IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

LLOYD RANDALL ANDERSON	)	
	)	
Plaintiff,	)	
	)	**Docket No. _________________**
v.	)	
	)	
TOL, Inc.,	)	
	)	
Defendant.	)	

VERIFIED COMPLAINT OF LLOYD RANDALL ANDERSON

Plaintiff Lloyd Randall Anderson ("Mr. Anderson" or "Plaintiff") states the following in support of this Complaint:

Introduction

1. Plaintiff Randy Anderson is the inventor of and owner of U.S. Patent Nos. 6,659,838 (the "'838 Patent"), 7,172,487 (the "'487 Patent") and 7,223,151 (the "'151 Patent") for "ridged helium balloons" (also collectively referenced as "the Anderson Patents"). The Anderson Patents were originally commercialized for a product known as the "HoverDisc." The HoverDisc is one of the most commercially successful toy products of the last ten years. A picture of the product is attached to this Complaint as **Exhibit A**.

2. This is an action for breach of contract, patent infringement, fraud, declaratory and injunctive relief that arises from a certain License Agreement dated February 22, 2003 (the "License Agreement") that Mr. Anderson, via his company PhoenixArts LLC, entered into with

Overbreak[1], LLC ("Overbreak"), a now defunct company, for the manufacture and sale of the HoverDisc.

3. Mr. Anderson asserts that Overbreak and TOL, Inc. ("TOL"), a separate entity with some or all of the same common owners as Overbreak, have consistently operated in bad faith and have defrauded Mr. Anderson in the calculation of royalties due; failed to pay these understated royalties; failed to obtain his approval on product designs and expenses despite an obligation to do so; and failed to continuously market the product as required by the Agreement. Because of these (and other) breaches of the License Agreement, Mr. Anderson terminated the parties' Agreement. Overbreak and/or TOL now seek to interfere with his rights to enter into a new agreement with a company that will fairly and honestly compensate him for the use of his intellectual property on the basis that the License Agreement was not terminated.

4. Overbreak and/or TOL have asserted that they have continued to and will continue to manufacture and sell the HoverDisc despite the Agreement's termination--conduct which constitutes a misuse of Mr. Anderson's confidential information and patent infringement.

5. Mr. Anderson seeks a Declaratory Judgment that the License Agreement is properly terminated, that neither Overbreak nor TOL have any rights of any kind or character with respect to the HoverDisc or the Patented Products, that Overbreak and TOL have breached the License Agreement in many material respects, that Overbreak and TOL's continued manufacture and sale of the HoverDisc and use of Mr. Anderson's inventions and "know-how" constitutes misuse of Mr. Anderson's confidential information and constitute patent

[1] Although Overbreak is apparently defunct, Mr. Anderson names it herein because he is not aware of any valid assignment from Overbreak to TOL and, because the companies appear to have been alter egos of one another. Mr. Anderson asserts that Overbreak and TOL are jointly and severally responsible for the acts alleged herein to the extent that Overbreak still exists.

infringement, and that Mr. Anderson is entitled to an injunction to cease TOL's continued sale and manufacture of the HoverDisc. In that regard, Mr. Anderson states as follows:

Parties

6. Plaintiff Lloyd Randall Anderson is a citizen of the state of Tennessee and resides at 133 Riverchase Drive, Hendersonville, Tennessee 37075.

7. Upon information and belief, Defendant TOL, Inc., is a Nevada corporation with its principal place of business in Woodland Hills, California.

Jurisdiction and Venue

8. Subject matter jurisdiction is proper in this court pursuant to 28 U.S.C. § 1332, because the parties are citizens of different states and the amount in controversy exceeds $75,000. In addition, this action arises under the patent laws of the United States, Title 35 of the United States Code. Accordingly, this Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

9. This Court has personal jurisdiction over TOL and Overbreak because TOL and Overbreak have established minimum contacts with the State of Tennessee. TOL and Overbreak, directly and/or through third-party manufacturers, manufacture or assemble or sell products that, on information and belief, are and have been offered for sale, sold, purchased, and used within the State of Tennessee. In addition, TOL and Overbreak, directly and/or through their distribution networks, regularly place their products within the stream of commerce, with the knowledge and/or understanding that such products will be sold in Tennessee. In addition, TOL and Overbreak entered into the License Agreement to make and sell products covered by the Anderson Patents owned by Plaintiff who resides in the State of Tennessee; have sent payments and or royalty statements under the License Agreement to Plaintiff in the State of Tennessee; and

have recently re-approached Mr. Anderson while he was located and residing in the State of Tennessee in order to persuade him to enter into a new license agreement with TOL. In addition, TOL and Overbreak have sent numerous letters and emails and have participated in numerous phone calls with Plaintiff and his counsel in Tennessee, regarding the License Agreement that is the subject of this lawsuit as well as the new license agreement that TOL was proposing. Thus, TOL and Overbreak have sufficient contacts with the State of Tennessee such that it is appropriate for this Court to exercise both specific and general jurisdiction over them. Further, TOL and Overbreak have purposefully availed themselves of the benefits of the State of Tennessee and the exercise of jurisdiction over TOL and Overbreak would not offend traditional notions of fair play and substantial justice.

