

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK DIVISION**

Noam J. Kritzer (nkritzer@bakoskritzer.com)

Edward P. Bakos (ebakos@bakoskritzer.com)

Bakos & Kritzer

147 Columbia Turnpike
Florham Park, New Jersey 07932
Telephone: 908-273-0770
Facsimile: 973-520-8260

*Attorneys for the Plaintiff:
Tristar Products, Inc.*

<hr/>)	
TRISTAR PRODUCTS, INC.)	
(a Pennsylvania corporation),)	
)	
)	
)	
Plaintiff,)	
)	CIVIL ACTION FILE NUMBER:
v.)	
)	
)	
CAP BARBELL, INC.)	
(a Texas corporation),)	
)	
)	
Defendant.)	
<hr/>)	<i>Document filed Electronically</i>

COMPLAINT FOR PATENT INFRINGEMENT AND DEMAND FOR JURY TRIAL

Plaintiff, Tristar Products, Inc., a Pennsylvania corporation having its corporate headquarters in New Jersey (hereinafter “Tristar Products” or “Plaintiff”), by its undersigned attorneys, for its Complaint against Cap Barbell, Inc., a Texas corporation, (hereinafter “Cap Barbell” or “Defendant”), upon actual knowledge with respect to itself and its own acts, and upon information and belief as to all other matters, alleges as follows:

THE PARTIES

1. Plaintiff Tristar Products, Inc. (“Tristar Products”) is a Pennsylvania corporation having its corporate headquarters at 492 Route 46 East, Fairfield, New Jersey 07004.
2. Upon information and belief, Defendant Cap Barbell, Inc. (“Cap Barbell”) is a Texas corporation having a principal place of business at 10820 Westpark Drive, Houston, Texas, 77042.

JURISDICTION AND VENUE

3. This civil action for patent and trademark infringement arises under the patent laws of the United States, Title 35 of the United States Code, the Lanham Act, Title 15 of the United States Code, and the state and common law of the State of New Jersey. The Court has subject matter jurisdiction over the action pursuant to 28 U.S.C § 1331 and 28 U.S.C. §1338(a), as it involves substantial claims arising under the Patent and Trademark Laws of the United States together with related claims for patent infringement, trademark infringement and unfair competition.
4. Personal jurisdiction is proper in this Court as Cap Barbell operates its distribution center in Union, New Jersey (Exhibit A), solicits and conducts business within the State of New Jersey, markets to customers in the State of New Jersey via its website and through its authorized retailer’s website (Walmart.com), and has commercial and residential sales in the State of New Jersey at least through its authorized retailer. Printouts from the website www.walmart.com depicting a web-based offer for sale (attached as Exhibit B) and the website www.capbarbell.com depicting Cap Barbell’s authorized retailers (attached as Exhibit C) demonstrate that Cap Barbell’s products are marketed to customers within the state of New Jersey. A “CAP Barbell Ab Roller” product was also purchased by Plaintiff via the

www.walmart.com website and shipped to a location within the state of New Jersey, further demonstrating that Cap Barbell's products are distributed and commercially sold within the state of New Jersey. Therefore, the Court has personal jurisdiction over Cap Barbell pursuant to N.J. Ct. R. 4:4-4, 28 U.S.C. §§ 1331, 1338(a), 1338(b), 35 U.S.C. §§ 101 et seq. and pursuant to the doctrine of supplemental jurisdiction. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1400(b), 28 U.S.C. §1391(c), and 28 U.S.C. §1400(b).

BACKGROUND

5. On November 26, 1996, U.S. Patent No. 5,577,987 ("the '987 patent") entitled "ABDOMINAL EXERCISER DEVICE" duly and legally issued to Donald Brown. The entire right, title and interest to the '987 patent is assigned to and owned by Tristar Products. Tristar Products maintains the right to make, have made, use, distribute, sell, offer for sale and import in the United States products covered by the '987 patent. A true and correct copy of the '987 patent is attached hereto as Exhibit D.

6. Since the 1990's, Tristar Products (and its predecessors-in-interest) has provided its AB ROLLER® product to the consuming public. Tristar Products has used the AB ROLLER® mark in commerce since at least 1995. The AB ROLLER® trademark has been duly registered with the United States Patent and Trademark Office and has been issued U.S. Trademark Registration No. 3,809,909 (the "AB ROLLER Trademark"). A copy of the U.S. Trademark Registration Certificate is attached as Exhibit E.

