

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VitalStim, LLC; ESD, LLC; DJO, LLC; and)	CIVIL ACTION NO:
Empi, Inc.,)	
Plaintiffs,)	DEMAND FOR JURY TRIAL
v.)	
eSwallow USA, LLC,)	
Defendant.)	

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiffs VitalStim, LLC (“VitalStim”), ESD, LLC (“ESD”), DJO, LLC (“DJO”) and Empi, Inc. (“Empi”) (collectively, “Plaintiffs”) for their Complaint against Defendant eSwallow USA, LLC (“eSwallow”), alleges as follows:

THE PARTIES

1. VitalStim is a company organized and existing under the laws of the state of Ohio with a principal place of business at 12730 Marine Drive, Marysville, WA 98271.

2. ESD is a company organized and existing under the laws of the state of Ohio with a principal place of business at 7840 Mayfield Road, Chesterland, Ohio 44026.

3. DJO, LLC is a company organized and existing under the laws of the state of Delaware with a principal place of business at 1430 Decision Street, Vista, CA 92081.

4. Empi, Inc. is a company organized and existing under the laws of the state of Minnesota with a principal place of business at 5999 Cardigan Rd, Shoreview, MN 55126.

5. Upon information and belief eSwallow is a corporation organized and existing under the laws of the state of Alabama with a principal place of business at 106 Hidden Drive, Scottsboro, AL 35769.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1338(a), and the Patent Laws of the United States, 35 U.S.C. §§ 271 et seq.

7. Personal jurisdiction (1) exists generally over eSwallow because it has sufficient minimum contacts with the forum as a result of business conducted within the State of Georgia and this district, either directly or through its distributors; and/or (2) exists specifically over eSwallow because of its infringing conduct within or directed at the State of Georgia and this district, either directly or through its distributors. For example, on November 15, 2012 eSwallow has sold

and/or offered to sell a product that infringes the patent-in-suit at the American Speech-Language-Hearing Association (ASHA) Convention in Atlanta, GA. Photographs of the eSwallow booth, order forms and brochures distributed to the public at the ASHA Convention are attached hereto as Exhibit A.

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

BACKGROUND FACTS

9. VitalStim is an innovator in the development of safe and effective treatments for patients suffering with difficulty swallowing or dysphagia.

10. On March 10, 1998, the United States Patent and Trademark Office (“USPTO”) duly and legally granted U.S. Patent No. 5,725,564 for an invention entitled “Method and Apparatus for Treating Dysphagia with Electrical Stimulation” (“the ‘564 patent”). A true and correct copy of the ‘564 patent is attached hereto as Exhibit B.

11. On November 16, 1999, the United States Patent and Trademark Office (“USPTO”) duly and legally granted U.S. Patent No. 5,987,359 for an invention entitled “Method for Treating Dysphagia with Electrical Stimulation” (“the ‘359 patent”). A true and correct copy of the ‘359 patent is attached hereto as Exhibit C.

12. On August 15, 2000, the United States Patent and Trademark Office (“USPTO”) duly and legally granted U.S. Patent No. 6,104,958 for an invention entitled “Device for Treating Dysphagia with Electrical Stimulation” (“the ‘958 patent”). A true and correct copy of the ‘958 patent is attached hereto as Exhibit D.

13. On October 9, 2007, the United States Patent and Trademark Office (“USPTO”) duly and legally granted U.S. Patent No. 7,280,873 for an invention entitled “Treatment of Oropharyngeal Disorders by Application of Neuromuscular Electrical Stimulation” (“the ‘873 patent”). A true and correct copy of the ‘873 patent is attached hereto as Exhibit E.

14. ESD is the owner of the entire right, title, and interest in and to the ‘564 patent, the ‘359 patent, the ‘958 patent, and the ‘873 patent (collectively, the “Dysphagia Patents”).

15. VitalStim is the exclusive licensee to the Dysphagia Patents with the right to sublicense.

16. VitalStim sublicensed the Dysphagia Patents to DJO and Empi. Empi has commercialized the Dysphagia Patents by making and selling its own products, which are covered by one or more claims of the Dysphagia Patents, including the VitalStim® Therapy System, K023347.