10. Venue is proper in this court pursuant to 28 U.S.C. § 1391 because a substantial part of the events giving rise to the dispute occurred in this district and the Court has personal jurisdiction over each of the parties as alleged throughout this Complaint and because Plaintiff is entitled to seek injunctive relief in this district. In addition, venue is proper in this District under 28 U.S.C. §§ 1391 (b)-(d) and 1400(b) because TOL and Overbreak are subject to personal jurisdiction in this District, have committed acts of patent infringement in this District, and because Plaintiff seeks to enjoin Defendant from committing the acts described herein as well as the breach of Section 19 of the License Agreement.

Background

11. Mr. Anderson is the inventor of a popular children's toy known as the "HoverDisc." The HoverDisc is a cross between a frisbee and a balloon: a large, flattened disc made of lightweight materials that may be filled with helium or air, hover in a floating position, and/or made to fly through the air and perform various tricks.

12. The HoverDisc is protected by one or more claims of the Anderson Patents that describe an apparatus comprised of a rigid chambered balloon containing supporting structures that will maintain its shape when inflated and float at the height from which it was released unless repositioned. The HoverDisc, together with all other products covered by the 'Anderson Patents, are referred to in this Complaint as the "Patented Products." True and correct copies of the Anderson Patents are attached to this Complaint as **Exhibit B**.

13. Mr. Anderson currently holds the rights to the Anderson Patents.

14. Mr. Anderson was the sole owner and President of a Tennessee-based limited liability company, PhoenixArts, LLC ("PhoenixArts"), which was granted the right to license the Anderson Patents by Mr. Anderson. Upon the dissolution of PhoenixArts, all right, title, and interest in and to the Anderson Patents reverted to Mr. Anderson.

The License Agreement

15. On February 22, 2003, PhoenixArts entered into the License Agreement with Overbreak, LLC, a Nevada limited liability company. Because the License Agreement and the Royalty Statements discussed herein contain confidential business terms and are considered Confidential Information pursuant to Section 19(a) of the License Agreement, they are not attached to this Complaint as Exhibits. Instead, Mr. Anderson is concurrently filing a Motion to File the License Agreement and Royalty Statements Under Seal with this Complaint. Upon the Court's granting of this Motion, a true and accurate copy of the License Agreement and Royalty Statements will be filed with the Court as a part of the record of this case.

16. Pursuant to Section 2 of the License Agreement, PhoenixArts granted Overbreak an exclusive license to manufacture, distribute, advertise and sell the Patented Products

worldwide as well as the right to use his Licensed Technical information. The License Agreement refers to PhoenixArts as "Licensor" and Overbreak as "Licensee."

17. Pursuant to Section 6(b) of the License Agreement, Overbreak agreed to pay PhoenixArts a periodic royalty based on the "Net Sales" of Overbreak. "Net Sales" for any period is defined in Section 1(a) of the License Agreement as "the Gross Sales Revenue[s] of the Licensee […] for Products shipped and invoiced by Licensee to Third Parties during such period[….]." "Gross Sales Revenues" is in turn defined by Section 2(d) of the License Agreement as follows:

> (i) with respect to television direct response sales […] and Mail Order Sales, gross revenues received for the Products, less (A) actual shipping, handling and transportation fees paid by Third Parties, (B) actual sales, excise, use or any other taxes (not including income or franchise taxes) payable by Licensee with respect to such sales, and (C) actual refunds, returns, chargebacks, and credit card fees; and
>
> (ii) for all other sales in the Territory, the actual wholesale price of the Products received by Licensee less (A) actual shipping, handling and transportation fees paid by Third Parties, (B) actual sales, excise, use, or any other taxes (not including income or franchise taxes) payable by Licensee with respect to such sales, (C) actual refunds, returns, chargebacks, and credit card fees, and (D) sales commissions actually paid by Licensee to its sales staff and non-Affiliate third party representatives.

18. The License Agreement anticipates attempts by an unscrupulous Licensee from using fake expenses to reduce the royalties due under the License Agreement by specifically delineating the expenses which may be deducted from "Gross Sales Revenues."

19. Reinforcing this strict limitation on the Licensee's ability to deduct expenses from "Gross Sales Revenues" and thereby reducing the royalties due, Section 2(e) of the License Agreement specifically provides that "Licensee shall be *solely* responsible for the manufacture, advertising, production, sale and distribution of the Products *and will bear all costs associated therewith*." (emphasis added).

