

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

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MSA PRODUCTS, INC.,	:	
	:	
Plaintiff,	:	Civ. No. 11-cv-5261 (WJM)(MF)
	:	
v.	:	
	:	
NIFTY HOME PRODUCTS, INC., FRANK:	:	
TIEMANN, FINGERHUT and SOUTHERN:	:	
REFRESHMENT SERVICES, INC.,:	:	
d/b/a COFFEEICON.COM,	:	
	:	
Defendants.	:	
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SECOND AMENDED COMPLAINT

Plaintiff, MSA Products, Inc., by its undersigned attorneys, for its Second Amended Complaint against Defendants Nifty Home Products, Inc., Frank Tiemann, Fingerhut and Southern Refreshment Services, Inc., d/b/a CoffeeIcon.com (collectively, “Defendants”), alleges:

JURISDICTION AND VENUE

1. This cause of action arises under the Patent Laws of the United States, 35 U.S.C. §101 et. seq. including §271.
2. Jurisdiction of the subject matter of this action is conferred on this Court by 28 U.S.C. §§ 1331 and 1338(a).
3. Venue is proper in this judicial district pursuant to 28 U.S.C. §§1391(b) and (c).

THE PARTIES

4. Plaintiff, MSA Products, Inc. (hereinafter “MSA” or “Plaintiff”), is a New York

corporation having a principal, regular and established place of business at 42 Burd Street, Nyack, NY 10960.

5. Upon information and belief, Defendant Nifty Home Products, Inc. (hereinafter “Nifty”), is a Minnesota corporation having a principal, regular and established place of business at 920 Walnut Avenue, Madison Lake, MN 56063.

6. Upon information and belief, Nifty transacts business within this district, derives substantial revenues from intrastate and interstate commerce and has committed tortious acts of patent infringement within this district and also without this district having injurious consequences within this district, and Nifty is otherwise within the jurisdiction of this Court.

7. In particular, upon information and belief, Nifty is selling in this district one or more products that infringe upon Plaintiff’s United States Design Patent Nos. D628,444 and/or D628,445 as is more thoroughly described below, and/or is actively doing business in this district and thereby is, and has been, regularly availing itself of the benefits of doing business in this district.

8. Upon information and belief, Defendant Frank Tiemann (hereinafter “Tiemann”), is an individual having a principal place of residence at 1020 Park Rd., Madison Lake, MN 56063.

9. Upon information and belief, Tiemann transacts business within this district, derives substantial revenues from intrastate and interstate commerce and has committed tortious acts of patent infringement within this district and also without this district having injurious consequences within this district, and is otherwise within the jurisdiction of this Court.

10. In particular, upon information and belief, Tiemann is selling or has induced Nifty and the other Defendants to sell in this district one or more products that infringe upon Plaintiff’s United States Design Patent Nos. D628,444 and/or D628,445 as is more thoroughly described

below, and/or is actively doing business in this district and thereby is, and has been, regularly availing himself of the benefits of doing business in this district.

11. Upon information and belief, Fingerhut is a corporation organized and existing under the laws of Minnesota having a principal place of business at 6509 Flying Cloud Drive, Eden Prairie, Minnesota 55344. Upon information and belief Fingerhut is a subsidiary of Bluestem Brands, Inc., a Minnesota corporation having a principal place of business at 6509 Flying Cloud Drive, Eden Prairie, Minnesota 55344.

12. Upon information and belief, Fingerhut transacts business within this district, derives substantial revenues from intrastate and interstate commerce and has committed tortious acts of patent infringement within this district and also without this district having injurious consequences within this district, and is otherwise within the jurisdiction of this Court.

13. In particular, upon information and belief, Fingerhut is selling in this district one or more products that infringe upon Plaintiff's United States Design Patent Nos. D628,444 and D628,445 as is more thoroughly described below, and/or is actively doing business in this district and thereby is, and has been, regularly availing itself of the benefits of doing business in this district.

14. Upon information and belief, Southern Refreshment Services ("Southern Refreshment") is a corporation organized and existing under the laws of Texas having a principal place of business at 18029 Hufsmith Kohrville Rd., Tomball, TX 77375, and is doing business as CoffeeIcon.com, which also has a principal place of business at 18029 Hufsmith Kohrville Rd., Tomball, TX 77375.

15. Upon information and belief, Southern Refreshment d/b/a CoffeeIcon.com, transacts business within this district, derives substantial revenues from intrastate and interstate commerce

and has committed tortious acts of patent infringement within this district and also without this district having injurious consequences within this district, and is otherwise within the jurisdiction of this Court.