17. The User Manual provided along with each VitalStim® Therapy System has been continuously marked with U.S. Patent Nos. 5,725,564, 5,987,359, and 6,104,958 since at least 2005 in compliance with the statutory notice requirement of 35 USC §287.

18. Upon information and belief, Bill Ingram is currently managing principal of eSwallow.

19. Mr. Ingram was principal of a former distributor of the VitalStim® Therapy System.

20. As principal of a former distributor of the VitalStim® Therapy System, eSwallow through its principal, Bill Ingram, was aware of the Dysphagia Patents.

21. Upon information and belief, eSwallow had and continues to have knowledge of the Dysphagia Patents at least by virtue of the marking.

22. eSwallow has made, used, offered to sell, and/or sold in the United States an electrical pharyngeal neuromuscular stimulator, identified as the eSwallow Dysphagia Therapy Unit Models 9950/9960 (the “9950/9960 Stim Unit”).

23. Upon information and belief, eSwallow obtained a VitalStim® Therapy System and copied the design of several elements and incorporated these features in the 9950/9960 Stim Unit.

24. eSwallow has directly infringed and is now infringing the Dysphagia Patents by making, using, offering to sell, and/or selling the 9950/9960 Stim Unit in the United States.

25. Upon information and belief, eSwallow sells the 9950/9960 Stim Unit in the United States to third-party distributors who, in turn, resell the 9950/9960 Stim Unit to purchasers, including therapists and consumers who operate the product (collectively, “the Purchasers”). In so doing, eSwallow actively aids and abets the resale and use of the 9950/9960 Stim Unit.

26. eSwallow induces the Purchasers of the 9950/9960 Stim Unit and the general public to infringe Dysphagia Patents by providing instruction, training and advertising. By way of example and not limitation, one such training course is advertised on a website located at <http://www.eswallow.net/Training.html> (last visited November 15, 2012). Upon information and belief this training course instructs an infringing use of the 9950/9960 Stim Unit for the treatment of dysphagia. A true and accurate copy of the contents of this webpage is attached hereto as Exhibit F.

27. Upon further information and belief, the 9950/9960 Stim Unit was designed for use, and intended to be used, in the treatment of dysphagia and that product lacks substantial uses that do not infringe claims of the Dysphagia Patents.

28. Upon further information and belief, eSwallow's distributors have infringed the Dysphagia Patents by using, offering to sell, and/or selling the 9950/9960 Stim Unit in the United States.

29. Upon further information and belief, the Purchasers of the 9950/9960 Stim Unit have infringed and are now infringing the Dysphagia Patents by using this product in the United States.

COUNT I

(Direct Infringement of U.S. Patent No. 5,725,564)

30. Paragraphs 1–28 are re-alleged and restated as if fully set forth herein.

31. By making, using, offering to sell, and/or selling the 9950/9960 Stim Unit in the United States, eSwallow has directly infringed and is infringing one or more claims of U.S. Patent No. 5,725,564, in violation of 35 U.S.C. § 271(a).

32. eSwallow's actions as described above demonstrate a deliberate and conscious decision to infringe the Dysphagia Patents, or at the very least, a reckless disregard of Plaintiffs' patent rights.

33. The direct infringement of the '564 patent by eSwallow was and is willful and deliberate, and will continue unless enjoined by this Court.

34. As a result eSwallow's acts of infringement of the Dysphagia Patents, Plaintiffs have suffered, and will continue to suffer, damages in an amount to be proven at trial. Furthermore, Plaintiffs have suffered, and continue to suffer, irreparable harm for which there is no adequate remedy at law.

COUNT II

(Indirect Infringement of U.S. Patent No. 5,725,564)

35. Paragraphs 1–34 are re-alleged and restated as if fully set forth herein.

36. eSwallow has offered to sell and sold the 9950/9960 Stim Unit in the United States to distributors.

37. eSwallow has also actively aided and abetted distributors and the Purchasers to offer for sale, sell and/or use the 9950/9960 Stim Unit by providing instruction, training and advertising to instigate an infringing use of the 9950/9960 Stim Unit. eSwallow intended to cause these acts and knew or should have known would directly infringe one or more claims of the '564 patent.