20. Similarly, Section 6(i) of the License Agreement provides, "Licensee will pay all taxes, customs, duties, assessments and other charges levied upon the importation of or assessed against the Products under this Agreement, *as well as all Licensee's costs of doing business, and Licensor shall have no liability for any of the foregoing*." (emphasis added).

21. The License Agreement further protects the Licensor by providing that the Licensee must obtain the Licensor's written consent to incur any expense chargeable against the Licensor's Royalties (as defined in the License Agreement). Specifically, Section 9(c) of the License Agreement provides, "Licensee will not create any expenses chargeable to Licensor without the prior written approval of Licensor *in each and every instance*."

22. In order to provide transparency into the calculation of royalties due and into all expenses charged against the royalties due, the License Agreement requires the Licensee to provide detailed quarterly royalty statements. Specifically, Section 6(c) provides:

> Licensee shall prepare to Licensor complete and detailed statements certified to be accurate by Licensee of Net Sales by Licensee in connection with the rights granted hereunder on a quarterly basis for each calendar quarter specifying, at minimum (a) number of units sold and shipped; (b) gross sales price; and (c) itemized deductions from gross sales price and Net Sales price together with any returns made during each calendar month.

23. Despite the License Agreement's clear prohibition on charging non-allowable expenses to the Licensor, Overbreak improperly deducted amounts from the royalties due under the License Agreement on numerous royalty statements provided to Mr. Anderson. For example, Overbreak underpaid Mr. Anderson by nearly $750,000 by improperly deducting non-allowable expenses such as "Reserve for Mass Merchant Returns," and "Handling of Obsolete Inventory." Overbreak also took deductions for "Accounts Receivable" each month, without ever making a corresponding adjustment when the funds for the Patented Products were actually received. This resulted in understating Mr. Anderson's royalties by at least another $800,000. Upon information

and belief, these dishonest accounting practices resulted in shorting Mr. Anderson more than $1,550,000. This does not even take into account Overbreak's write-off of millions in sales to its own affiliate—an accounting move allowing Overbreak to short Mr. Anderson another $73,125.

24. By way of a specific example, Overbreak sent PhoenixArts a quarterly statement for the second quarter of 2005 showing a non-allowable deduction of $3 Million against Net Sales denominated as a "Reserve for Mass Merchant Returns." Overbreak did not seek permission from PhoenixArts prior to creating this expense. This improper deduction had the effect of reducing the royalty due to PhoenixArts in this instance by $150,000. A copy of this quarterly statement is filed under seal in this case.

25. Similarly, in the third quarter of 2006 Overbreak improperly deducted $177,200 from the royalties due to Phoenix Arts for "handling of obsolete inventory." Overbreak did not seek permission from PhoenixArts prior to creating and deducting this expense. A copy of this quarterly statement is filed under seal in this case.

26. Upon information and belief, Overbreak again improperly deducted amounts for "handling of obsolete inventory" in the fourth quarter of 2006, resulting in a *negative* royalty for the year. Overbreak concealed its continuing improper deductions, however, by failing to provide any further quarterly royalty statements following the statement for the third quarter of 2006.

27. On November 14, 2005, counsel for PhoenixArts wrote to Overbreak, formally notifying Overbreak that it had violated the License Agreement by withholding $150,000 from royalties due as a "Reserve for Mass Merchant Returns" and demanding that the money be paid immediately. A copy of this November 14, 2005, letter is attached to Plaintiff's Complaint as **Exhibit C.** Overbreak's counsel, Elizabeth Risha, Esq., personally contacted counsel for

PhoenixArts by phone and admitted that Overbreak was not entitled to withhold these amounts under the License Agreement and requested that PhoenixArts permit Overbreak to deduct them anyway. A transcript of Ms. Risha's voicemail for Mr. Anderson's counsel is attached as **Exhibit D**.

28. PhoenixArts did not agree to this change to the parties' Agreement and continued to demand that the proper amount of royalties be paid immediately. *See* Mr. Anderson's counsel's letter of December 16, 2005, attached as **Exhibit E.** Overbreak, however, did not cure this breach by paying any of the amounts due and these amounts remain outstanding to this day.

29. Counsel for PhoenixArts again wrote to Overbreak on January 29, 2007 (the "Termination Letter") following the 2006 underpayments, again formally notifying Overbreak that it had breached the License Agreement by, again, deducting non-allowable expenses from royalties due, and demanding immediate payment. A copy of the January 29, 2007, letter is attached as **Exhibit F.** In addition, because of the repeated problems with Overbreak, its repeated violations of the License Agreement, and its failure to honestly account for the royalties due, the Termination Letter specifically referenced Section 16(a) of the License Agreement, which allows the Licensor to terminate the License Agreement immediately upon ten days written notice to Licensee if Licensor has previously sent Licensee written notice of its breach of the License Agreement and Licensee has failed to cure the breach within thirty days.