7. Tristar Products has expended millions of dollars advertising and promoting the AB ROLLER® product on television, on the Internet and in print. As a result, the AB ROLLER® product has become a cultural phenomenon, spurring tens of thousands of YouTube® videos and fan and parody spots on the Internet. The AB ROLLER® product has appeared and been

featured on television and talk shows for over a decade. As a result of these substantial advertising and promotional efforts, Tristar Products' sales of the AB ROLLER® product have been enormous. The gross revenue for the AB ROLLER® product in the United States since its introduction has been in excess of one billion dollars. In addition, Tristar Products has trade dress rights in and to, among other features, the overall appearance of its AB ROLLER® devices, such as the combination of the arcuate rocker portions, arch-shaped design, and forearm rests. This trade dress has been extensively marketed and sold only by Tristar Products since the 1990's. As a result of this and the phenomenal success and acclaim of the AB ROLLER® product, these features and designs have acquired secondary meaning as Ab Coaster's proprietary trade dress. These features and designs are not functional since other designs and features can be and are employed in competing exercise devices. Tristar Products is the rightful owner of the above-referenced trademark and trade dress in and to its AB ROLLER® device. The trademark is inherently distinctive, has acquired distinctiveness, and is non-functional.

8. Upon information and belief, without authorization from Tristar Products, Cap Barbell makes, uses, sells and/or offers to sell and induces others to make, use, sell and/or offer to sell, abdominal exercising devices, bearing the name "AB ROLLER" which embody and/or use the inventions claimed in the '987 patent.

COUNT I
INFRINGEMENT OF THE '987 PATENT BY CAP BARBELL

9. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 8 herein.

10. Upon information and belief, Cap Barbell directly infringes, contributorily infringes and/or actively induces infringement of one or more claims of the '987 patent by making, using, selling and/or offering to sell, or inducing others to make, use, sell or offer to sell abdominal

exercising devices that embody or use the inventions claimed in the '987 patent. Such infringing abdominal exercising devices include at least the "CAP Barbell Ab Roller."

11. Cap Barbell's acts of infringement of the '987 patent have caused and will continue to cause Tristar Products injury for which Tristar Products is entitled to compensation pursuant to 35 U.S.C. § 284.

12. Cap Barbell's acts of infringement of the '987 patent have caused and will continue to cause Tristar Products irreparable harm unless such infringing activities are enjoined by this Court pursuant to 35 U.S.C. § 283.

13. This case is exceptional, and therefore Tristar Products is entitled to an award of attorneys' fees pursuant to 35 U.S.C. § 285.

14. Upon information and belief, Cap Barbell's commercial activities relating to the making, using, offering for sale, selling and/or importing into the United States abdominal exercising devices have continued and are continuing with knowledge of the '987 Patent, in spite of the fact that Cap Barbell's actions constitute infringement of the '987 Patent. These commercial activities are, at a minimum, in reckless disregard of Tristar Products' rights under the '987 Patent. Such acts of infringement have therefore been intentional, deliberate and willful.

COUNT II
FEDERAL TRADEMARK INFRINGEMENT
(15 U.S.C. § 1114)

15. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 14 herein.

16. Cap Barbell's actions described herein constitute infringement of the AB ROLLER Trademark in violation of the Lanham Act, 15 U.S.C. § 1114(1).

17. Cap Barbell's willful, deliberate and unauthorized use of the AB ROLLER Trademark in its sale and offers for sale has caused confusion and is likely to continue to cause confusion, mistake and deception in that consumers are likely to associate and believe Cap Barbell's goods and services are associated with, connected to, affiliated with, authorized by, endorsed by, and/or sponsored by Tristar Products, in violation of Section 32(b) of the Lanham Act, 15 U.S.C. § 1114(1).

18. As a direct and proximate result of Cap Barbell's unauthorized use of the AB ROLLER Trademark, Cap Barbell has damaged and will continue to damage Tristar Products' goodwill and reputation, and has caused and is likely to continue to cause a loss of sales and profits for Tristar Products. Cap Barbell's actions have caused and will continue to cause irreparable harm to Tristar Products and to the public, who is confused by Cap Barbell's unauthorized use of the AB ROLLER Trademark, unless restrained and enjoined by this Court. Tristar Products has no adequate remedy at law to prevent Cap Barbell from continuing its infringing actions and from injuring Tristar Products.

19. As a further direct and proximate result of Cap Barbell's actions, Tristar Products has been damaged and will continue to sustain damage and is entitled to receive compensation arising from its lost sales, lost profits, and efforts necessary to minimize and/or prevent customer confusion, in an amount to be proven at the time of trial. In addition, Tristar Products is entitled to disgorge Cap Barbell's profits, and is entitled to interest and to its attorney's fees and costs incurred bringing this action, all in an amount to be proven at the time of trial. Tristar Products is further entitled to injunctive relief as set forth above, and to all other and further forms of relief this Court deems appropriate.

