

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MERRY PRODUCTS CORPORATION

Civil Action No:

Plaintiff

Hon.

vs.

JURY TRIAL DEMANDED

TEST RITE PRODUCTS CORP.

Defendant

COMPLAINT

For its Complaint, Plaintiff Merry Products Corporation (“Merry Products” or “Plaintiff”) states as follows:

THE PARTIES

1. Plaintiff is a Canadian Corporation and has a principal place of business at 3601 Highway 7 East, Markham, Ontario, Canada L3R 0M3.
2. Upon information and belief, Defendant Test Rite Products Corp. (“Test Rite” or “Defendant”) is a California corporation and has a principal place of business at 1900 South Burgundy Place, Ontario, California 91761.

JURISDICTION AND VENUE

3. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. § 1, et seq. and for breach of contract. This Court has original jurisdiction over the patent-related subject matter of this action pursuant to 28 U.S.C. §§ 1331

and 1338(a). Further, this Court has jurisdiction over the contract-related subject matter of this action pursuant to 28 U.S.C. § 1367 and 28 U.S.C. § 1332.

4. Upon information and belief, Defendant is subject to personal jurisdiction in this district because, *inter alia*, it regularly conducts business in this district by selling its products within this district.

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

6. Upon information and belief, the amount in controversy exceeds the sum or value of \$75,000.

GENERAL ALLEGATIONS

7. Plaintiff is a leading manufacturer and supplier of pet products, including cat washroom products.

8. On May 13, 2008, the U.S. Patent and Trademark Office duly and legally issued U.S. Patent No. D569,053 (“the ‘053 Patent”), for a “CAT WASHROOM.” A copy of the ‘053 Patent is attached as Exhibit A.

9. Plaintiff is the owner of the entire right, title, and interest in and to the ‘053 Patent.

10. Possessing the rights to the ‘053 Patent, and the ‘053 Patent being in full force and effect, Plaintiff has the right to sue for any infringement thereof.

11. On or about September 14, 2009, Plaintiff and Defendant entered into a License Agreement whereby Defendant agreed to pay royalties in exchange for a license under the ‘053 Patent and agreed to provide, each quarter, a written report verified by an independent third party

auditor of the number of units sold under the license by Defendant in the quarter. (Under the License Agreement, the specific monetary terms of the License are confidential. Upon entry of a Protective Order, Plaintiff will file a copy of the License Agreement under seal.)

12. Defendant last made a royalty payment to Plaintiff in June, 2010.

13. Since June 2010, and despite repeated requests by Plaintiff, Defendant has failed to provide, within one month after the end of each calendar quarter, a written report verified by an independent third party auditor to Plaintiff of the number of units of sold under the License Agreement by Defendant in the quarter, as required by the License Agreement. *See* Exhibit B, email chain between Melody Lee of Merry Products and Alicia Musquiz and Heidi Fuentes of Test Rite.

14. Upon information and belief, subsequent to June 2010, Defendant sold a product known as the “Home Zone Pet Hideaway Product,” model number CVA0091G, shown in Exhibit C. Upon information and belief, subsequent to June 2010 Defendant sold a similar product known as the “HomeZone MDF Kitty Litter House, Espresso,” model number CVA0092G, shown in Exhibit D. Defendant may have sold and may be continuing to sell, without authorization from Plaintiff, other similar products that fall within the scope of the ‘053 Patent. The products shown in Exhibits C and D are referred to as the “Accused Products.”

15. Defendant has failed to provide the required written report verified by an independent third party auditor of the number of units sold and, upon information and belief, Defendant has failed to pay to Plaintiff the agreed royalties under the License Agreement for sales of the Accused Products.

16. Upon information and belief, Defendant has taken the position that the License Agreement is limited to Defendant’s model numbers CVA0092G, CVA0079G, CVA0082G,

000826141, and 826148, and that model number CVA0091G, shown in Exhibit C, is not covered by the License Agreement.

17. As detailed below, to the extent Defendant's sales of the Accused Products are not covered by the License Agreement, such sales constitute an infringement of Plaintiff's '053 Patent. To the extent Defendant's sales of the Accused Products are covered by the License Agreement, Defendant has breached the License Agreement by failing to provide the required royalty payments and/or the required written report verified by an independent third party auditor.

18. Despite having failed to pay to Plaintiff the agreed royalties under the License Agreement and having failed to provide the required written report verified by an independent third party auditor, upon information and belief, subsequent to June 2010, Defendant continued to manufacture, sell, and offer to sell Accused Products without authorization from Plaintiff.

COUNT I: INFRINGEMENT OF U.S. PATENT NO. D569,063

19. Plaintiff hereby incorporates by reference the allegations set forth in paragraphs 1 through 18 as if fully set forth herein.

20. Upon information and belief, Defendant infringed the '053 Patent, either directly or contributorily, by making, using, offering to sell, or selling, within the United States, the Accused Products without the authority of Plaintiff and in violation of 35 U.S.C. § 271 et seq.

21. Upon information and belief, Defendant, without the authority of Plaintiff, has (1) applied the patented design of the '053 Patent, or a colorable imitation thereof, to an article of manufacture, namely the Accused Products, for the purpose of sale, and/or (2) sold or exposed

for sale an article of manufacture to which such design or colorable imitation has been applied, namely the Accused Products, in violation of 35 U.S.C. § 289.

22. By reason of Defendant's acts of infringement, Plaintiff has suffered and is suffering damages in an amount to be determined.

23. Upon information and belief, Defendant has known of the '053 Patent since prior to September 14, 2009. As such, Defendant's infringement of the '053 Patent is willful and justifies a trebling of damages pursuant to 35 U.S.C. § 284.

24. This is an exceptional case supporting an award of reasonable attorneys' fees pursuant to 35 U.S.C. § 285.

COUNT II: BREACH OF LICENSE AGREEMENT

25. Plaintiff hereby incorporates by reference the allegations set forth in paragraphs 1 through 24 as if fully set forth herein.

26. As referenced above, Plaintiff and Defendant entered into a License Agreement with respect to the '053 Patent on September 14, 2009.

27. Plaintiff has performed all conditions, covenants, and promises required by it under the terms of the License Agreement.

28. Defendant has materially breached the License Agreement by, among other things, failing to pay royalties due under the License Agreement for sales of the Accused Products and/or by failing to provide, each quarter, a written report verified by an independent third party auditor of the number of units sold of the Accused Product by Defendant in the quarter.

29. As a direct and proximate result of Defendant's breaches of the License Agreement, Plaintiff has suffered damages in an amount to be determined.

RELIEF REQUESTED

WHEREFORE, Plaintiff requests the following relief:

A. A judgment declaring that Defendant has infringed the '053 Patent in violation of 35 U.S.C. §§ 271 and 289;

B. A judgment awarding Plaintiff its damages for patent infringement, together with pre-judgment interest, post-judgment interest, and costs, against Defendant pursuant to 35 U.S.C. § 284;

C. A judgment awarding Plaintiff its damages for breach of the License Agreement, together with pre-judgment interest, post-judgment interest, and costs;

D. A judgment awarding Plaintiff its damages under 35 U.S.C. § 289 in an amount commensurate with Defendant's total profits;

E. An order increasing awarded damages by three times the amount found or assessed under 35 U.S.C. § 284;

F. A judgment declaring this an exceptional case and awarding Plaintiff its reasonable attorneys' fees under 35 U.S.C. § 285; and

G. Such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury for each and every issue so permitted by law and statute.

Dated: September 21, 2012

s/ Michael P. Doerr
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