30. On February 21, 2007, Overbreak responded to the Termination Letter, admitting that the amounts withheld for "handling of obsolete inventory" related to Overbreak's operating expenses – were expenses that are solely Overbreak's responsibility, as expressly set forth in the License Agreement. A copy of the February 21, 2007, letter is attached as **Exhibit G.** In essence, Overbreak proposed that PhoenixArts accept these deductions as part of "team effort" to

shoulder the hard times while waiting for interest to rise again in the product at some undetermined time in the future. The letter explicitly stated that Overbreak planned to shelve the product for an extended period of time (another material breach under Section 16(b)(iii) of the Agreement) and that these expenses were related to that plan. Even though these expenses were not allowed to reduce PhoenixArts' royalties under the License Agreement, Overbreak stated its President believed that if Overbreak was not making money then Mr. Anderson should not make money. Overbreak's President apparently believed that Mr. Anderson should share the risk despite the fact that Overbreak had refused to help PhoenixArts with the approximately $500,000 in expenses related to a frivolous patent infringement suit less than a year before. Consequently, Mr. Anderson did not acquiesce to Overbreak's request and continued to insist that the true and correct amount of the royalties be paid.

31. When Overbreak did not receive any indication from Mr. Anderson and PhoenixArts that it agreed to Overbreak's self-interested request that they go along with allowing it to deduct disallowed expenses, Overbreak wrote a second letter to Plaintiff on the 30th day of the cure period triggered by Plaintiff's termination letter. In a letter dated March 1, 2007, Overbreak affirmed its debt to PhoenixArts by claiming that it was in the process of curing its breach of the License Agreement. A copy of the March 1, 2007 letter is attached to Plaintiff's Complaint as **Exhibit H.**

32. Because it was weary of Overbreak's continued failure to pay the amounts due under the License Agreement, PhoenixArts responded in writing the same day, again demanding immediate payment. No payment of these amounts was ever made and has not been as of the date of this Complaint. A copy of PhoenixArt's letter of March 1, 2007, is attached to Plaintiff's Complaint as **Exhibit I.**

33. Following this exchange of letters, Overbreak and PhoenixArts ceased any business relationship. Overbreak in all ways treated the License Agreement as terminated. Overbreak failed to cure the breaches cited by PhoenixArts, failed to make *any* further royalty payments, failed to issue *any* further royalty statements, failed to communicate at all with Mr. Anderson, and did not respond to Plaintiff's March 1, 2007, letter. Upon information and belief and based on its conversations with and letters to Plaintiff, Overbreak ceased making any significant effort to market and sell the Patented Products.

34. As further evidence of Overbreak's belief that the License Agreement was terminated and that it was no longer marketing the Patented Product, it abandoned its trademark registrations with the United States Patent Trademark Office for the Mark "HoverDisc."

35. Overbreak let the "hoverdisc.com" website "go dark" and it has remained inactive for a number of years. *See e.g.* **Exhibit J.**

36. Upon information and belief, Overbreak became defunct and was dissolved on July 1, 2009.

TOL Enters the Picture and Asserts Rights Under the License Agreement

37. Upon information and belief, Defendant TOL was formed in November of 2006 in order to avoid the debts of Overbreak, and the managing members of Defendant TOL are the former managing members of Overbreak. TOL shares key employees with the administratively revoked Overbreak, including its in-house counsel, Elizabeth Risha.

38. In June 2012, Mr. Anderson and TOL began to discuss the possibility of TOL licensing the Anderson Patents. TOL, which claims to be a successor to Overbreak, expressed a strong interest in negotiating a *new* license agreement with Mr. Anderson for the Anderson Patents that would allow TOL to market and sell the Patented Products.

39. Subsequently, TOL and Mr. Anderson met and discussed the potential for a new license agreement. Mr. Anderson made clear that he was considering offers to license the Patented Products to other toy manufacturers and would consider TOL's offer along with these other offers.

40. In this meeting to discuss a new license agreement, TOL presented Mr. Anderson with a check for $4,118.44 (without a supporting royalty statement) telling him the check was for royalties that had been earned from 2007 at the end of the term of the "original agreement" but never given to Mr. Anderson. According to TOL, the reason that it had not provided Mr. Anderson with any royalty statements or royalty payments since 2007 and was only just giving this money to Mr. Anderson was because "it had not been able to find him." This explanation is not credible, however, because Mr. Anderson had maintained his "Diddle Drive" address (the notice address in the License Agreement) in Hendersonville, Tennessee, and received mail there since he entered into the contract with Overbreak in 2003 until at least 2008. In addition, Mr. Anderson has maintained the same email address since at least the beginning of the parties' License Agreement and receives email at that address to this day. Further, if Overbreak had genuinely been trying to contact Mr. Anderson, all it had to do was simply call his lawyers at Bass, Berry & Sims—lawyers that Overbreak had communicated with on Mr. Anderson's behalf numerous times over a number of years and who were listed as Mr. Anderson's "Notice" contact under the Agreement. Overbreak never made any attempts to contact Mr. Anderson or his lawyers since the termination of the License Agreement in 2007.