COUNT III
LANHAM ACT UNFAIR COMPETITION
(15 U.S.C. § 1125(a))

20. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 19 herein.

21. Tristar Products produces abdominal exercise machines for distribution through direct marketing, retail establishments, and Internet sales. The AB ROLLER Trademark has become uniquely associated with, and hence identifies the AB ROLLER® product. The Defendants' use of the AB ROLLER Trademark and trade dress constitutes utilizing false descriptions or representations in interstate commerce.

22. Cap Barbell provides the same product in interstate commerce and utilizes the AB ROLLER Trademark to obtain customers and drive website traffic. The products which are provided by Cap Barbell are confusingly similar and have caused, and are likely to continue to cause, mistake and to deceive and confuse members of the public who have been, and will likely continue to be, wrongfully led to believe that the products sold by Cap Barbell are Tristar Products' AB ROLLER products.

23. Tristar Products is informed and believes that the Defendant, in adopting the AB ROLLER trademark and trade dress, has acted willfully and with full knowledge of Tristar Products' rights in the AB ROLLER trademark and trade dress, and has used this false designation of origin and description in contravention of 15 U.S.C. § 1125(a).

24. As a result of Cap Barbell's acts, Tristar Products has and will suffer harm, including loss of income from the sale of its products because it did not and will not benefit from the sale of Cap Barbell's products. Further, Tristar Products will lose goodwill since the potential poor quality of the "CAP Barbell Ab Roller" products produced and advertised by Cap Barbell may be far below Tristar Products' standards which could reflect negatively on Tristar Products' AB

ROLLER products, thus harming Tristar Products' business reputation. As a direct and proximate result of Cap Barbell's unlawful conduct, Tristar Products has been and will continue to be damaged, and is thus entitled to relief in an amount to be determined according to proof at the time of trial.

COUNT IV
INJUNCTIVE RELIEF UNDER LANHAM ACT
(15 U.S.C. § 1116)

25. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 24 herein.

26. Upon information and belief, Cap Barbell knowingly and willfully copied and is using the AB ROLLER Trademark, trade dress and product likeness. Further, upon information and belief, Cap Barbell copied the AB ROLLER Trademark for the specific purposes of infringing upon the AB ROLLER Trademark and falsely designating its products as originating from Tristar Products.

27. Upon information and belief, unless enjoined by this Court, Cap Barbell intends to and will continue its course of conduct and will wrongfully advertise, use, infringe upon, sell and otherwise profit from the AB ROLLER Trademark. As a direct and proximate result of the acts of Cap Barbell, Tristar Products will suffer irreparable damage and will continue to sustain lost profits. Tristar Products will continue to lose the benefit of the advertising and goodwill for which it has spent large sums of money for at least the last 18 years, and Tristar Products will also lose large sums of money in diverted business.

28. Tristar Products has no adequate remedy at law to address all of the injuries Cap Barbell has caused, and will continue to cause, by its conduct. Tristar Products will suffer irreparable damage and sustain loss of profits until Defendant's actions alleged herein are enjoined by this Court.

COUNT V
STATE LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION
(N.J.S.A. Section 56:4-1, et seq.)

29. Tristar Products realleges and incorporates the allegations set forth in Paragraph 1 through Paragraph 28 herein.

30. While continuously using the AB ROLLER Trademark in the United States for at least 18 years, Tristar Products has built up valuable goodwill in the AB ROLLER Trademark which has come to be associated exclusively with Tristar Products' business by the public generally throughout the United States.

31. Upon information and belief, at all times herein mentioned, Cap Barbell had actual knowledge of the existence of Tristar Products' use of the AB ROLLER Trademark.

32. Tristar owns and has extensively used the AB ROLLER Trademark for promotions and product sales, and the name has become a distinctive trade name denoting to the eye and mind of the public, care, skill, industry, reliability and individuality resulting in a reputation for excellence and high quality throughout the United States. Due to such reputation and public awareness, Tristar Products has established considerable goodwill in connection with the AB ROLLER Trademark.

33. Cap Barbell is selling and continues to sell the same product as Tristar Products. Defendants' use of the AB ROLLER Trademark creates a likelihood that Tristar Products' current customers, potential customers and the public generally will be confused or misled as to the source of goods in that they are likely to believe that Cap Barbell's business is identical to or affiliated with that of Tristar Products. Cap Barbell's conduct amounts to unfair competition prohibited by N.J.S.A. Section 56:4-1, *et seq.*, as well as the New Jersey common law prohibiting trademark infringement and unfair competition.