16. In particular, upon information and belief, Southern Refreshment d/b/a CoffeIcon.com is selling in this district one or more products that infringe upon Plaintiff's United States Design Patent Nos. D628,444 and D628,445 as is more thoroughly described below, and/or is actively doing business in this district and thereby is, and has been, regularly availing itself of the benefits of doing business in this district.

COUNT I – PATENT INFRINGEMENT

17. Plaintiff re-alleges all of the foregoing paragraphs, as if fully set forth herein.

18. Plaintiff is the owner of United States Design Patent No. D628,444, for the invention entitled "Countertop Coffee Pod Drawer", duly issued by the United States Patent and Trademark Office on December 7, 2010 (hereinafter "the '444 patent", Exhibit 1 hereto). The '444 patent has at all times been valid and subsisting.

19. Nifty is a manufacturer and wholesaler of home furnishings, including but not limited to, bakeware, barbecue equipment, fruit racks, kitchenware, pet products and coffee accessories including coffee pod holders, etc. sold under the Nifty name.

20. Upon information and belief, Nifty has been and is directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '444 patent, by manufacturing, importing into the United States, offering for sale and/or selling coffee pod holder products identified as "K-Cup Drawer", "Nifty 36 Coffee Pod Single Drawer", "K-Cup Holder Storage Drawer", also identified as Model Nos. 6410 and/or 6410B.

21. Upon information and belief Nifty has made and/or had made for it, sold, offered for sale and/or is selling at least three versions of the “K-Cup Drawer” which infringe the ‘444 patent: vertically stacked three-drawer arrangements identified as Model Nos. 6436 (capacity 36 coffee pods)(Exhibit 2 hereto) and 6454 (capacity 54 coffee pods)(Exhibit 3 hereto) and single-drawer arrangements identified as Model Nos. 6410 and 6410B (capacity 36 coffee pods)(Exhibits 4 and 4A hereto). On information and belief Nifty sells 36- and 54-cup sizes of the “K-Cup drawer” products to the public through its distributors.

22. Upon information and belief, Tiemann is principal of Nifty Home Products, Nifty is the alter ego of Tiemann, and Tiemann has been and now is directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the ‘444 patent, by offering for sale and selling coffee pod holders identified as “K-Cup Drawers”, Model Nos. 6436, 6454, 6410 and/or 6410B, on the Nifty website for example at http://niftyhomeproducts.net/index.php?option=com_k2&view=itemlist&task=category&id=20:coffee-accessories&Itemid=334 and through distributors such as but not limited to Fingerhut and Southern Refreshment in this and other judicial districts.

23. Upon information and belief Nifty is the alter ego of Tiemann to the extent that no separate entity in effect exists. Tiemann effectively controls and operates Nifty.

24. Upon information and belief, at all relevant times Nifty has been grossly undercapitalized.

25. Upon information and belief, Nifty has not at all relevant times observed required corporate formalities and not paid dividends.

26. Upon information and belief, Tiemann dominates Nifty and has in the past siphoned

and/or used funds from Nifty, and/or currently siphons and/or uses funds of Nifty, for his personal use.

27. Upon information and belief, at all relevant times Tiemann has been and is the decision maker of Nifty, and he directed Nifty's activities.

28. Upon information and belief, other officers and/or directors of Nifty provide little or no function.

29. Upon information and belief, there are inadequate corporate records reflecting proper corporate practices and/or governance of Nifty.

30. Upon information and belief, Nifty is merely a facade for the operations of Tiemann.

31. Upon information and belief, Nifty is a mere instrumentality of Tiemann created to facilitate the sale of products, including infringing products, for the purpose of evading liability.

32. Upon information and belief, Tiemann has responsibility for, selects, and authorizes product manufacture and sale of products that infringe the patents in suit.

33. Upon information and belief, at all relevant times Tiemann used Nifty and the other defendants named herein to engage in patent infringement, knowingly and personally directed Nifty, and not only consented to, but actually directed the wrongful conduct perpetrated by Nifty.

34. Upon information and belief, the unity of interest and ownership between Tiemann and Nifty, and the patent infringement which Tiemann directs, necessitate that the Court disregard Nifty and treat its acts as if they were the acts of Tiemann.

35. Adherence to the fiction of separate corporate existence between Tiemann and Nifty would otherwise sanction fraud and promote injustice.

36. Upon information and belief, Fingerhut has been and now is directly infringing, and

indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '444 patent, by offering for sale and selling Nifty "K-Cup Drawer" coffee pod holders, Model Nos. 6436, 6454, 6410 and/or 6410B, in this and other judicial districts by and through its website for example at <http://www.fingerhut.com/product/Nifty-Single-KCup-Drawer/NX042.uts>.

37. Upon information and belief, Southern Refreshment d/b/a CoffeIcon.com has been and now is directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '444 patent, by offering for sale and selling Nifty "K-Cup Drawer" coffee pod holders, Model Nos. 6436, 6454, 6410 and/or 6410B, in this and other judicial districts by and through its website for example at <http://www.coffeeicon.com/v-7133.html>.