41. During these meetings, TOL also never indicated that it believed that the License Agreement was still in force or that TOL had any rights whatsoever under the License Agreement. In addition, at no time did counsel for TOL, Ms. Risha, claim that the License

Agreement was still in force after repeated conversations between Ms. Risha and counsel for Mr. Anderson in August 2012, regarding the "prior contract" and TOL's desire to enter into a *new* license agreement.

42. On August 10, 2012, Ms. Risha sent an email to Mr. Anderson's counsel on behalf of TOL that stated, "I hope all is well with you, and I was happy to hear the good news that your client and TOL will be working together again. Dayne Sieling at TOL has asked me to contact you regarding the new license agreement……*Do you plan to start with the prior contract as a template*?" *See* **Exhibit K** (emphasis added).

43. On August 14, 2012, Ms. Risha sent Mr. Anderson a Letter of Intent ("the "LOI") which spelled out the terms that TOL wished to reach with Mr. Anderson for a new license agreement. *See* **Exhibit L.** In this LOI, Ms. Risha stated "[p]lease have your client execute this letter agreement where indicated below to show his agreement to the terms stated above, his express intent to finalize a full agreement with additional provisions and more fully explained terms, *and to indicate permission for TOL, Inc. to utilize the Licensed Property as needed to meet the prospective launch date*, as of the date of his signature."(emphasis added).

44. Mr. Anderson did not sign the LOI.

45. On August 28, 2012, Dayne Sieling of TOL sent an email to Mr. Anderson's counsel that purported to explain away "concern regarding royalties for 'recent past' Hoverdisc sales." In this email, Mr. Sieling admitted that TOL had not been "aggressively marketing the product instead receiving inquiries for small purchases every so often." Mr. Sieling went on to say, "[f]eel free to Google/you tube/or whatever to see that *there is no concerted effort to actively promote and sell.*" *See* **Exhibit M** (emphasis added).

46. After Mr. Anderson and his counsel were preparing a draft of a new license agreement, Mr. Anderson became increasingly concerned about the potential downsides of renewing a business relationship with the same unscrupulous individuals who ran Overbreak. Mr. Anderson decided to seek a licensing arrangement for the Patented Products with another company and notified TOL of the same by an email dated October 16, 2012. *See* **Exhibit N.**

47. In a startling turn of events, and consistent with Overbreak's owners' constant attempts to revise history, TOL sent Mr. Anderson an email on October 18, 2012, claiming that the License Agreement was still in force and that TOL had exclusive rights to market and sell the Patented Products under the License Agreement. Although Mr. Anderson was never made aware of any assignment of the License Agreement, TOL now apparently claims to have been assigned Overbreak's (non-existent) rights under the License Agreement. *See* **Exhibit O.**

48. Counsel for Mr. Anderson wrote TOL on October 23, 2012 (the "Second Termination Letter"), explaining that the License Agreement had long since been terminated due to Overbreak's breaches of contract. The Second Termination Letter is attached to Plaintiff's Complaint as **Exhibit P.** To resolve any doubt, however, Mr. Anderson's counsel notified TOL that the Second Termination Letter should be considered as a notice of immediate termination pursuant to Section 16(a) of the License Agreement as a result of the breaches of the License Agreement by Overbreak which were the subject of the prior letters and which had never been cured.

49. The Second Termination Letter again invoked Section 16(b) of the License Agreement, which grants Licensor the right immediately to terminate the License Agreement with no opportunity to cure in the event that the Licensee, among other things, "fails to maintain insurance as set forth herein" or "ceases to market the Products for three consecutive months."

The Second Termination Letter noted that Mr. Anderson had the right to immediately terminate the License Agreement, and was doing so, because of numerous breaches of it, including but not limited to the failure to maintain insurance and failure to market the products for over three consecutive months.

50. Furthermore, the Second Termination Letter noted that, pursuant to Section 18 of the License Agreement, TOL had no right to sell off any inventory of the Patented Products because TOL and Overbreak had failed to pay royalties and breached its warranties under Section 9 of the License Agreement.

51. On November 7, 2012, TOL responded to the Second Termination Letter, claiming that the License Agreement was never breached, was never terminated, and that TOL had been selling the Patented Products covered by the License Agreement and intends to continue to manufacture, market, and sell the Patented Products. This letter is attached to Plaintiff's Complaint as **Exhibit Q.**

52. To add insult to injury, TOL now claims that Mr. Anderson owes TOL approximately $70,000 as a result of alleged overpayments of royalties by Overbreak in 2006 and before. Despite the exchange of several letters regarding the non-payment of royalties and several conversations between counsel regarding Overbreak's failure to properly calculate and pay the royalties due, Overbreak had never before asserted that it did not owe PhoenixArts any money because it had overpaid him in excess of $70,000. Upon information and belief, the alleged "overpayment" is entirely due to amounts improperly deducted by Overbreak from royalties due and is fabricated in bad faith in order to hide the fact that it never cured its numerous failures to pay the royalties due.

