintiffs' dealings with potential distributors and customers, demonstrating a concerted pattern of purposeful interference. As a consequence, Plaintiffs' relationships with actual and/or potential distributors and customers have been harmed by Edizone statements alleging "infringement" of the Patents

16. For example, in January 2009, at a trade show in Las Vegas, Waterton was in discussions with certain third parties concerning potential purchases of Tempergel products. A

representative for Edizone approached these third parties, apparently to discourage them, and alleged that any such purchases would "infringe" the Patents and result in liability.

17. Subsequently in 2009, Waterton was again engaged in discussions with a third party concerning potential purchases of Tempergel products. On information and belief, Edizone contacted the third party and threatened that any such purchases would constitute patent infringement and result in liability.

Edizone's November 1, 2011 Letter

18. On November 1, 2011, Edizone sent RumbleGel a letter, a true and correct copy of which is attached hereto as Exhibit 1. In the letter, Edizone asserted its ownership of the Patents, alleged that Tempergel products infringe the Patents, and claimed that neither RumbleGel nor Waterton could sell Tempergel products in the United States without the express authorization of Edizone.

19. In the letter, Edizone also asked RumbleGel to confirm that it had not and would not purchase any Tempergel products from Waterton. Edizone also asked RumbleGel to change its "website to state that no sales are offered or will be made within the United States."

20. In the letter, Edizone offered to negotiate a license to the Patents. Alternatively, Edizone offered to facilitate a meeting with Edizone's sister company, WonderGel, LLC ("WonderGel"), so that RumbleGel might purchase and sell products as a distributor of WonderGel products instead of Waterton's Tempergel products. Plaintiffs are informed and believe and thereon allege that Edizone's ability to license the Patents to RumbleGel (or Plaintiffs) is severely restricted by virtue of prior license agreements with other parties.

21. In the letter, Edizone threatened that, if RumbleGel were to elect to distribute Waterton's Tempergel products instead of WonderGel products, "an adversarial dispute [might result] that will distract both . . . companies from pursuing their main objectives."

22. Significantly, the president of Waterton Ltd. was copied on Edizone's letter.

23. Under all of the circumstances, Edizone's letter makes it clear that Edizone intends to bring suit, at some point, against Plaintiffs and/or RumbleGel for alleged infringement of the Patents unless Waterton and RumbleGel agree to a license agreement, or, in the alternative, RumbleGel agrees to distribute WonderGel products instead of Tempergel products. Edizone's conduct has created the reasonable apprehension by Plaintiffs that Edizone intends to file, and will file, for a legal action asserting infringement of the Patents.

The Parties' Current Controversy

24. By virtue of Edizone's actions and statements, there currently exists an actual and justiciable controversy between Plaintiffs and Defendant relating to the Patents.

25. In order to earn revenue, Edizone's business model necessitates either a lawsuit against Plaintiffs or the continued harassment of Plaintiffs' potential distributors in order to obtain license agreements and royalties for Edizone. As set forth above, Edizone has made numerous threats of litigation against Plaintiffs and associated third parties.

26. The continued allegations of infringement relating to the Patents place a cloud over Tempergel products and relationships with potential distributors and customers. In fact, Tempergel products are manufactured and sold in a way that does not infringe the Patents.

27. Under the circumstances, there exists a clear, substantial and continuing threat to Plaintiffs' business as long as the current controversy remains unresolved. Accordingly, Plaintiffs need and seek resolution of the issues raised in this complaint for declaratory relief to lift the cloud over their business. On such basis, Plaintiffs are entitled to declaratory relief.

28. Plaintiffs deny that they now infringe or in the past have infringed, either literally or under the doctrine of equivalents, any claim of the Patents, or either of them, as amended following the '656, '659, '003, and '026 Reexamination proceedings.

29. Plaintiffs seek a declaratory judgment that they do not infringe, either literally or under the doctrine of equivalents, any claim of the Patents, or either of them, as amended following the '656, '659, '003, and '026 Reexamination proceedings.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment of Patent Non-Infringement)

30. Plaintiffs reallege and incorporate by reference, as though fully set forth herein, the allegations contained in paragraphs 1 through 29 inclusive.

31. Neither Plaintiffs nor the Tempergel products directly infringe, contributorily infringe, or actively induce others to infringe, either literally or under the doctrine of equivalents, any claim of the '111 Patent or the '527 Patent, as properly construed, as amended following the '656, '659, '003, and '026 Reexamination proceedings.

32. Plaintiffs are entitled to a declaration by the Court that they have not and do not infringe any claim of the '111 Patent or the '527 Patent, as properly construed, as amended following the '656, '659, '003, and '026 Reexamination proceedings.

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for entry of judgment against Defendant, as follows:

1. For a declaration that Plaintiffs and Plaintiffs' products do not infringe and have not infringed, either literally or under the doctrine of equivalents, any claim of any of the Patents, as amended following the '656, '659, '003, and '026 Reexamination proceedings;

2. For a declaration, as warranted, that this is an exceptional case under 35 U.S.C. § 285 and for an award to Plaintiffs of their attorneys' fees and expenses in this action; and,

3. For such other and further relief as this Court deems just and proper.

DATED THIS 5th day of January, 2012.

PARSONS BEHLE & LATIMER

By______________________
John N. Zarian

Attorneys for Plaintiffs WATERTON POLYMER PRODUCTS USA, LLC and WATERTON POLYMER PRODUCTS, LTD.