38. By actively and knowingly aiding and abetting distributors and the Purchasers to offer for sale, sell, and/or use the 9950/9960 Stim Unit, eSwallow

has indirectly infringed one or more claims of the '564 patent, in violation of 35 U.S.C. § 271(b).

39. eSwallow's actions as described above demonstrate a deliberate and conscious decision to infringe the Dysphagia Patents, or at the very least, a reckless disregard of Plaintiffs' patent rights.

40. The indirect infringement of the '564 patent by eSwallow was and is willful and deliberate, and will continue unless enjoined by this Court.

41. As a result of the indirect infringement of the Dysphagia Patents by eSwallow, Plaintiffs have suffered, and continue to suffer, damages in an amount to be established at trial. Furthermore, Plaintiffs have suffered, and continue to suffer, irreparable harm for which there is no adequate remedy at law.

COUNT III

(Direct Infringement of U.S. Patent No. 5,987,359)

42. Paragraphs 1–41 are re-alleged and restated as if fully set forth herein.

43. By making, using, offering to sell, and selling the 9950/9960 Stim Unit in the United States, eSwallow has directly infringed and is infringing one or more claims of U.S. Patent No. 5,987,359 in violation of 35 U.S.C. § 271(a).

44. eSwallow's actions as described above demonstrate a deliberate and conscious decision to infringe the Dysphagia Patents, or at the very least, a reckless disregard of Plaintiffs' patent rights.

45. The direct infringement of the '359 patent by eSwallow was and is willful and deliberate, and will continue unless enjoined by this Court.

46. As a result of the direct infringement of the Dysphagia Patents by eSwallow, Plaintiffs have suffered, and continue to suffer, damages in an amount to be established at trial. Furthermore, Plaintiffs have suffered, and continue to suffer, irreparable harm for which there is no adequate remedy at law.

COUNT IV

(Indirect Infringement of U.S. Patent No. 5,987,359)

47. Paragraphs 1–46 are re-alleged and restated as if fully set forth herein.

48. eSwallow has offered to sell and sold the 9950/9960 Stim Unit in the United States to distributors. eSwallow has also actively aided and abetted distributors and the Purchasers to offer for sale, sell and/or use the 9950/9960 Stim Unit by providing instruction, training and advertising to instigate an infringing use of the 9950/9960 Stim Unit. eSwallow intended to cause these acts and knew or should have known would directly infringe one or more claims of U.S. Patent No. 5,987,359.

49. By actively and knowingly aiding and abetting distributors and the Purchasers to offer for sale, sell, and/or use the 9950/9960 Stim Unit, eSwallow has indirectly infringed one or more claims of the '359 patent, in violation of 35 U.S.C. § 271(b).

50. eSwallow's actions as described above demonstrate a deliberate and conscious decision to infringe the Dysphagia Patents, or at the very least, a reckless disregard of Plaintiffs' patent rights.

51. The indirect infringement of the '359 patent by eSwallow was and is willful and deliberate, and will continue unless enjoined by this Court.

52. As a result of the indirect infringement of the Dysphagia Patents by eSwallow, Plaintiffs have suffered, and continue to suffer, damages in an amount to be established at trial. Furthermore, Plaintiffs have suffered, and continue to suffer, irreparable harm for which there is no adequate remedy at law.

COUNT V

(Direct Infringement of U.S. Patent No. 6,104,958)

53. Paragraphs 1–52 are re-alleged and restated as if fully set forth herein.

54. By making, using, offering to sell, and selling the 9950/9960 Stim Unit in the United States, eSwallow has directly infringed and is infringing one or more claims of U.S. Patent No. 6,104,958 in violation of 35 U.S.C. § 271(a).

55. eSwallow's actions as described above demonstrate a deliberate and conscious decision to infringe the Dysphagia Patents, or at the very least, a reckless disregard of Plaintiffs' patent rights.

56. The direct infringement of the '958 patent by eSwallow was and is willful and deliberate, and will continue unless enjoined by this Court.