38. Upon information and belief, Defendants have had full knowledge of Plaintiff's rights in the '444 patent since its issuance on December 7, 2010.

COUNT II – PATENT INFRINGEMENT

39. Plaintiff re-alleges all of the foregoing paragraphs, as if fully set forth herein.

40. Plaintiff is the owner of United States Design Patent No. D628,445, for the invention entitled "Countertop Coffee Pod Drawer", duly issued by the United States Patent and Trademark Office on December 7, 2010 (hereinafter "the '445 patent", Exhibit 5 hereto). The '445 patent has at all times been valid and subsisting.

41. Upon information and belief, Nifty has been and is directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the '445 patent, by manufacturing, importing into the United States, offering for sale and/or selling coffee pod holders identified as "K-Cup Drawer".

42. Upon information and belief Nifty has sold, made and/or had made for it, offered for

sale and/or is selling at least three versions of the “K-Cup Drawer” which infringe the ‘445 patent: a vertically stacked three drawer arrangements identified as Model Nos. 6436 (capacity 36 coffee pods) and 6454 (capacity 54 coffee pods) and single-drawer arrangements identified as Model No. 6410 and 6410B (capacity 36 coffee pods). On information and belief Nifty sells 36- and 54-cup sizes of the “K-Cup drawer” products to the public through its distributors.

43. Upon information and belief, Tiemann is the principal of Nifty Home Products, Nifty is the alter ego of Tiemann, and Tiemann has been and now is directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the ‘445 patent, by offering for sale and selling coffee pod holders identified as “K-Cup Drawers”, Model Nos. 6436, 6454, 6410 and/or 6410B, on the Nifty website for example at http://niftyhomeproducts.net/index.php?option=com_k2&view=itemlist&task=category&id=20:coffee-accessories&Itemid=334 and through distributors such as but not limited to Fingerhut and Southern Refreshment in this and other judicial districts.

44. Upon information and belief, Fingerhut has been and now is directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the ‘445 patent, by offering for sale and selling Nifty “K-Cup Drawer” coffee pod holders, Model Nos. 6436, 6454, 6410 and/or 6410B, in this and other judicial districts by and through its website for example at <http://www.fingerhut.com/product/Nifty-Single-KCup-Drawer/NX042.uts>.

45. Upon information and belief, Southern Refreshment d/b/a CoffeIcon.com has been and now is directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of the ‘445 patent, by offering for sale and selling Nifty “K-Cup Drawer” coffee pod holders, Model Nos. 6436, 6454, 6410 and/or 6410B, in this and other judicial

districts by and through its website for example at <http://www.coffeeicon.com/v-7133.html>. Upon information and belief, Defendants have had full knowledge of Plaintiff's rights in the '445 patent since its issuance on December 7, 2010.

46. All of the acts of Defendants are without the permission, license or consent of Plaintiff and, if allowed to continue, will continue to cause irreparable injury to Plaintiff, unless enjoined by this Court.

47. Defendants have been unjustly enriched and Plaintiff is entitled to an accounting and award of damages, interest, attorneys' fees and costs.

48. Defendants' acts of infringement have been willful, wanton and exceptional, thereby subjecting Defendants to an award of enhanced damages.

49. Defendants' foregoing activities have damaged Plaintiff in an amount as yet unknown, but if Defendants' foregoing activities continue, Plaintiff believes damages will exceed at least the sum of at least \$500,000, and will likely be far higher.

JURY DEMAND

50. Plaintiff hereby demands trial by jury.

PRAYER

WHEREFORE, Plaintiff prays for a judgment, including:

- A. That Defendants infringed and/or continue to infringe the '444 and/or '445 patents;
- B. that the acts of infringement by Defendants were, and continue to be, willful;
- C. damages, with interest, pursuant to all applicable statutes including 35 U.S.C. §284 and §289;

D. declaring this case exceptional and awarding Plaintiff its attorneys' fees and costs of this action;

E. an award of treble damages for Defendants' willful infringement of the '444 and/or '445 patents;

F. a permanent injunction against Defendants, and their respective officers, directors, agents, servants, employees, attorneys, successors, licensees, assigns and all others in active concert or participation with the Defendants, prohibiting the engaging in any acts that constitute infringement, or contributory infringement of the '444 and/or '445 patents;

G. an order requiring Nifty to file corrective recordations to remove the recordal of a quit claim of Al Hertaus against the '444 and '445 patents; and

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

Respectfully submitted,

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Dated: February 15, 2013

s/Timothy X. Gibson/
Timothy X. Gibson (TG 6800)