53. At least $1,500,000 remains due to Mr. Anderson under the License Agreement and, upon information and belief, Overbreak dramatically underreported its sales to Plaintiff so as to fraudulently reduce the amount of royalties due.

54. TOL's claims that it has exclusive rights to manufacture, market, and sell the Patented Products under the License Agreement greatly harm Mr. Anderson's ability to enter into an agreement to license the Patented Products with any other company.

55. Further, TOL's continued manufacture and sale of the HoverDisc constitute a misuse of Mr. Anderson's confidential information ("Confidential Information") as that term is defined in Section 19(a)[2] of the Licensed Agreement. Section 19(a) of the License Agreement prohibits TOL's use of Mr. Anderson's Technical Information, operations or systems, product specifications, data, know-how, processes, designs, inventions, discoveries, ideas, improvements and methods: "[e]ach party shall treat such Confidential Information as confidential and *shall not disclose or use* (except in connection with this Agreement) such Confidential Information during or after the term of this Agreement."(emphasis added).

56. TOL claims that it has been manufacturing and selling the Patented Products without interruption since 2007, although Mr. Anderson was not aware that TOL sold any Patented Products after 2007 given Ms. Risha's claim in her February 21, 2007, letter (**Exhibit G)** that Overbreak was going to "shelve" the product and "re-launch" it sometime in the future. Obviously, this belief was reasonable and was bolstered by the fact that TOL did not send any royalty statements or pay any royalties.

[2] Section 19(a) of the License Agreement provides that Mr. Anderson's Confidential Information is defined as follows: "information supplied by Licensor to Licensee regarding Technical Information, trade secrets, executive summaries, operations or systems, product specifications, data, know-how, processes, designs, sketches, photographs, drawings, samples, inventions, prototypes, discoveries, ideas, improvements, methods is to be considered "Confidential Information Of The Licensor")…".

Count I: Declaratory Judgment

57. Overbreak breached the License Agreement by, among other things, failing to obtain Mr. Anderson's approval for expenses charged against his royalties, improperly deducting amounts from royalties due under the License Agreement, and failing to pay the royalties actually due.

58. By its letters dated November 14, 2005, December 16, 2005, January 29, 2007, and March 1, 2007, and pursuant to Section 16(a) of the License Agreement, PhoenixArts provided Overbreak with written notice of its various breaches of the License Agreement and gave Overbreak the opportunity to cure the breaches. *See* **Exhibits C, E, F, and H.**

59. Pursuant to Section 16(a) of the License Agreement, PhoenixArts terminated the License Agreement by its Termination Letter. This termination was effective under Section 16(a) because PhoenixArts had already provided Overbeak with at least three written notices of its breaches and given it thirty days to cure the breaches, but Overbreak failed to ever cure them.

60. In the alternative, even if the Termination Letter did not terminate the License Agreement, it was terminated by the Second Termination Letter, **Exhibit P.** The Second Termination Letter validly terminated the License Agreement pursuant to its Section 16(a) because Overbreak had been given written notice of its breaches in the November 12, 2005. December 16, 2005, January 29, 2007, and March 1, 2007, letters, and neither Overbreak nor TOL cured the breaches. In addition, the Second Termination Letter validly terminated the License Agreement pursuant to Section 16(b) of the License Agreement because Overbreak and TOL had failed to pay royalties, provide royalty statements, carry proper insurance and had failed to market the Patented Products for three consecutive months as required by the License Agreement.

61. An actual controversy exists because TOL continues to claim that the License Agreement remains in force and that TOL consequently has the exclusive right to manufacture, market, and sell the Patented Products. TOL's assertions greatly harm Mr. Anderson's ability to enter into a new licensing agreement with another company and stand to destroy Mr. Anderson's chances to exploit his intellectual property and of taking advantage of a new deal offered by another manufacturer.

62. Pursuant to 28 U.S.C. 2201, Plaintiff Randy Anderson seeks a declaratory judgment from this Court that:

a. The License Agreement is terminated;

b. TOL has no present right to manufacture, market, distribute or sell the Patented Products or to use the Licensed Technology; and

c. TOL may not sell off any remaining inventory of the Patented Products.

Count II: Breach of Contract

63. The License Agreement is a valid and binding contract.

64. Overbreak breached the License Agreement by, among other things, (a) failing to pay royalties due; (b) creating expenses chargeable to Licensor without Licensor's prior permission; (c) improperly deducting various expenses from royalties due; (d) failing to provide quarterly royalty statements; and (e) failing to carry proper insurance.