57. As a result of the direct infringement of the Dysphagia Patents by eSwallow, Plaintiffs have suffered, and continue to suffer, damages in an amount to be established at trial. Furthermore, Plaintiffs have suffered, and continue to suffer, irreparable harm for which there is no adequate remedy at law.

COUNT VI

(Direct Infringement of U.S. Patent No. 7,280,873)

58. Paragraphs 1–57 are re-alleged and restated as if fully set forth herein.

59. By making, using, offering to sell, and selling the 9950/9960 Stim Unit in the United States, eSwallow has directly infringed and is infringing one or more claims of U.S. Patent No. 7,280,873 in violation of 35 U.S.C. § 271(a).

60. Upon information and belief, eSwallow's actions as described above demonstrate a deliberate and conscious decision to infringe the Dysphagia Patents, or at the very least, a reckless disregard of Plaintiffs' patent rights.

61. As a result of the direct infringement of the Dysphagia Patents by eSwallow, Plaintiffs have suffered, and continue to suffer, damages in an amount to be established at trial. Furthermore, Plaintiffs have suffered, and continue to suffer, irreparable harm for which there is no adequate remedy at law.

COUNT VII

(Indirect Infringement of U.S. Patent No. 7,280,873)

62. Paragraphs 1–61 are re-alleged and restated as if fully set forth herein.

63. eSwallow has offered to sell and sold the 9950/9960 Stim Unit in the United States to distributors. eSwallow has also actively aided and abetted distributors and the Purchasers to offer for sale, sell and/or use the 9950/9960 Stim Unit by providing instruction, training and advertising to instigate an infringing use of the 9950/9960 Stim Unit. eSwallow intended to cause these acts and knew or should have known would directly infringe one or more claims of the ‘873 patent.

64. By actively and knowingly aiding and abetting distributors and the Purchasers to offer for sale, sell, and/or use the 9950/9960 Stim Unit, eSwallow has indirectly infringed one or more claims of the ‘873 patent, in violation of 35 U.S.C. § 271(b).

65. Upon information and belief eSwallow's actions as described above demonstrate a deliberate and conscious decision to infringe the Dysphagia Patents, or at the very least, a reckless disregard of Plaintiffs' patent rights.

66. Upon information and belief the indirect infringement of the '873 patent by eSwallow was and is willful and deliberate, and will continue unless enjoined by this Court.

67. As a result of the indirect infringement of the Dysphagia Patents by eSwallow, Plaintiffs have suffered, and continue to suffer, damages in an amount to be established at trial. Furthermore, Plaintiffs have suffered, and continue to suffer, irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, VitalStim prays that the Court:

A. Preliminarily and permanently enjoin eSwallow, and its officers, employees, servants, and agents, and all persons in active concert with any of them, against any further acts of direct infringement or indirect infringement under 35 U.S.C. § 283, including without limitation making, using, offering to sell, and/or selling the 9950/9960 Stim Unit.

B. Order eSwallow to pay, in accordance with 35 U.S.C. § 284, damages adequate to compensate for the patent infringement, but in no event less than a

reasonable royalty for the use made of the invention, together with interest and taxable costs.

C. Find the infringement by eSwallow to be willful, and order it to pay three (3) times the amount of damages found or assessed, under 35 U.S.C. § 284.

D. Find this to be an exceptional case under 35 U.S.C. § 285, and order eSwallow to pay Plaintiffs' attorneys' fees, expenses and costs in this action.

E. Grant Plaintiffs such other and further relief as the Court may deem proper and just under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiffs VitalStim, LLC, ESD, LLC, DJO, LLC, and Empi, Inc. hereby make demand for a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure as to all issues of this lawsuit.

Dated: December 3, 2012

Respectfully submitted,

Of Counsel:

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Empi, Inc.*

LOCAL RULE 7.1(D) CERTIFICATION

Undersigned counsel hereby certifies that this Complaint for Patent Infringement has been prepared in Times New Roman 14 pt., which is one of the font and point selections approved by the Court under Local Rule 5.1(B).

s/ D. Clay Holloway

D. Clay Holloway
Attorney for Plaintiffs