34. Cap Barbell threatens to, and unless restrained will, continue to use the AB ROLLER Trademark. As a result, the public generally will be misled and deceived into believing that Cap Barbell's product is identical to or affiliated with products of Tristar Products, all to the irreparable injury of Tristar Products' business and goodwill and to the unjust enrichment of Cap Barbell. Tristar Products has no adequate remedy at law for the damages proximately caused to Tristar Products' business and goodwill.

35. Tristar Products is entitled to injunctive relief restraining Cap Barbell's conduct, an award of damages, including punitive damages, and other legal and equitable relief.

PRAYER FOR RELIEF

WHEREFORE, Tristar Products prays that the Court enter judgment against Defendant Cap Barbell as follows:

- A. That Cap Barbell has infringed and is infringing the '987 Patent;
- B. That Cap Barbell and its officers, directors, agents, employees, attorneys, and those persons in active concert or participation with any of them, be preliminarily and permanently enjoined from further acts of infringement of the '987 Patent;
- C. That Cap Barbell be ordered to pay Tristar Products damages sufficient to compensate for Cap Barbell's infringement of the '987 Patent, with pre-judgment and post-judgment interest, including profits lost as a result of infringement of the '987 Patent, and that such damages be enhanced due to the willfulness of the infringement in accordance with 35 U.S.C. §284;
- D. That this action be declared exceptional under 35 U.S.C. § 285 and that Tristar Products be awarded its attorneys' fees, costs, and expenses;
- E. That Tristar Products be awarded damages for lost profits and goodwill in a sum according to proof at trial pursuant to 15 U.S.C. § 1125;

F. That the AB ROLLER Trademark has been infringed and/or diluted by Cap Barbell under 15 U.S.C. §1114, 15 U.S.C. §1123(c)(1) and Federal Common Law;

G. That Cap Barbell has unfairly competed with Tristar Products in violation of 15 U.S.C. §1125 and N.J.S.A. Section 56:4-1, *et seq.*, as well as the New Jersey common law;

H. That Tristar Products be awarded damages from Cap Barbell for its acts of federal trademark infringement, dilution and unfair competition, and that these damages be trebled under 15 U.S.C. §1117(b) because Cap Barbell's acts have been willful, and that Tristar Products be awarded its reasonable attorneys' fees;

I. That Tristar Products be awarded damages from Cap Barbell for its acts of unfair competition, common law trademark infringement, and unjust enrichment, and that Tristar Products further recover punitive damages under New Jersey law because Cap Barbell's acts have been willful; and

J. That Tristar Products be awarded such other and further relief as this Court deems proper and just.

DEMAND FOR JURY TRIAL

Tristar Products demands a trial by jury of all issues properly triable to a jury in this case.

Respectfully submitted this 21st day of MARCH 2013,

*Attorneys for the Plaintiff,
Tristar Products, Inc.*

By: /s/ Noam J. Kritzer
Noam J. Kritzer

Noam J. Kritzer (nkritzer@bakoskritzer.com)
Edward P. Bakos (ebakos@bakoskritzer.com)

Bakos & Kritzer
147 Columbia Turnpike
Florham Park, New Jersey 07932
Telephone: 908-273-0770
Facsimile: 973-520-8260

CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

Tristar Products, by its undersigned counsel, hereby certifies pursuant to Local Civil Rule 11.2 that the matters in controversy are not the subject of any other action pending in any other court or of any other pending arbitration or administrative proceeding.

Respectfully submitted this 21st day of MARCH 2013,

*Attorneys for the Plaintiff:
Tristar Products, Inc.*

By: /s/ Noam J. Kritzer
Noam J. Kritzer

Noam J. Kritzer (nkritzer@bakoskritzer.com)
Edward P. Bakos (ebakos@bakoskritzer.com)

Bakos & Kritzer

147 Columbia Turnpike
Florham Park, New Jersey 07932
Telephone: 908-273-0770
Facsimile: 973-520-8260

CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 201.1

Tristar Products, by its undersigned counsel, hereby certifies pursuant to Local Civil Rule 201.1 that, in addition to monetary damages greater than \$150,000, Plaintiff seeks injunctive relief, and therefore this action is not appropriate for compulsory arbitration.

Respectfully submitted this 21st day of MARCH 2013,

*Attorneys for the Plaintiff:
Tristar Products, Inc.*

By: /s/ Noam J. Kritzer
Noam J. Kritzer

Noam J. Kritzer (nkritzer@bakoskritzer.com)
Edward P. Bakos (ebakos@bakoskritzer.com)
Bakos & Kritzer
147 Columbia Turnpike
Florham Park, New Jersey 07932
Telephone: 908-273-0770
Facsimile: 973-520-8260