65. If the License Agreement was assigned to TOL by Overbreak, TOL stepped into the shoes of Overbreak and is liable for Overbreak's breaches of the License Agreement pursuant to Section 2(b) and 2(g) of the License Agreement, which together provide that no assignment of the License Agreement is valid unless the assignee "succeeds to all of the rights and assumes all of the obligations and limitations of Licensee under this Agreement."

66. In addition, TOL is liable for Overbreak's breaches of the License Agreement because TOL is the successor and/or alter ego of Overbreak.

67. If the License Agreement was validly assigned to TOL by Overbreak, then TOL has independently breached the License Agreement at all times following the assignment, including but not limited to (a) failure to properly and accurately calculate the amount of royalties due; (b) failure to pay royalties due for over five years; (c) failure to provide quarterly royalty statements; (d) failure to obtain Mr. Anderson's approval for product designs that materially altered the quality of the products; (e) failure to continually market the product; (f) failure to obtain approval for all expenses charged against royalties due under the License Agreement; and (f) breaching its duty of good faith and fair dealing.

68. Despite written notice of most if not all of these breaches, Overbreak and/or TOL failed to cure the breach.

69. Mr. Anderson has been damaged by TOL's breaches in the sum of at least $750,000, plus interest.

Court III: Breach of License Agreement's Confidentiality Provisions and Entitlement to Injunctive Relief

70. TOL's continued manufacture and sale of the Patented Products after the termination of the License Agreement constitutes a misuse of Mr. Anderson's Confidential Information. Section 19(a) of the License Agreement prohibits TOL's use of Mr. Anderson's Technical Information, operations or systems, product specifications, data, know-how, processes, designs, inventions, discoveries, ideas, improvements and methods after the termination of the License Agreement: "[e]ach party shall treat such Confidential Information as confidential and *shall not disclose or use* (except in connection with this Agreement) such Confidential Information during or after the term of this Agreement."(emphasis added).

71. TOL's continued manufacture and sale of the Patented Products after its termination constitutes use of Mr. Anderson's Confidential Information in breach of Section 19 of the License Agreement.

72. As provided in Section 19(c) of the License Agreement, TOL's breach of Section 19 causes Mr. Anderson irreparable harm for which money damages alone is inadequate compensation.

73. Consequently, Mr. Anderson is entitled to an injunction and other equitable relief to prevent further irreparable harm by TOL's breach of Section 19.

74. The parties have expressly agreed that in the event one party breaches Section 19, the non-breaching party has waived the making of a bond as a condition for obtaining injunctive relief.

75. In view of the irreparable harm caused to Mr. Anderson by TOL's breach of Section 19 of the License Agreement, Mr. Anderson is entitled to temporary and preliminary injunctive relief without the necessity of posting a bond.

Count IV: Patent Infringement of U.S. Patent No. 7,223,151

76. TOL has been and Overbreak has been and continues to infringe one or more claims of the '151 patent, literally and under the doctrine of equivalents, by making, using, selling, offering to sell, or importing, without license or authority, Patented Products, including including but not limited to, the product described in this Complaint as the HoverDisc.

77. To the extent that facts learned in discovery show that TOL and/or Overbreak's infringement of the '151 patent is or has been willful, Mr. Anderson reserves the right to request such a finding at the time of trial.

78. To the extent applicable, the requirements of 35 U.S.C. § 287(a) have been met with respect to the '151 patent.

79. As a result of TOL and Overbreak's infringement of the '151 patent, Mr. Anderson has suffered monetary damages in an amount adequate to compensate for TOL and Overbreak's infringement, but in no event less than a reasonable royalty for the use made of the invention by TOL and Overbreak, together with interest and costs as fixed by the Court, and Mr. Anderson will continue to suffer damages in the future unless TOL and Overbreak's infringing activities are enjoined by this Court.

80. Unless a permanent injunction is issued enjoining TOL and Overbreak and its agents, servants, employees, representatives, affiliates, and all others acting or in active concert therewith from infringing the '151 patent, Mr. Anderson will be greatly and irreparably harmed.

Count V: Patent Infringement of U.S. Patent No. 6,659,838

81. TOL has been and Overbreak has been and continues to infringe one or more claims of the '838 patent, literally and under the doctrine of equivalents, by making, using, selling, offering to sell, or importing, without license or authority, Patented Products, including but not limited to, the product described in this Complaint as the HoverDisc.

82. To the extent that facts learned in discovery show that TOL and/or Overbreak's infringement of the '838 patent is or has been willful, Mr. Anderson reserves the right to request such a finding at the time of trial.

83. To the extent applicable, the requirements of 35 U.S.C. § 287(a) have been met with respect to the '838 patent.

84. As a result of TOL and Overbreak's infringement of the '838 patent, Mr. Anderson has suffered monetary damages in an amount adequate to compensate for TOL and Overbreak's

infringement, but in no event less than a reasonable royalty for the use made of the invention by TOL and Overbreak, together with interest and costs as fixed by the Court, and Mr. Anderson will continue to suffer damages in the future unless TOL and Overbreak's infringing activities are enjoined by this Court.

85. Unless a permanent injunction is issued enjoining TOL and Overbreak and its agents, servants, employees, representatives, affiliates, and all others acting or in active concert therewith from infringing the '838 patent, Mr. Anderson will be greatly and irreparably harmed.

Count VI: Patent Infringement of U.S. Patent No. 7,172,487

86. TOL has been and Overbreak has been and continues to infringe one or more claims of the '487 patent, literally and under the doctrine of equivalents, by making, using, selling, offering to sell, or importing, without license or authority, Patented Products, including but not limited to, the product described in this Complaint as the HoverDisc.

87. To the extent that facts learned in discovery show that TOL and/or Overbreak's infringement of the '487 patent is or has been willful, Mr. Anderson reserves the right to request such a finding at the time of trial.

88. To the extent applicable, the requirements of 35 U.S.C. § 287(a) have been met with respect to the '487 patent.

89. As a result of TOL and Overbreak's infringement of the '487 patent, Mr. Anderson has suffered monetary damages in an amount adequate to compensate for TOL and Overbreak's infringement, but in no event less than a reasonable royalty for the use made of the invention by TOL and Overbreak, together with interest and costs as fixed by the Court, and Mr. Anderson will continue to suffer damages in the future unless TOL and Overbreak's infringing activities are enjoined by this Court.

90. Unless a permanent injunction is issued enjoining TOL and Overbreak and its agents, servants, employees, representatives, affiliates, and all others acting or in active concert therewith from infringing the '487 patent, Mr. Anderson will be greatly and irreparably harmed.

Count VII: Fraud

91. Upon information and belief, while the License Agreement was still in force, Mr. Anderson has recently learned that Overbreak and TOL intentionally underreported sales to Mr. Anderson in an attempt to cheat him out of royalties due.

92. In addition, upon information and belief, while the License Agreement was still in force, Overbreak and TOL have charged bogus expenses against sales, without the approval of Mr. Anderson and with express notice of his disapproval, in an effort to reduce the amount of royalties that would otherwise be due.

93. Once Mr. Anderson turned down TOL's recent proposal that Mr. Anderson enter into a new license agreement with it, TOL fraudulently contended for the first time that the earlier agreement was never terminated and cooked up a scheme in order to hide the fact that neither it or Overbreak ever paid royalties due to Mr. Anderson by claiming that Mr. Anderson owed it money, rather than the other way around.

94. Upon information and belief, this fraudulent behavior is a continuing scheme and plan for the purpose of cheating Mr. Anderson out of the fruits of his intellectual property and for preventing him from entering into a new agreement with another toy manufacturer.

95. This conduct has caused and will continue to cause extensive damage and irreparable harm to Mr. Anderson

Prayer for Relief

In view of the foregoing, Plaintiff Lloyd Randall Anderson seeks the following relief:

1. That judgment be awarded to Mr. Anderson on all counts of this Complaint;

2. That Mr. Anderson be awarded a judgment that that (a) the License Agreement is terminated; (b) TOL has no present right to manufacture, market, distribute or sell the Patented Products or to use the Licensed Technology; and (c) TOL may not sell off any remaining inventory of the Patented Products;

3. That Mr. Anderson be awarded compensatory damages for breach of contract, together with pre-judgment, post-judgment interest and costs;

4. That Mr. Anderson be awarded his reasonable attorney's fees and costs pursuant to Section 25 of the License Agreement;

5. That Mr. Anderson be awarded a judgment that Overbreak and TOL have infringed one or more claims of each of the Anderson Patents;

6. A temporary, preliminary, and permanent injunction enjoining Overbreak and TOL and its officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in active concert or participation with it, from infringing each of the Anderson Patents and from using Mr. Anderson's Confidential Information and Licensed Technology without the necessity of posting a bond;

7. An award of damages resulting from Overbreak and TOL's acts of infringement in accordance with 35 U.S.C. § 284;

8. A finding that TOL's infringement has been willful under 35 U.S.C. § 284 and increase such damages to three times the awarded amount;

9. A finding that this case is an exceptional one under 35 U.S.C. § 285 and that Mr. Anderson is entitled to an award of attorney fees;

10. A judgment and order requiring TOL (and/or Overbreak) to provide an accounting and to pay supplemental damages to Mr. Anderson, including, without limitation, prejudgment and post-judgment interest;

11. A judgment for fraud and an award of compensatory, punitive, and any other damages to which Mr. Anderson is entitled after trial for this claim;

12. That the Court award Mr. Anderson any other relief to which this Court determines that he is entitled; and

13. Mr. Anderson hereby demands a trial by jury of all issues so triable.

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of knowledge, information, and belief.

Dated: December 14, 2012.

Lloyd Randall Anderson

Respectfully submitted,

/s/ Paige Waldrop Mills

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